

70267-0

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No. 70267-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HANNELORE W. MALLET,
Appellant/Plaintiff,

v.

ADELPHI, LLC, a Washington limited liability company,
and/or SMITH FAMILY REAL ESTATE, LLC, a Washington limited
liability company, both d/b/a Adelphi Apartments,
Respondents/Defendants.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
SEATTLE

REPLY BRIEF OF APPELLANT

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ARGUMENT

As a private property owner abutting a public sidewalk that uses or allows special use of the sidewalk for the benefit of its own property, Adelphi had a duty to notice, inspect and repair any dangerous condition (the open and obvious hole in the sidewalk created by a heavy lifter with metal tracks used during the bat infestation project) that threatened the safe travel of Ms. Mallett since the primary use of the sidewalk is for the paramount right of safe passage by the public. *See James v. Burchett*, 15 Wn.2d 119, 122-123, 129 P.2d 790 (1942).

Ms. Mallett's testimony is consistent and clear, with no backtracking: She and her small dog were distracted by a cat¹ and tripped over a hole in the sidewalk; the hole was caused by a heavy lifter with metal tracks used in the front of the building during the landlord's special project to eliminate a bat infestation around the entire apartment building; the hole was not there before the heavy lifter with metal tracks was used in front of the building during the bat project; and the hole was there immediately after the heavy lifter with metal tracks was used in the front

¹ Adelphi expends considerable effort to argue that a cat in a window was the sole proximate cause of Ms. Mallett's fall, and that she fell "backward" as established by putative reports by Ms. Mallett to her landlord and health care provider. The cat is a red herring and a distraction, which is exactly what it (i.e., a distraction) was, and all it was, when Ms. Mallett fell forward over the hole. Moreover, no injured person is required to submit an affidavit citing all factual and legal theories of liability as to the cause of a fall resulting in injury to health care providers for contemporaneous and completely accurate recording in the medical records in order to receive necessary treatment.

of the building. CP 79-88 & 267-268; CP 221-225 (deposition pages 63-74 & 77-80).

Ms. Mallett does not argue that Adelphi is prohibited from using the sidewalk for the special purpose of eliminating a bat infestation in the entire perimeter of its roof, resulting in a direct benefit to its apartment building. Ms. Mallett simply argues that Adelphi, as a private owner abutting the public sidewalk, cannot use the sidewalk without any limitations, thereby relieving it of any duty to ensure the safe passage of pedestrians. Adelphi is restricted in its special use of that public sidewalk such that its special use does not create a danger to pedestrians using the public sidewalk.

Sidewalks are constructed for the primary use of pedestrians, though they may be used by abutting property owners for special purposes.

* * *

The owners of lots bordering upon streets or ways have the right to make all proper and reasonable use of such part of the street for the convenience of their lots not inconsistent with the paramount right of the public to the use of the street in all its parts.

James v. Burchett, 15 Wn.2d at 122-123, *citing* McCormick v. South Park Com'rs, 150 Ill. 516, 37 N.E. 1075. Thus, Adelphi, as the owner abutting a public sidewalk, has a duty to ensure that its special use of the public sidewalk in order to maintain its private property is such that its special use of the sidewalk is not a source of danger to the users of the public right

of way. James, at p. 126. *See also* Stone v. City of Seattle; Buck et. al d/b/a Randolph Apts., 64 Wn.2d 166, 168-69, 391 P.2d 179 (1964) (apartment owner liable to injured pedestrian who fell over a hole on sidewalk created by tenants driving improperly, but foreseeably, over sidewalk to parking spots, such driving constituting a special use); Edmonds v. Pacific Fruit & Produce Co., 171 Wash. 590, 591, 593, 18 P.2d 507 (1933) (abutting property owner had duty to keep sidewalk safe where pedestrian fell into a depression in sidewalk in which were a hole or holes as much as three or four inches in depth with broken jagged edges exposed caused by heavy trucks allowed to drive over it).

The controlling principle for the special use doctrine cases focuses on whether the special use of the property was **for the benefit of the abutting private property**. Where the private owner abutting the public sidewalk allowed activity or special use (by its contractor, agent, employee or some other representative) that benefited the abutting private property but created a dangerous condition on the abutting public sidewalk, the abutting private property owner is deemed to have known or should have known of the dangerous condition and has a duty to remediate it. What is important is that the abutting private owner may not use the public right of way for the benefit of its own property in such a way that

such use trumps the duty to provide for the paramount safety of the users of the public right of way.

Adelphi attempts to distinguish the James case by arguing the abutting private property owner in that case caused the dangerous condition on the sidewalk and not an independent contractor. However, in James, the property owner abutting the sidewalk allowed (in addition to its own employees) a third party business owner to drive trucks over its property and the sidewalk, also creating the dangerous condition (pebbles & rocks) on the sidewalk. Similarly, here, for the benefit of Adelphi, Adelphi allowed an independent contractor, or other entity operating the lift with metal tracks during the bat remediation project, to drive over its property and the public sidewalk, thereby creating the hole where Ms. Mallett fell.

Albin v. Nat'l Bank of Commerce, 60 Wn.2d 745, 375 P.2d 487 (1962) is instructive for the proposition that, similarly, it is the private property owner abutting the public right of way who allows an independent contractor to conduct activity on the private property that is ultimately responsible for ensuring that the independent contractor's activity does not create a dangerous condition on the public right of way. Just as in James, persons injured using the public right of way were allowed to sue the abutting private property owner who allowed the

special use benefitting the private property but resulting in a dangerous condition to the public right of way. The injured users of the public right of way were not required by the court to sue the logging contractor (in Albin) or the third party business owner driving its trucks (in James).

In sum, Adelphi argues that a private landowner abutting the public right of way is not liable to users of the public right of way if the private landowner merely hires a contractor to do the work that directly benefits the private property owner. None of the authority cited and relied upon by Adelphi deals with private property owners abutting the public right of way and the duty of those abutting property owners to ensure the paramount use of the right of way for safe passage of the public. Ms. Mallett is not arguing that she need only sue Adelphi if Adelphi's pest control contractor ran over Ms. Mallett with a heavy lifter. Instead, Ms. Mallett contends that, as a private landowner abutting the public sidewalk, whose allowed special use of the public sidewalk was for its own benefit, (1) Adelphi knew or should have known of the dangerous condition (the hole, which, by Adelphi's own admission, was open and obvious) caused during the bat infestation project and (2) Adelphi (e.g., its resident manager) had a duty to notice,² inspect and promptly repair the obvious

² Although Adelphi makes much of the notice issue arguing that the hole was open and obvious to its tenant, Ms. Mallett, this position ignores the fact that the hole must also be open and obvious to Adelphi vis-à-vis its resident manager. Although not the major

dangerous condition of the abutting public sidewalk caused during the special use of the sidewalk for the benefit of maintaining its own property.

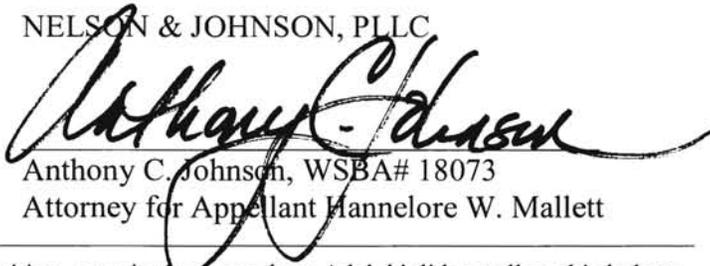
CONCLUSION

The trier of fact must assess the credibility of Ms. Mallett and Adelphi's representatives and witnesses and make the appropriate determination of the material facts and duties of the parties flowing therefrom. Adelphi, as a private property owner abutting the public sidewalk, is responsible for the hole created in the sidewalk during the special use of the sidewalk to eliminate a bat infestation around the entire roof. Moreover, by failing to notice the open and obvious hole and promptly repair it, Adelphi is responsible for allowing the dangerous condition to pedestrians to remain after it was created during the bat remediation work.

Dated this 6th day of November, 2013.

Respectfully submitted,

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thrust of Ms. Mallet's position, even in the case where Adelphi did not allow this hole to be created during work that specifically benefited its property, Adelphi knew or should have known of the dangerous hole on the public sidewalk that posed a danger to the safe ingress and egress of invitees and it should have properly warned of the danger. *See Rockefeller vs. Standard Oil Co.*, 11 Wn. App. 520, 522, 523 P.2d 1207 (1974 Div. I).