

70267-0

70267-0

No. 70267-0

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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HANNELORE W. MALLETT,  
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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BRIEF OF APPELLANT

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## INTRODUCTION

The overarching issue in this case is who created and who is responsible for the dangerous condition (a hole in the sidewalk) that Ms. Hannelore W. Mallett injured herself on. In this case, this should be an issue for the trier of fact to decide.

On Christmas Day, 2010, Ms. Mallett, at the time almost 71 years old, suffered serious injury (broken shoulder) after becoming distracted and then tripping over a hole in the sidewalk in front of her apartment building. The hole was caused a few months earlier by the operation of heavy equipment during work being done by her landlord (Adelphi Apartments) to eliminate a bat infestation by examining and repairing gaps in the fascia boards surrounding the entire roof of the apartment building where bats were nesting.

Mallett presented evidence to the trial court that the hole in the sidewalk in front of the building was created by a heavy lifter with metal tracks during the perimeter roof/bat infestation project. Adelphi presented evidence that the hole was caused by normal wear and tear. Since both parties presented competent evidence of the cause of the dangerous condition, the issue must be determined by the trier of fact.

Adelphi claims that Mallett's testimony is not credible and that Mallett completely changed her story after she hired an attorney. Mallett

claims that her story has been consistent: she fell forward over a hole in the sidewalk caused months earlier (during Adelphi's work on the apartment building roof's perimeter to eliminate a bat infestation) while walking her dog, when she and her dog were distracted. This is a material issue of fact.

Adelphi also claims that Mallett's story is based upon conjecture and speculation. Mallett claims that her testimony is based upon her personal observations and that the hole was created during Adelphi's bat project work by heavy equipment used on the sidewalk; her testimony in this regard is competent, circumstantial evidence and not speculation and conjecture. This is a material issue of fact.

Adelphi claims that its pest control contractor did not create the hole in the sidewalk, but even if it did, Adelphi is not liable for its independent contractor's work. Mallett claims that a property owner who uses an abutting sidewalk for its own purpose and benefit is responsible for any damage (i.e., dangerous condition) it creates. In this case, Adelphi knew or should have known of the dangerous condition and it allowed the dangerous condition to continue without proper repair until Adelphi finally repaired the front sidewalk some 2 ½ years later.

Finally, Adelphi claims that the hole where Mallett fell is not a hidden, dangerous condition and no duty is owed to Mallett and other

pedestrians. Mallett claims that, at most, any claim by Adelphi that she was distracted or knew of the hole in the sidewalk before tripping over the dangerous condition does not bar her claims, but, at most, only goes to the issue of contributory negligence. Mallett is not required under the law to watch every single inch of sidewalk during every single second of her walk.

### **ASSIGNMENT OF ERROR**

#### **Assignment of Error**

1. The trial court erred in granting Adelphi's summary judgment motion which dismissed Mallett's claim against Adelphi, by order entered on April 5, 2013.

#### **Issues Pertaining to Assignment of Error**

1. Mallett has presented evidence that the sidewalk hole she tripped over was created by a heavy lifter with metal tracks used during Adelphi's perimeter roof/bat infestation project. Adelphi presented evidence that the hole was not caused by a heavy lifter with metal tracks, but that it was caused by normal wear and tear. Is this a material issue to be decided by the trier of fact?

2. Adelphi commenced a project to eliminate a bat infestation around the entire roof of the apartment building. It hired a pest control company. During the project, Mallett saw a heavy lifter with metal tracks

used on the sidewalk in front of the building to access the boards around the roof where bats were nesting. Four months after the roof/bat project was finished, Mallett fell over the hole in the front sidewalk. Is Adelphi responsible for creating the hole (dangerous condition) in the front sidewalk during the perimeter roof/bat infestation work?

3. Although damage caused during the roof/bat project to the sidewalk on another side of the building was repaired immediately after the work, the hole in the sidewalk in front of the building was not repaired immediately. This hole was finally repaired by Adelphi in April 2012, twenty months after the roof/bat project was finished. Is Adelphi responsible for allowing the hole (dangerous condition) in the front sidewalk to remain after it knew or should have known it had been created during the perimeter roof/bat infestation work?

4. Adelphi claims that the hole in the sidewalk (dangerous condition) that Mallett tripped on was “open and obvious,” that Mallett knew of the hole before tripping on it, and that Mallett was momentarily distracted before tripping on the hole. Do these claims bar Mallett’s recovery against Adelphi for negligence, or do these claims only go to the issue of contributory negligence or comparative fault of Mallett to be decided by the trier of fact?

### STATEMENT OF THE CASE

Later in the morning around noon on Christmas Day, 2010, Hanna Mallett was returning back from a short walk with her small dog, Toby. CP 79. They were turning the corner from Thomas Street (north side of apartment building) and heading to the front entrance of the apartment building, the Adelphi Apartments, on 23<sup>rd</sup> Avenue East (west side of the apartment building) on Capitol Hill in Seattle. CP 79, 85. As she always does when returning to the entrance of the apartment with her small dog because she is worried about other larger dogs that might be entering or leaving the building, Mallett had about half of her dog's leash wrapped up in her left hand so he could not walk too far ahead of her. CP 79-80. Mallett's dog saw a cat on the inside window sill of a ground floor apartment window near the apartment entrance and then went a bit ahead toward the window, without barking, to look at the cat. CP 80, 86. As she continued walking and was now looking at the cat and at her dog (her dog was not pulling her as he is too small and too weak), Mallett was able to get Toby going toward the front door again and that is about when she tripped over the damaged hole in the sidewalk and fell forward (not backward). CP 80, 83 & 84. The mechanics of her fall are consistent with the injuries she suffered. CP 80-81, 87. Mallett broke her shoulder where it meets the arm while she was trying to break her fall with her right hand.

CP 80. After struggling for some time to get up, Mallett went back to her apartment and immediately told the resident apartment manager what happened; fairly sure that she told her that she tripped over the hole when she and her dog were distracted by the cat in one of the apartment windows. CP 80.

Mallett declared that “[i]n the nine years that I have been walking Toby several times a day, he has never ever pulled me down or knocked me off balance in any way when he has been distracted or startled by a cat, bird, squirrel, person (he likes and rushes up to Katie the apartment manager), ambulance, bus or another dog.” CP 81. Mallett and her dog were heading toward the front door when she tripped over the hole and injured her shoulder (she did not injure her tailbone or backside at all during the fall). CP 81.

Ms. Katie Brockman is the onsite resident apartment building manager that the landlord’s principal, Ms. Nancy Smith<sup>1</sup>, relies upon for nearly all duties relating to the operation of the building except for writing checks. CP 89-90; 146. In August 2010, Ms. Brockman solicited and obtained bids from pest control contractors to take care of bats in the building. CP 89-90; 147. Ms. Brockman referenced an August 16, 2010 e-mail she wrote to Ms. Smith in the following testimony:

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<sup>1</sup> Ms. Smith was the sole CR 30(b)(6) designee for defendant landlord, Adelphi.

- 7 Q The next page is Page 8 at the bottom. And it looks like  
8 it's an email -- is that from you?  
9 A Yes.  
10 Q And it's to Nancy Smith.  
11 A Yes.  
12 Q You actually copied yourself too. And it says "Adelphi  
13 pictures."  
14 Do you see that as the subject?  
15 A Yes.  
16 Q And the text of it says: "Here are pictures of the gap  
17 where the bats are nesting. The gap is around the **entire**  
18 building. Will fax estimate shortly."  
19 Did you write that?  
20 A Yes.

CP 89, 108 (emphasis supplied). The wooden fascia boards go around the entire top of the four-story, plus basement, apartment building, including the front of the building. CP 81. Mallett says she saw a heavy lifter with metal tracks working in the front of the building. CP 81; 223 (deposition p. 70); 267. She did not see any ladders in front of the building during the bat project. CP 267. Ms. Brockman did not see the pest/bat control workers and their lift throughout the entire day, but only at the beginning and the end of the day. CP 89, 105. Ms. Brockman admits that she did not watch them go all the way around the building, but just on Thomas Street on the north side of the building (and not the front of the building on 23<sup>rd</sup> Avenue which is the west side). CP 89, 111-112. Ms. Smith also stated that she never saw the workers working on the lift. CP 89-90, 156.

The landlord's gardener notified and warned the landlord that the bat project construction work had caused damage to the sidewalks. CP 162-163; 184. The landlord did not inspect the sidewalk in front of the building or the sidewalk at the corner of the building for damage after the bat work was done. CP 89-90; 114; 160-163, 179, 184.

Mallett states that the first time she saw the hole she tripped over was after the lifter ran over that area of the sidewalk during the roof/bat project, and she never saw the hole before the lifter was on the sidewalk in front of the building. CP 81-82. Ms. Brockman does not remember, one way or the other, seeing the cracks and damage to the sidewalk area where Ms. Mallett fell before or after the bat work project in August 2010. CP 89; 115-116. Just as with Ms. Brockman, Ms. Smith (the landlord's sole CR 30(b)(6) designee), does not know when the hole that Mallett fell over first appeared. CP 89-90; 168-169, 171, 173. The hole Mallett tripped over was not repaired by Adelphi until April of 2012. CP 82. The sidewalk damaged on Thomas Street close to the alley (north side of building) during the perimeter roof/bat infestation work was repaired immediately. CP 82. Mallett also believes that the damaged sidewalk area around the corner of Thomas Street and 23<sup>rd</sup> Avenue was also repaired before her fall. CP 82.

## ARGUMENT

1. **Both Mallett and Adelphi presented contradictory evidence of how the hole in the sidewalk was created. How the hole was created is a material issue that should be decided by the trier of fact.**

Mallett's testimony (in her deposition and two declarations) is consistent and clear. The hole in the sidewalk that she tripped over while she and her dog were distracted by the cat was made by a heavy lifter machine with metal tracks. The heavy lifter was used in the summer before her accident during the landlord's project to get rid of bats nesting in the fascia board around the entire roof top of the apartment building. The hole was not there before the heavy lifter used in the front of the building during the perimeter roof/bat infestation project, but was there immediately after. CP 79-88 & 267-268; CP 221-225 (deposition pages 63-74 & 77-80).

Such testimony is competent, substantial, circumstantial testimony. Substantial evidence exists if a fair minded person would be convinced by it, even if there are several reasonable interpretations of the evidence. Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Circumstantial evidence is as good as direct evidence. *Id.*

Contrary to Mallett's testimony, the testimony of the landlord's resident manager, Ms. Brockman, and the landlord's sole CR 30(b)(6)

designee, Ms. Smith, is equivocal at best. Neither person watched the lifter being used throughout the entire project, let alone in front of the building. Moreover, neither one inspected the sidewalk in front of the building after the bat work. Finally, neither one could say when they first saw the hole.

After offering this nonprobative testimony about the origin of the hole where plaintiff fell, Adelphi later proffered opinion evidence from a “sidewalk engineer” as to the origin of the hole that Mallett tripped over. CP 58-70. However, Adelphi’s sidewalk engineer expert never personally inspected the actual hole Ms. Mallett tripped over. He only inspected the scene in-person one time, in January 2013, some 9 months after the hole in the sidewalk was repaired by Adelphi, some 25 months after Ms. Mallett tripped over it on Christmas 2010, and some 29 months after Ms. Mallett states she saw the hole created by a heavy lifter with metal tracks used on the sidewalk in front of the building during the perimeter roof/bat infestation work. CP 59-60. Mallett is entitled to challenge these opinions before the trier of fact.

Essentially, Adelphi argues that because Mallett did not actually see the heavy lifter with metal tracks while it was actually driving over the sidewalk and breaking up the concrete and creating the hole where she fell, that her testimony should be considered speculation and conjecture

and not allowed to be presented to a trier of fact. Our courts have long held that circumstantial evidence is direct and probative evidence that may be used to prove any fact, including negligence. *See, e.g., James v. Burchett*, 15 Wn.2d 119, 122, 129 P.2d 790 (1942). In *James*, a property owner abutting a public sidewalk allowed, in addition to its own employees, a third party business owner to drive its trucks over a portion of the property and abutting sidewalk. Ms. James, who lived nearby, slipped on a small rock or piece of gravel and fell on the sidewalk on the way to the library. Ms. James and the only eye-witness to her fall testified that, after the fall, they noticed some crushed pebbles on the sidewalk varying in size. However, neither saw the pebbles being placed on the sidewalk. Nonetheless, the court accepted the plaintiff's theory that the circumstantial evidence proved that the gravel was brought from defendant's lot onto the sidewalk by the action of the third party's, as well as the defendant's employees', car wheels when the cars were driven over the sidewalk. *Id.*, 15 Wn.2d at pp. 122, 125-127.

The origin or cause of the hole over which Mallett tripped is a material factual issue. Mallett's unwavering testimony is that after a decade living in her Adelphi apartment and walking on the sidewalk in front of the building, the hole she tripped over first appeared after – and was created by – the use of a heavy lifter with metal tracks during the

landlord's perimeter roof/bat infestation project. This testimony is competent, circumstantial evidence. At the very least, the credibility of her testimony should be presented to the trier of fact (here, an arbitrator in MAR) for final determination.

2. **As a property owner abutting a public sidewalk, Adelphi is responsible for repairing the hole in the sidewalk that it knew or should have known was created during Adelphi's use of the sidewalk during its perimeter roof /bat infestation project.**

The James court laid down some general rules relative to the rights of pedestrians and the duties of abutting property owners who use sidewalks for their particular purposes. *Id.*, at pp. 122-126. "Sidewalks are constructed for the primary use of pedestrians, though they may be used by abutting property owners for special purposes." *Id.*, at p. 123. Similarly, "[t]he 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." *Id.*, at p. 123, *citing McCormick v. South Park Com'rs*, 150 Ill. 516, 37 N.E. 1075. Finally, the owner abutting a public street has a duty to ensure that its property is so constructed and maintained so as not to be a source of danger to the users of the public right of way. James, at p. 126 (citations omitted). Indeed, "[i]f one fails to perform that duty and that failure is the effectual

factor in doing injury to one using the street, even though the act of a third party may be the immediate cause of the injury, still that failure to fulfill the duty mentioned may constitute actionable negligence. *Id.*, at p. 126, citing 1 Sutherland on Damages (4<sup>th</sup> Ed.) 152 (other citations omitted).

A landowner abutting a public sidewalk or road has a duty to prevent a dangerous condition resulting from activity allowed on its land that the abutting landowner knew or should have known could endanger the public using the abutting right of way. Albin v. Nat'l Bank of Commerce, 60 Wn.2d 745, 375 P.2d 487 (1962). In Albin, the private landowner (a bank) of remote wooded property abutting a county road allowed a contractor to use the land for a logging operation. It was the plaintiff's theory that the loggers using defendant's land cut down protective timber surrounding a particular tree which increased the hazard of that tree falling onto the public road. *Id.*, 60 Wn.2d at p. 752. Indeed, during a windstorm, the tree did fall on a passing car, killing the passenger and injuring the driver.

The court in Albin determined that the jury should decide whether the owner should have known of the hazardous condition caused by the logging operation. *Id.*, at p. 751. Accordingly, this involved the further jury question of whether there was a duty of the abutting property owner to inspect the status of its property abutting the road after it was left from

the logging operation. *Id.*, at pp. 751-752, 754. Thus, in the instant case, the trier of fact should determine at least two issues:

1) whether Adelphi knew or should have known of the dangerous condition caused by its perimeter roof/bat infestation work; and

2) whether Adelphi had a duty to inspect (and ultimately repair) the condition of the abutting public sidewalk after using it for the benefit of its own property.

These legal principles are distilled in the pertinent pattern jury instruction.

**WPI 135.01 Duty of Owner or Occupier of Property Adjacent to Public Way**

An owner of property adjacent to a public sidewalk has a duty to exercise ordinary care in connection with the use of the property so as not to make, or create conditions that make, the adjacent way unsafe for ordinary travel or to cause injury to persons using the public sidewalk.

Thus, in both James and Albin, liability of the landowner abutting a public right of way is premised upon whether they knew or should have known that the allowed activity or use created a dangerous condition to users of the public right of way. Persons injured using the public right of way were not required to directly sue third parties allowed to use the private property or abutting public right of way. In Albin, occupants of the car using the public right of way were not required to sue the logging

contractor, but the court allowed their case against the property owner abutting the highway to go to the jury. Similarly here, Mallett should not be required to sue the pest control contractor (or any agent or independent contractor who used the heavy lift with metal tracks on the front sidewalk during the perimeter roof/bat infestation project), but the court should allow her case against Adelphi, the property owner abutting the sidewalk, to be decided by the trier of fact.

Adelphi knew or should have known that use of a heavy lift with metal tracks (whether used by landlord, landlord's principal's heavy lift equipment company, landlord's agents or an independent contractor hired by landlord) for its perimeter roof/bat infestation project would and did cause damage to the public sidewalks, including the area where Ms. Mallett fell. Indeed, Adelphi recognized its duty to make repairs to damaged public sidewalks caused by landlord or entities the landlord hires to do work.

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- 2 Q What is your understanding of your obligations with the  
3 sidewalk as it relates to the city's sidewalk and the  
4 city's requirements?  
5 A My understanding is that if I do something or hire  
6 somebody to do something, such as the Dominion [pest  
7 Control contractor/bat work] case, and  
8 they damage the sidewalk, then I'm responsible to repair  
it.

CP 164. Of course, after conceding this duty to repair, Adelphi was reluctant to expressly accept responsibilities for injuries to pedestrians resulting from the failure to make repairs.

Thus, when Adelphi, as a property owner abutting a public sidewalk allows use of the sidewalk for the benefit of its property, Adelphi has a duty to inspect and repair any dangerous conditions that threaten the safe travel of the public since the primary use of the sidewalk is for the paramount right of safe passage by the public.

3. **Issues concerning whether the hole that Mallett tripped over was “open and obvious” to her, or whether she was temporarily distracted, or whether she had prior knowledge of that hole, are issues that do not bar her claim against Adelphi for negligence. These issues, at most, go to contributory negligence of Mallett, to be determined by the trier of fact.**

Whether a dangerous condition in a pedestrian’s path is “open and obvious” is a jury question and does not operate as a bar to negligence. Millson v. City of Linden et al, 298 P.3d 141, 142-143, 144-145 (Wash.App. Div. I 2013), *citing* Blasick v. City of Yakima, 45 Wn.2d 309, 313, 274 P.2d 122 (1954) (other citations omitted). A pedestrian is not required to keep her eyes on the sidewalk immediately in front of her at all times. Millson, at 144. Nor does it constitute negligence on the part of the pedestrian as a matter of law if there is something in the pedestrian’s path

which she could see if she looked but does not see because she did not look. *Id.*

Additionally, a “[m]omentary diversion of the attention of the pedestrian does not as a matter of law constitute contributory negligence.” *James*, at p. 128, *citing Mischke v. Seattle*, 26 Wash. 616, 67 P. 357 (1901).

Finally, a pedestrian’s knowledge of a dangerous condition in a sidewalk is analyzed as a jury question of the pedestrian’s comparative negligence and not a bar to the pedestrian’s negligence claim. *Millson*, at p. 145 (citations omitted).

Thus, even where Ms. Mallett had prior knowledge of the hole created during the landlord’s project and her attention to where she was walking was momentarily diverted by her distracted dog, her claim of negligence against Adelphi is not barred and should, at a minimum, go to the trier of fact for determination.

### **CONCLUSION**

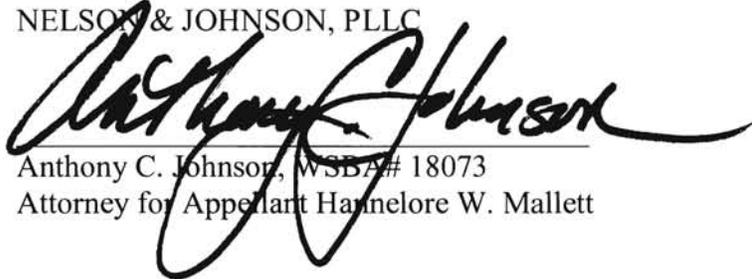
The trial court order granting Adelphi’s motion for summary judgment should be reversed and this case remanded to the trial court for further proceedings. The actual cause of the hole is at issue and should be decided by the trier of fact. Adelphi created the hole in the sidewalk during the use of the sidewalk for the benefit of its property (eliminating a

bat infestation around the entire roof). Even if Adelphi did not directly create the hole, by allowing the dangerous condition to pedestrians to remain after the project, Adelphi became responsible to repair the hole and, therefore, liable to any pedestrians injured as a result of the hole.

Dated this 6th day of September, 2013.

Respectfully submitted,

NELSON & JOHNSON, PLLC

A large, stylized handwritten signature in black ink, appearing to read "Anthony C. Johnson". The signature is written over a horizontal line.

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