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COURT OF APPEALS
DIVISION II

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NO. 39562-2-II

STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARILYN DENISE SMITH,

Appellant

and

WINTHER PROPERTIES,

ROBERT A. MATTSON, and CATHERINE M. MATTSON,

Respondents.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR and ISSUES

Assignments of Error

1. The trial court erred by granting the Respondents' Motion for Summary Judgment.
2. The court erred in not finding that the Appellant raised a genuine issue of material fact that Respondents were negligent by allowing a flight of stairs to remain in disrepair.
3. The court erred in not finding that the Appellant raised a genuine issue of material fact that Respondents were negligent in not providing a handrail along the stairs.
4. The court erred in finding that Respondents Robert Mattson and Catherine Mattson were members of Winther Properties, LLC.

Issues Pertaining to Assignments of Error

1. Whether the trial court correctly found the Appellant failed to establish the existence of a genuine issue of material fact that the Respondents knew or should have known that the staircase was in need of repair or replacement? AE 1, 2
2. Whether the trial court correctly found the Appellant failed to establish that the Respondents had a duty to provide a handrail along the staircase where the Appellant fell? AE 3
3. Whether the trial court correctly found that Respondents Robert and Catherine Mattson were members of the Winther Properties, LLC (and thus not personally liable for the Appellant's damages)? AE 4

B. STATEMENT OF THE CASE

Respondent Winther Properties LLC, (hereinafter “Winther”), CP 55–73, was at all relevant times owner of an office building at 7030 Tacoma Mall Boulevard, Tacoma, Washington (“the building”). CP 45 Winther was a “single member L.L.C.”, CP 19, 23, 67, 72, the single member being the R. A. & C. M. Mattson Living Trust. *Id.*, CP 69, 65 Respondents Robert Mattson and Catherine Mattson were trustees of the Trust, CP 56, 65, and managed the property on behalf of Winther. CP 18–24

The building permit for the building was issued May 19, 1981, CP 84, and the building was required to be Handicapped Accessible as required by the Washington state rules and Regulations for Barrier-Free Design, promulgated as chapter 51-10 WAC, CP 86, 90, which stated:

Stairways shall have handrails on each side ... The handgrip portion of handrails shall not be less than 1 1/4 inches nor more than two inches in outside dimension and shall be basically oval or round in cross-section and shall have smooth surfaces with no sharp corners.

CP 95–96

Independent Capital Mortgage, Inc. (“INDCAP”) was a second floor tenant of Respondent’s office building. CP 2, 45 The only means of access to the second floor of the building for INDCAP, CP 12, was an exterior concrete staircase in which each of the approximately twenty steps was supported by bolts and metal beams on each side of the staircase. CP

51–52 There was no handrail on either side of the staircase but there was a six-inch wide board running the length of the outside wall of the staircase that served as a bannister. *Id.*, CP 50

About 3:00 p.m. on August 23, 2005, CP 9–10, Marilyn Smith, an employee of INDCAP, left the office for lunch. CP 10–11 As she began to descend the concrete staircase, she placed her right hand on the six-inch wide bannister. As she stepped down, the third step moved under the her feet, causing her to lose her balance. CP 17 Attempting to catch herself, Ms. Smith grabbed with her left hand for the banister; but it was too wide for her to achieve a good grip. CP 51 Unable to grasp the banister with her left hand, and prevented by the size and shape from getting a firm grasp of the bannister with her right hand, she tumbled down the entire flight of concrete stairs. CP 50

A month before her fall, Ms. Smith noticed that steps lower on the staircase were loose, and she reported this to her employer. CP 49 The loose stairs at the bottom had also been noticed by another INDCAP worker, Suzanne Kline. CP 81 Robert Mattson said he was at the building on almost a daily basis, that routinely walked up and down each of the stairways, and claimed that he never felt any wobble in any of the stairs “that would give [him] cause for concern as a property manager.” CP 20 Mr. and Mrs. Mattson stated neither heard of or received any reports of

problems with the stairs at the building. CP 20, 24 The Mattsons stated they were very good about responding to telephone reports regarding safety concerns at the building, CP 21, 24, though Suzanne Kline had to call them twice before they replenished supplies for which they were responsible but which were not been done in a timely manner. CP 81–82

Mr. Mattson learned of Ms. Smith's fall about an hour after it happened and he went to the building. CP 20 When he walked up the steps in question, he noticed that three of the steps had a "little wobble", so that day he tightened the lag screws on each step in the staircase. CP 20 He replaced the entire flight of stairs the following weekend. *Id.* Mr. Mattson stated a surprise safety inspection by the City of Tacoma "in 2005 or 2006" found only one deficiency with the building (which was unrelated to the staircase). *Id.*

Ms. Smith brought suit against Winther and the Mattsons to recover for her injuries. The Respondents brought a Motion for Summary Judgment on June 22, 2009, claiming they were not liable and that Ms. Smith produced no evidence they had actual or constructive notice of the steps being loose. CP 38 The Respondents also argued that because the City found no defect with the office building prior to the Appellant's fall, the Respondent's had no obligation to have a code-compliant handrail along the staircase. CP 31 The Respondents also argued that the Mattsons

were members of Winther Properties LLC and were therefore not personally liable for the Ms. Smith's injuries. CP 38–39 The Court granted the Motion for Summary Judgment, dismissing the Ms. Smith's claim. This appeal timely followed.

C. SUMMARY OF ARGUMENT

The Order on Summary Judgment should be reversed because genuine issues of material fact exist regarding when the Respondents knew or should have known of the deterioration of the stairway where Marilyn Smith fell and sustained injuries, when Robert Mattson should have been concerned about the wobble in the stairs, and whether the Respondents should have had an appropriate handrail along the staircase.

D. ARGUMENT

I. INTRODUCTION.

Ms. Smith raised three points in opposition to the Respondent's Motion for Summary Judgment:

A. The parties have no dispute as to the law.

The Respondents admitted in their Motion that (a) Ms. Smith was a business invitee at the time of her fall; (b) that the landlords owe to invitees a duty of ordinary care to keep premises in a reasonably safe condition; (c) and that landlords are liable for physical harm caused to invitees

if the landlord knows or by the exercise of reasonable care would discover the condition, should expect that the invitee would not discover or realize the danger or will fail to protect themselves against it, and fails to exercise reasonable care to protect the invitee from the danger. CP 26–27

B. A property owner has a duty to an invitee to make reasonable, periodic inspections in an effort to discover possible hazards.

A landlord’s duty to invitees includes conducting frequent periodic inspections. *Coleman v. Ernst Home Center, Inc.*, 70 Wn. App. 213, 222, 853 P.2d 473 (1993). Steps on the staircase had been loose for a month prior to Ms. Smith’s fall, CP 49, 81, and Respondent Robert Mattson admitted that he noticed three loose steps on the staircase just after the accident. CP 20 Therefore the Respondents had constructive notice that the staircase was deteriorating. For if steps had been loose for a month, and if Mr. Mattson was “constantly ... almost on a daily basis” there at the building, “routinely walk[ing] up and down each of the stairways” at the building, CP 20, Ms. Smith’s and Ms. Kline’s month-long knowledge that stairs were loose certainly creates a genuine issue of material fact, when considered most favorably to Ms. Smith, the non-moving party.

Mr. Mattson admitted that the stairs were loose and that though he used the stairs on almost a daily basis he did not feel any “wobble in any of the stairs that would give me cause for concern as a property manager.”

Mr. Mattson's admission created a material issue of fact as to what amount if any wobble in stairs should cause a property owner concern; and what amount of wobble, if any, is acceptable. The fact that Robert Mattson admitted that he had to replace the entire flight of stairs the weekend after the Ms. Smith's fall raises the material issue of fact as to whether Ms. Smith's and experiencing loose stairs in other areas of the staircase—for a period of a month prior to her fall—was an indication of the failure of the entire staircase. Therefore, the Respondent had constructive notice that the staircase was deteriorating. CP 76

Furthermore, that the office building did not have a handrail along the staircase where the Appellant fell gave Respondents notice that the building was unsafe.

- C. A genuine issue of material fact exists as to whether the Mattsons are members of Winther, LLC and entitled to immunity from liability.

Certified records from the Office of the Secretary of the State of Washington show the Mattsons are not members of Winther Properties, LLC, CP 67, but only the Trust was a member, CP 19, 23, and real estate records reflecting that they were trustees of the member trust and not themselves members of Winther Properties, LLC, establish that a material issue of fact exists as to their status. CP 56

II. STANDARD OF REVIEW.

Summary judgment orders are reviewed de novo by the Court of Appeals. *Hayden v. Mut. Of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000). The Court of Appeals performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Mountain Park Homeowners Association v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

The moving party must initially meet the burden of showing no material fact issues remain, with the trial court resolving all reasonable inferences in favor of the nonmoving party. *Hill v. Cox*, 110 Wn. App. 394, 41 P. 3d 495 (2002). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party. *Tydings, supra*. This burden is met when the court is convinced reasonable persons could not reach but one conclusion or could not differ about the alleged facts. *Id.*

However, summary judgment cannot be granted if there is a dispute as to any issue of material fact, nor can a summary judgment be granted if the facts are not in dispute, but reasonable minds might differ as to liability. *Mathis v. Swanson*, 68 Wn.2d 424, 427, 413 P.2d 662 (1966). Furthermore, any reasonable inference drawn from the evidence may

defeat summary judgment. *Sorenson v. Keith Uddenberg, Inc.*, 65 Wn. App. 474, 480, 828 P.2d 650 (1992).

Ms. Smith submits in the present case that reasonable minds can differ as to: 1) whether the Respondents who claimed Mr. Mattson used the stairs almost daily was in fact an inspection as required by *Coleman, supra*, and accordingly should have recognized that the entire staircase was hazardous; 2) whether the Respondents knew or should have known about the loose stairs with reasonable inspection, and therefore had constructive knowledge of the deterioration of the staircase; 3) whether the amount of stair “wobble” or “wobble” recognized by Mr. Mattson was hazardous; 4) whether Respondents breached a duty to Ms. Smith by not fixing the lower loose stairs; 5) whether by not fixing the lower stairs the Respondents failed to miss the fact that the upper stairs were loose also; 6) whether the Respondents breached a duty to Ms. Smith by not having a handrail along the staircase; and 7) whether Respondents Robert and Catherine Mattson were in fact not members of Winther Properties LLC, and were therefore subject to personal liability for Ms. Smith’s injuries.

III. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THE RECORD AND INFERENCES DRAWN THEREFROM DEMONSTRATE THAT MATERIAL ISSUES OF FACT EXIST AS TO WHETHER THE RESPONDENTS KNEW OR SHOULD HAVE KNOWN OF THE DETERIORATING CONDITION OF THE STAIRCASE, REQUIRING ITS REPLACEMENT.

A. Respondents had a duty to Ms. Smith as a business invitee to inspect and keep the building premises reasonably safe.

As noted above at 5, the Respondents admit that the Appellant at the time of her fall held the status as an “invitee” to the Respondents’ property. CP 26 The Respondents concede that as a matter of law, not only did they have a duty to use ordinary care to keep the premises in a reasonably safe condition, but would be liable for injuries to an invitee if they knew of a potentially hazardous condition, or by exercise of reasonable care would have discovered the condition. CP 2–3 This duty includes conducting frequent periodic inspections. *Coleman*, 70 Wn. App. at 222. The property owner has a duty to inspect to discover possible dangerous conditions of which he does not know and to take reasonable precautions to protect the invitee from dangers that are foreseeable from the use of his property. *Id.* at 223.

Ms. Smith’s statement that other stairs were loose during the month prior to her fall, CP 49, as well as that of Suzanne Kline, CP 81, establish an inference that Respondents had ample time to discover the other loose or “wiggling” or “wobbling” stairs. Respondents thus could have

inspected the entire staircase, including the top three stairs, and could have tightened or replaced the entire flight of stair—which they finally did just after Ms. Smith tumbled down the stairs. A jury could find that the fact that other stairs were loose for a period of a month prior Ms. Smith falling amounts to constructive notice that the steps on the staircase had become loose. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994); *Mucsi v. Graoch Associates Limited Partnership*, 144 Wn.2d 847, 859, 31 P.3d 684 (2001) In *Mucsi* the court stated:

To prove constructive notice, the plaintiff must prove the specific unsafe condition had " 'existed for such time as would have afforded [the landowner] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.' " *Iwai [v. State]*, 129 Wn.2d at 96 (quoting *Pimental v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983)).

This notice requirement insures liability attaches once the landowners have become or should have become aware of a dangerous situation. *Iwai*, 129 Wn.2d at 96-97. This Court also stated in *Iwai* that where the plaintiff is unable to establish actual or constructive notice, the plaintiff may present evidence to establish the unsafe condition was reasonably foreseeable. *Id.*, 129 Wn.2d at 100-01.

The Respondents' constructive knowledge is independent of the claim of Respondent Robert Mattson of actual knowledge of the condition of the staircase as reflected by his Declaration in which he claimed to have used

the staircase almost daily. CP 20 It is noteworthy that Mr. Mattson was careful not to state that he actually inspected the stairs, *only* that he had used them. Furthermore, Mr. Mattson did not deny that the stairs of the staircase were loose prior to the Plaintiff's fall. *Id.* The Respondents should have known that the staircase was deteriorating because other steps were loose for a period of a month prior to the Appellant's fall.

Whether or not the Respondents actually inspected the stairs prior to the Ms. Smith's fall or if they would have discovered the loose top three stairs had they inspected, discovered and repaired the lower loose stairs, are "reasonable inspection issues" and are questions for the jury. *Mesher v. Osborne*, 75 Wn. 439, 451, 134 P. 1092 (1913). The fact that the Respondents have not denied that the stairs prior to the Plaintiff's fall were "wobbly", creates an issue of fact as to how much "wobble" is acceptable "wobble", or how much "wobble" if any an invitee should expect when he or she goes up or down a staircase. A jury could also infer that the Respondents breached a duty to the Plaintiff by allowing the stairs to be loose at all.

It is well established law in Washington that all reasonable inferences from the evidence must be resolved against the moving party. *Caldwell v. Yellow Cab Service, Inc.*, 2 Wn. App. 588, 592, 469 P.2d 218 (1970);

Dickinson v. Edwards, 105 Wn. 2d 457, 466, 716 P.2d 814 (1986). From the following facts:

- Ms. Smith’s and Ms. Kline’s statements that other stairs had been loose for a period of a month prior to the fall,
- Mr. Mattson’s not stating that he actually inspected the stair prior to the Appellant’s fall,
- Mr. Mattson’s not denying that the stairs were loose prior to the Plaintiff’s fall,
- Mr. Mattson’s finding the stairs to be in fact loose after Ms. Smith’s fall, requiring tightening and complete replacement the following weekend,

a jury could infer a violation of the Respondents’ duty to exercise reasonable care to inspect, discover the condition and protect the invitee. Accordingly, there exists material issues of fact, making summary judgment inappropriate.

B. The record reflects that the entire staircase was the hazardous condition, not just the steps near the top of the staircase.

The Respondents’ primary argument in support of their Motion for Summary Judgment was that because the Appellant had not noticed any movement in the third step from the top of the staircase prior to her fall, and she knew of no other person who had difficulty with the third step from the top prior to her fall, the Respondents had neither actual or constructive notice of the defect, and they did not have reasonable time to alleviate the defect. CP 28, 38

For obvious reasons, the Respondents would like to make just the third step from the top the only hazard, when in fact the entire failing staircase was the hazardous condition the Respondents should have repaired. In opposition to the respondent's motion for summary judgment, Ms. Smith stated that the lower steps of the same staircase were loose the entire month prior to her fall. CP 49 The Declaration of Robert A. Mattson, placed in the record by the Respondents, confirmed that immediately after Ms. Smith's fall, he discovered that not just one, but three of the stairs were loose. CP 20 Robert Mattson also established for the record that he used a socket wrench to tighten the screws on the steps and that he replaced the entire flight of steps the following weekend. *Id.*

Even if the Ms. Smith were unable to establish actual or constructive notice of the loose upper stair, a plaintiff may present evidence to establish the unsafe condition was reasonably foreseeable. *Mucsi, supra* at 859. In the case at hand the record contains the Ms. Smith's Declaration that the lower steps of the same staircase on which she fell were loose approximately a month prior to her fall, CP , and three stairs were discovered to be loose immediately after the fall, followed by the total replacement of the entire staircase, the weekend after the fall. Clearly, there exist in the record ample evidence by inference that the deterioration

of the staircase was a result of a deteriorating process that could have been discovered. Based upon the declaration testimony of Respondent Robert Mattson, together with the declaration of the Appellant, there exists material issues of fact as to whether Respondents knew or should have known that the entire staircase was deteriorating or otherwise in need of repair or replacement.

- C. According to the record, Respondents had actual knowledge that the stairs were loose and the entire staircase was deteriorating.

The Respondents placed into the record the Declaration testimony of Robert Mattson that during the year of the accident he was in the office building where the accident occurred on almost a “daily basis” that he “routinely walk[ed] up and down each of the stairways to the various office suites”, and stated that he “never felt any wobble in any of the stairs *that would give me cause for concern* as a property manager.” (Emphasis added.) CP 20

The fact that Respondent Robert Mattson used the staircase on an almost daily basis, together with the fact that the Ms. Smith experienced loose stairs on the same staircase for a period of a month prior to her fall, the fact that Robert Mattson did not deny that the stairs were loose only that they were not loose enough to give him any concern, the fact that Robert Mattson confirmed that discovered the top three stairs were in fact

loose immediately after Ms. Smith's fall, and the fact that the entire staircase had to be replaced the following weekend, indicate that issues of material fact exist as to: (1) whether the entire staircase was the hazard; (2) whether Mr. Mattson as a person who claimed to use the stairs almost daily should have had actual notice the amount of stair "wobble"; (3) whether the wobble should have given the Respondents concern prior to the Ms. Smith's fall; (4) whether, had the Respondents sought to tighten the loose lower steps, they would have either tightened or replaced the entire staircase earlier; and (5) whether with reasonable inspection the Respondents could have discovered a problem with the entire staircase.

D. The Respondents are charged with having constructive knowledge of the deteriorating condition of the staircase as evidenced by the loose stairs.

The declarations of Ms. Smith and Suzanne Kline, CP 49, 81 establishes for the record that the lower stairs of the staircase were loose for a period of a month prior to her fall. Due to the length of time the lower stairs were loose, the Respondents had constructive knowledge that the entire staircase was deteriorating and was in need of repair or replacement. The fact that Respondent Robert Mattson was able to tighten the screws on the stairs immediately after the Ms. Smith's fall, and to replace the entire staircase the following weekend demonstrates that immediate repairs were feasible.

- E. Respondent Robert Mattson's subjective feeling as to whether the stairs were loose enough to cause him concern, whether there was enough evidence that should have caused him to have enough concern to repair the staircase prior to the Appellant's fall, as well as his credibility are all issues of fact for a jury to decide.

As stated earlier, Respondent Robert Mattson has not denied that the steps in the staircase were loose prior to the Appellant's fall. Mr. Mattson's stating he never felt any wobble in any of the stairs that would give cause for concern as a property manager, suggests that he made a "judgment call" as to how much "wobble" in the steps was acceptable and not a hazard. Whether there was "wobble" in the stairs prior the Ms. Smith's fall and how much, if any, wobble constituted a hazard, in addition to Robert Mattson's credibility, are issues of fact for a jury.

It is well established law that where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feeling, summary judgment procedure is particular inappropriate. *Sedwick v. Gwinn*, 73 Wn. App. 879, 886, 873 P.2d 528 (1994) citing to *White Motor Company v. United States*, 372 U.S. 259, 83 S. Ct. 696, 9 L.Ed. 2d 738 (1963). Furthermore, it is only when a witness is present and subject to cross-examination that his credibility and the weight to be given to his testimony can be appraised. *Id.*

Though Ms. Smith was on the third to the top step of the staircase at the time she lost her balance, the evidence in the record shows that the entire staircase was in disrepair, and had been for a period of at least a month prior to the her fall. Issues of material fact remain as to whether prior to Ms. Smith's fall the Respondents knew or should have known of the condition of the staircase and whether they could have repaired or replaced the entire staircase.

F. Material issues of fact exist as to whether the Respondent's breached a duty to the Appellant by not having appropriate handrails along the staircase.

Notwithstanding the factual issues pertaining to the stairs, the failure of the building to have appropriate handrails provides another genuine issue of material fact from which a jury could find the Respondents liable for Ms. Smith's injuries. Appellant's Declaration made clear that the absence of an appropriate handrail (a banister approximately 6 inches wide she was unable to grip), and allowed her to fall completely down the concrete steps. CP 49

Code requirements for handrails are found in the Regulations for Barrier-Free Facilities, (chapter 51-10 WAC) effective October 1, 1976, and documents from the Washington State Building Code Council, CP 89-97 The standard for handrails that existed when the building was built required stairways to have handrails on each side with a handgrip of not

less than 1 1/4 inches nor more than 2 inches in cross-section dimension
These code violations establish the existence of a genuine issue of material
fact as to the Respondents' breach of their duty to Ms. Smith to maintain
the premises in a reasonably safe condition.

Except for Robert Mattson's statement of a surprise inspection in
"2005 or 2006" by the city—that may have occurred after the stairway was
replaced—that the City inspectors found no stairway-related deficiencies
with the office building, CP 20, and their attorney's use of the dictionary
rather than the Building Code to define "handrail" a comment in the
Respondent's Reply the a banister is a handrail, CP 102, the Respondents'
ignored their liability for failure to have an appropriate handrail along the
staircase where the Appellant fell.

Assuming as accurate the Respondents' contention that the City
inspectors found no defect with the building stairways, their reliance on
the contention to relieve them of liability for not having an appropriate
handrail is misplaced. Compliance with a minimum standard does not
relieve a defendant of liability. *Dickinson*, supra at 476 (1986). In

Dickinson the court held:

The simplicity and relative inexpensiveness of some of these
suggest a duty in much the same manner that the existence of the
simple glaucoma test led us to find the failure routinely use it to
be negligence, even though that was not then the standard of the
profession. *Helling v. Carey*, 83 Wn.2d 514, 518–19, 519 P.2d

981, 67 A.L.R 3d 175 (1974). Where the burden of prevention is small compared to the probability and magnitude of the foreseeable harm, the failure to provide the preventative measures cannot be excused. See *The T.J. Hooper*, 60 F.2d 737, 740 (2nd Cir. 1982) (Hand, J.)

A landlord's compliance with a standard is not conclusive on the issue of negligence in the construction field, *Pickering v. State of Hawaii*, 57 Haw. 405, 408, 557 P.2d 125 (1976), and does not excuse a defendant from liability. Furthermore, evidence of applicable standards at the time of the accident in the construction field is admissible at trial in handrail cases. *Cramer Van Parys*, 7 Wn. App. 584, 586, 500 P.2d 1255 (1972).

While violation of a statutory duty may in certain circumstances constitute negligence per se, the inverse proposition that compliance with a statute precludes a finding of negligence, is not the law; a statutory standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions. Compliance with a statute does not establish the defendant's due care as a matter of law. It provides a minimum standard of care and does not preclude a finding that an actor was negligent in failing to take additional precautions.

57A Am. Jur. 2d Negligence §709, West

Based upon the facts and the authorities cited above, it is a question for the jury—and not appropriate for summary judgment—whether the Respondents breached a duty to Ms. Smith by their failure to have appropriate handrails installed.

IV. PUBLIC RECORDS PREPARED BY THE RESPONDENTS ESTABLISH THAT GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER ROBERT AND CATHERINE MATTSON ARE MEMBERS OF WINTHER PROPERTIES, LLC.

The Respondents admit that Respondents Robert and Catherine Mattson were the managers of the property where Ms. Smith tumbled down the stairs. But the Respondents contend the Mattsons cannot be held personally liable because the Mattsons are allegedly the trustees of a trust that was a member of a limited liability company (Winther Properties, LLC), which owns the building where Ms. Smith was injured. CP 38–40 However, as reflected by the language of RCW 25.15.125, entitled “Liability of members and managers to third parties”, only *members* or *managers* of a limited liability company are free from personal liability.

The Mattsons, however, were neither members of Winther Properties, LLC nor were they managers of Winther Properties, LLC. Rather, the Mattsons were trustees of a *trust* that was a member of Winther Properties, LLC; but they themselves personally were not personally members. As stated by both Mr. and Mrs. Mattson, “The RA and CM Mattson living trust is the single member of the LLC.” CP 19, 23 *See also*, Initial Annual Report, filed April 5, 2004, designating the LLC as “A single member LLC”. CP 67 According to the Deed of Trust for purchase of the property in question, dated June 15, 2004, the Mattsons

each signed the Deed of Trust as “trustee” of “The R.A & C.M. Mattson Living Trust, Member of Winther Properties, LLC.” They did not identify themselves as members of Winther Properties, LLC. CP 56

Furthermore, the Mattsons were not *managers* of Winther Properties, LLC. The Application for Reinstatement of a Domestic Limited Liability Company filed by Winther Properties, LLC, dated April 19, 2006, was filed by Robert Mattson, as “Trustee / Member”, with the title “Manager” crossed out. CP 64 The Limited Liability Company Reinstatement Report of April 19, 2006, clearly states: “Management of Limited Liability Company is vested in (Check One): Members.” The only “member” the form identifies is the “RA & CM Mattson Living Trust”, not Mr. or Mrs. Mattson who specifically identify themselves with the handwritten designation of “trustee”, not managers of Winther Properties, LLC. CP 65. *See also*, CP 56 Moreover, the Completed Annual Reports for 2007 and 2008 answer “no” to the question, “Is the company managed by managers?” CP 69, 72

In addition, the 2007 and 2008 Completed Annual Report for Winther Properties, LLC, CP 70, 72, identifies only “RA & CM Mattson Living Trust” as “Confirmed Governing People” and is the only member identified. Robert Mattson signed the 2007 Completed Annual Report as “Completed by: R.A. Mattson, Trustee/Member (Agent Authorized to

Complete)”. CP 69; *see also*, CP 64, 65, 67. But the 2008 Completed Annual Report stated “Completed By: RA & CM Mattson Living Trust (Member). CP 73

Though Respondents discussed in their Motion the issue of piercing the corporate veil, citing RCW 25.12.125(1):

Except as otherwise provided by this chapter, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company *solely by reason of being a member or acting as a manager* of the limited liability company.

(Emphasis added.) The Appellant submits there is no corporate veil for Ms. Smith to pierce; the Mattsons were neither members nor managers of Winther Properties, LLC. Furthermore, RCW 25.15.125(2) clearly states:

A member or manager of a limited liability company is personally liable for his or her own torts.

Thus, even if the Mattsons were members or managers of Winther Properties, LLC, they would remain personally liable for their own torts—such as neglecting the repair of the stairs of the building, knowing that the stairs were loose.¹

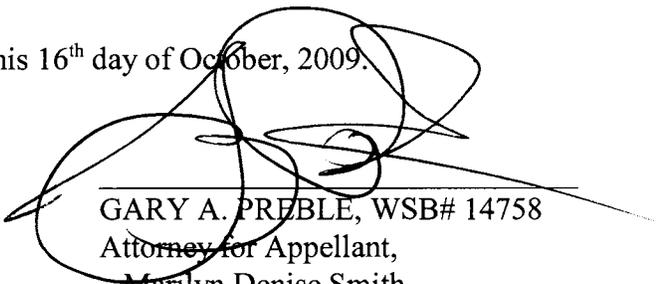
¹ Furthermore, based upon the language of RCW 25.15.125, it does not appear to bar a plaintiff from naming a member of a Limited Liability Company as a party defendant solely for the purpose of establishing vicarious liability on the part of the LLC, though it would prevent an execution of judgment against the member’s personal assets.

E. CONCLUSION

The declarations in the record clearly reflect that material issues of fact exist as to when the Respondents knew or should have known of the deterioration of the stairway, when Robert Mattson should have been concerned about the wobble in the stairs, whether the Respondents should have had an appropriate handrail along the staircase, whether the Mattsons were members of the Winther Properties, LLC., and if members of the LLC, whether the Mattsons are liable for damages arising from their personal negligence.

For all of the foregoing reasons, Appellant Marilyn Denise Smith respectfully requests that the Court reverse the trial Court's order granting Respondents summary judgment, and remand this case for trial.

Respectfully submitted this 16th day of October, 2009.

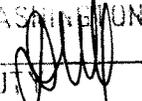


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DIVISION II

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**IN THE COURT OF APPEALS
STATE OF WASHINGTON DIVISION II**

STATE OF WASHINGTON
BY 
DEPUTY

MARILYN D. SMITH,

NO. 39562-2-II

Appellant,

**CERTIFICATE OF
SERVICE**

v.

Winther Properties, LLC, et al.,

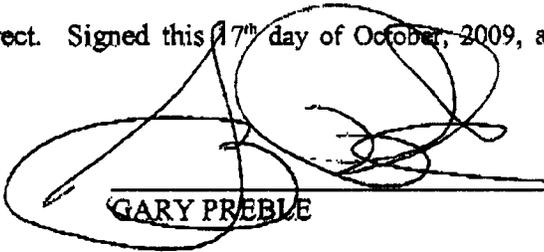
Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of October, 2009, he caused a copy of the Appellant's Brief to be served on the parties listed below by the method indicated:

Counsel/Party	Additional Information	Method of Service
Nathaniel B. Green, Jr. Attorney for Respondents	15500 SE 30 th Place, Suite 201 Bellevue, WA 98007	Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed this 17th day of October, 2009, at Olympia, Washington.


GARY PREBLE