

FILED

JAN 31 2014

No. 318362

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

WASHINGTON STATE COURT OF APPEALS
DIVISION III

EDWARD C. HVOLBOLL,

Appellant,

vs.

THE WOLFF COMPANY, DBA THE WOLFF COMPANY, LLC, DBA
THE WOLFF COMPANY II, LLC; HSC REAL ESTATE, INC., DBA
RIVERSTONE RESIDENTIAL, DBA RIVERSTONE RESIDENTIAL
GROUP, DBA RIVERSTONE RESIDENTIAL WEST, LLC;
CONSOLIDATED AMERICAN SERVICES; PERRENOUD ROOFING
INCORPORATED; CLOCKTOWER PLACE, LLC; AND W-B
SUNRISE, LLC,

Respondents.

JOINT BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR	2
III. STATEMENT OF THE CASE	2
IV. ARGUMENT	8
A. Assumption of risk applies to the landlord/tenant relationship in regard to icy conditions.	9
B. It is undisputed that Mr. Hvolboll voluntarily encountered the icy conditions, of which he had knowledge.	15
1. It is undisputed Mr. Hvolboll had knowledge that the ice berm was slippery.	15
2. The undisputed facts establish Mr. Hvolboll's alternative courses of action, which in turn establishes the voluntary encounter of the risk as a matter of law.	18
V. CONCLUSION	20

APPENDIX:

Exhibits A – E (CP 120-124)

TABLE OF AUTHORITIES

Cases	Page
<u>Armstrong v. State</u> , 2009 WL 2992585 (Wash.App. 2009)	19
<u>Coleman v. Hoffman</u> , 115 Wn.App. 853, 64 P.3d 65 (2003)	11
<u>Erie v. White</u> , 92 Wn.App. 297, 966 P.2d 342 (1998)	10, 15
<u>Geise v. Lee</u> , 84 Wn.2d 866, 529 P.2d 1054 (1975)	9
<u>Hartley v. State</u> , 103 Wn.2d 768, 698 P.2d 77 (1985)	8
<u>Iwai v. State</u> , 129 Wn.2d 84, 915 P.2d 1089 (1996)	11, 14
<u>Jessee v. City Council of Dayton</u> , 173 Wn.App. 410, 293 P.3d 1290 (2013)	9,11,15,16,18,19
<u>Martin v. Kidwiler</u> , 71 Wn.2d 47, 426 P.2d 489 (1967)	16
<u>Maynard v. Sisters of Providence</u> , 72 Wn.App. 878, 866 P.2d 1272 (1994)	9
<u>Mucsi v. Graoch Ass. Ltd. Partnership #12</u> , 144 Wn.2d 847, 31 P.3d 684 (2001)	9, 11, 14
<u>Seven Gables Corp. v. MGM/UA Ent. Co.</u> , 106 Wn.2d 1, 721 P.2d 1 (1986)	8, 20
<u>Wilson v. Steinbach</u> , 98 Wn.2d 434, 656 P.2d 1030 (1982)	8

Wirtz v. Gillogly,
152 Wn.App. 1, 216 P.3d 416 (2009) 18

Zinn v. Gichner Systems Group,
880 F.Supp. 311 (M.D. Pa. 1995) 13, 14

Rules and Statutes

CR 56(c) 8

Restatement (Second) of Torts, §343A 10, 12, 13

Restatement (Second) of Torts, §496E, cmt. b 18

I. INTRODUCTION

Appellant Edward Hvolboll fell at his apartment complex while crossing an icy berm on a roadway in January. It is undisputed he knew the conditions were slippery and had encountered them for at least a month prior to his fall. In fact, Mr. Hvolboll had traversed the area where he fell several times prior to his fall, and after it had been plowed. Mr. Hvolboll chose to walk across this icy area to reach the property office, and chose the most direct route across the complex. He chose not to drive his car to the office, communicate with the property office by telephone, return to his apartment until the conditions changed, or travel along a cleared area to reach the roadway without crossing the icy berm. The trial court dismissed the action because Mr. Hvolboll assumed the risk of the icy conditions when he voluntarily encountered the area he knew to be slippery.

Contrary to Appellant's argument, the existence of a landlord/tenant relationship does not obviate the application of assumption of risk in Washington for icy conditions. Moreover, the undisputed facts establish both that Mr. Hvolboll had sufficient knowledge of the danger and voluntarily encountered it, establishing the propriety of summary dismissal.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issue No. 1:

Does Washington law preclude the application of assumption of risk of an icy condition when the injured party is a tenant claiming a landlord is liable for his injury?

Issue No. 2:

When a plaintiff admits he could have avoided the dangerous condition by several different courses of conduct, is it undisputed he voluntarily encountered and assumed the risk as a matter of law?

Issue No. 3:

When a plaintiff admits he was aware that snow and ice are slippery, encountered the same area covered in snow or ice prior to his fall, and knew that others had fallen in the same area, is it undisputed he had knowledge of the condition and assumed the risk as a matter of law?

III. STATEMENT OF THE CASE

Mr. Hvolboll is a 45 year old man who resided in the Clocktower Apartments with his roommate and business partner, Travis Hitchcock. (CP 74-76) The Clocktower is one of three apartment complexes that make up The Villages in the Spokane Valley. (CP 84-85) Mr. Hvolboll and Mr. Hitchcock moved to the Clocktower Apartments in November of 2008, approximately two months before the fall. (CP 75)

Mr. Hvolboll was experienced with slippery surfaces and had training on maneuvering on such surfaces in the restaurant industry. (CP 78-81) This training included the necessity of wearing slip resistant footwear; Mr. Hvolboll had purchased and was wearing slip resistant footwear when he fell on January 7, 2009 at the Clocktower Apartments. (CP 81-83)

The Spokane area received a record setting snowfall during the winter of 2008-2009. (CP 89) The first significant snowfall occurred during the first week of December of 2008 which deposited a foot of snow on the ground. (CP 86) There was six feet of snow during December of 2008. (CP 89) A lot of people in Spokane, including the maintenance personnel at the Clocktower, were overwhelmed with the amount of snow. (CP 90)

There were generally two types of surfaces at the Clocktower Apartments. The concrete sidewalk areas within the complex were regularly cleared and deicer was occasionally used. (CP 88) Mr. Hvolboll testified that the sidewalks were clear of snow and ice on the day of the accident. (CP 95) Pictures Mr. Hvolboll took himself show the condition of the sidewalk on the day of the accident, and establish that there were clear sidewalk paths leading to the roadway, including a handicap type

ramp down to the roadway surface. (CP 110, 120, 123)¹ Mr. Hvolboll had no complaints about the snow removal on the sidewalk areas, including the sidewalk area from his apartment to the mailbox. (CP 92)

The roadways within the complex were also plowed, but by others than Clocktower Apartment employees. (CP 87)

At the end of December of 2008, Mr. Hvolboll's roommate, Mr. Hitchcock, slipped and fell near the dumpster area. (CP 91) At that time, Mr. Hitchcock told Mr. Hvolboll that it was really slippery outside. (CP 93) Mr. Hvolboll knew it was really slippery. (CP 93) In fact, Mr. Hvolboll had slipped, but not fallen, several times before he fell on January 7, 2009. (CP 93-95)

Prior to his fall, Mr. Hvolboll had discussed the slippery conditions with Mr. Hitchcock who had told him to be careful when he walked around outdoors. (CP 95) Mr. Hitchcock reminded Mr. Hvolboll on several occasions to be careful when he walked around. (CP 95) Mr. Hitchcock would say "Hey, you are going out for a walk. Be careful out there." (CP 96)

¹ Color copies of the photographs referenced herein are attached to the brief for the convenience of the court, since the black and white copies contained in the Clerk's Papers (CP 120-124) are difficult to review.

There was a new snowfall on January 1, 2009. (CP 99) The complex was snowplowed on January 2, 2009. (CP 99) There was no new snow accumulation between the plowing on January 2, 2009 and Mr. Hvolboll's fall on January 7, 2009. (CP 99) There was no need for additional plowing between January 2, 2009 and January 7, 2009. (CP 100)

According to Mr. Hvolboll's testimony, when the roadways were snowplowed on January 2, 2009, a slippery surface remained. (CP 106) Mr. Hvolboll had frequently walked across this slippery area "...at least daily." (CP 109, 111)

On January 2, 2009, Mr. Hvolboll decided to document the slippery conditions by taking two photographs of them. (CP 86, CP 106) The first (Jan. snow 1) was taken before the area was plowed. (CP 121) The second (Jan. snow 2) was taken after the plowing. (CP 83, CP 122) In order to take these pictures, Mr. Hvolboll had to twice walk across the slippery ice berm where he later fell. (CP 86, CP 106)

Q: Is it your contention, looking at January snow 2, that what they left after that plow left a slippery surface?

A: Yes.

Q: And you walked across that slippery surface twice to take these pictures?

A: Yes, I do.

Q: Did you slip at all when you were going across the road to take the pictures?

A: I don't believe I did.

(CP 106-107)

Mr. Hvolboll further testified concerning his frequent trips over this path across the ice berm:

Q: On other days that you travelled over to the office during the snow storm of '09, which path would you take?

A: Usually right here, the same path I took.

Q: The same path where you fell?

A: Yes.

(CP 118, 212)

He could have walked over to the handicap access approach, which would have taken him to a different place on the roadway. (See, CP 123) This would have bypassed the area where he fell.

Q. And then also that, what's the handicapped approach, right there, that is clean and bare until you get to the roadway?

A. Yes. Until you get to the roadway.

(CP 116)

On January 7, 2009, Mr. Hvolboll knew the roadway area near the mailboxes was very slippery. (CP 107) Late that morning, he left his apartment, went directly to the mailboxes, and checked his mail. (CP 101-102) He testified that he intended to walk to the property office to complain about the snow removal. (CP 104) Mr. Hvolboll also had the

option of registering his complaint by calling the property office or driving his vehicle to the office. (CP 107, 119)

Before stepping off of the curb onto the icy area, Mr. Hvolboll testified he paused briefly to consider the path he was going to take. (CP 117-118) There were several other routes that he could have taken to go to the property office but the route across the ice was the most direct route for him. (CP 109) The path he took was the shortest path to the office. (CP 117-118) There was also a handicap access route that was clear and bare until the plaintiff would have reached the roadway. (CP 113, 115, 116, 123) After checking his mailbox, the plaintiff took two steps, considered his route, and stepped onto the ice berm on the paved driving area. (CP 102, 108, CP 120) He slipped and fell on his second step, injuring his right ankle. (CP 102, 103-114)

The location where he fell was later marked by the plaintiff as seen on another photograph. (CP 112, 124)

The undisputed facts thus establish that Mr. Hvolboll understood and even documented the slippery conditions before his fall, and had the option to proceed or not to proceed again over the ice berm. He chose to proceed. This was a voluntary decision, the same as he had done "daily," as well as when he walked over it twice to take pictures to document how slippery it was. He could have chosen to not have crossed at that location,

taken a different route, called the office to register his concerns, driven to the office, or just not taken any action. As a result, he voluntarily assumed the risk of injury as a matter of law.

Accordingly, there is no genuine issue of material fact concerning Mr. Hvolboll's assumption of the risk, and the trial court decision should be affirmed.

IV. ARGUMENT

When reviewing an order of summary judgment, the Court of Appeals engages in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). As a result, summary judgment is appropriate if the pleadings, affidavits, depositions and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A party may not rely on speculation, or having its own affidavits accepted at face value. Seven Gables Corp. v. MGM/UA Ent. Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). While questions of fact are typically left to the trial process, they may be treated as a matter of law if "reasonable minds could reach but one conclusion" from the facts. Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

Mr. Hvolboll asserts that the underlying basis for the summary judgment, assumption of risk, is a legal doctrine inapplicable to the

landlord/tenant setting when icy conditions are at issue. However, no Washington law supports such a theory, and the court must proceed to determine whether disputed issues of fact exist on the existence of assumption risk. Here, the undisputed facts fail to raise an issue for trial; Appellant's "spin" on the necessary level of proof of knowledge of dangerous conditions, or the voluntary nature of his course of conduct in encountering the conditions, do not create a material issue for trial.

A. Assumption of risk applies to the landlord/tenant relationship in regard to icy conditions.

Washington law provides that a landlord's duty to its tenants in relation to snow or ice conditions is analyzed under the general rules of a landowner's duty to invitees. Maynard v. Sisters of Providence, 72 Wn.App. 878, 882, 866 P.2d 1272 (1994); Mucsi v. Graoch Ass. Ltd. Partnership No. 12, 144 Wn.2d 847, 856, 31 P.3d 684 (2001). That duty is generally to maintain common areas in a reasonably safe condition; the landowner is not a guarantor of the invitee/tenant's safety. Geise v. Lee, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975).

It is also uncontested that an invitee injured by a condition on land which he or she voluntarily encountered despite understanding the nature of the risk has no claim against the landowner. See, Jessee v. City Council of Dayton, 173 Wn.App. 410, 293 P.3d 1290 (2013). This concept is

known as the implied primary assumption of risk doctrine, and operates to negate the duty that the landowner otherwise owed to the plaintiff. Erie v. White, 92 Wn.App. 297, 302, 966 P.2d 342 (1998). No Washington law creates a different analysis when the landowner is a landlord of residential property, or when the dangerous condition is slipperiness caused by snow and ice conditions.

The Appellant apparently, however, asserts that Washington's citation to the Restatement (Second) of Torts, §343A, creates a duty by landlords relating to snow and ice that precludes application of an "assumption of risk" defense. However, that Restatement provision makes no such distinction, and neither does Washington case law. The Restatement (Second) of Torts, §343A deals solely with the original establishment of the duty owed by possessors of property, and confirms the basic premise that a landowner cannot be liable for injuries caused by "open and obvious" conditions; it goes on to create a narrow exception when facts establish that "the possessor should anticipate the harm despite such knowledge or obviousness."

Washington has cited this Restatement provision, and found that a landowner will owe a duty when it has "reason to expect the tenant will encounter the known or obvious danger because to a reasonable person in that position the advantages of doing so would outweigh the apparent

risk." Mucsi, 144 Wn.2d at 860. The Appellant utilizes these concepts to assert that a landlord has a duty to make a common area completely free of snow and ice if it is foreseeable that a tenant will individually decide that it is more important to cross a known icy, dangerous area than to avoid it. (Appellant's Brief, p. 13) From that argument, Appellant asserts that a tenant could **never** assume a risk if the tenant makes an individual assessment that there existed an advantage to him to encounter the risk. This is not Washington law.

First, Washington has not recognized a conflict between landowner duties and the implied assumption of risk. Courts continue to analyze the existence of landowner duties in accord with the lack of liability for open and obvious dangers, unless evidence that the exception applies exists; i.e. that the landlord had reason to expect the tenant would choose to encounter the obvious danger because to a reasonable person in that position the advantage of doing so would outweigh the risks. Iwai v. State, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996). Courts also continue to recognize that the primary implied assumption of risk defense negates any landowner's duty that exists. See, Jessee, supra; see also, Coleman v. Hoffman, 115 Wn.App. 853, 64 P.3d 65 (2003) (Court notes that the landlord could be liable for obvious defects in "common areas" of the apartment building, but also noted that "certain defenses i.e. assumption of

risk or comparative fault" may preclude or otherwise affect the landlord's liability for injuries in the common area).

No conflict exists because the authorities Appellant cites relate to the original existence of a duty to an invitee/tenant, and not to the application of the defense of assumption of risk which impacts that duty. The trial court properly recognized the distinction between a determination of the duty owed to individuals within the status of an invitee, as opposed to the concept of the defense of assumption of risk, which would "cut off" that duty; the focus is not on the defendant, but instead on the plaintiffs. Id. (RP 20-22)

In fact, the Restatement itself recognizes that the "anticipation of harm" exception to the landlord's lack of duty for obvious dangers, and assumption of risk, will be analyzed together:

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or failed to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee would proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. **In such cases, the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk.** (See, §466 and 496D) It is not, however, conclusive

in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Thus, while a duty may be owed by a landowner even where the condition causing the injury was open or obvious, a landowner is entitled to the defense of that claim of assumption of the risk. The concepts do not contradict one another as the Appellant claims. While a Washington court may not have more specifically analyzed the doctrines together, other courts have. For example, in Zinn v. Gichner Systems Group, 880 F.Supp. 311 (M.D. Pa. 1995), a plaintiff was injured when he slipped on a substance on the floor of a factory and fell into a floor opening. The court analyzed the facts presented and concluded there existed an issue of fact on whether the defendant landowner should have anticipated the harm despite the obviousness of the condition under the Restatement §343A. However, the court went on to grant summary judgment based on the plaintiff's assumption of risk. Just as in this case, the plaintiff contended that the court was precluded from concluding the plaintiff had assumed the risk because the defendant had a duty under §343A; the court rejected that argument and explained the distinctions between the two doctrines:

...Plaintiff mixes two distinct theories: relief of a landowner's duty to invitees under section 343A and assumption of risk. Under Plaintiff's argument, the doctrine of assumption of risk would be totally abolished since a plaintiff could not relieve a defendant of its duty by assuming the risk of injury unless that defendant was also

relieved of its duty through application of section 343A. Thus, assumption of risk and section 343A would be merged into one doctrine.... In addition to the requirement of a known or obvious danger, a defendant must not have anticipated the danger, notwithstanding its obviousness, to be relieved of its duty under section 343A. [cite omitted] In an assumption of risk analysis, that added element is not required.

880 F.Supp. at 318.

Ultimately, the court noted that the two concepts have different elements, and operate as "counterparts" to first determine the existence of a duty by the landowner to protect an invitee from known dangers, and then apply the defense based on the plaintiff's assumption of risk.

The cases cited in Appellant's brief, Mucsi v. Graoch Assocs. Ltd. Partnership No. 12, 144 Wn.2d 847, 860, 31 P.3d 684 (2001) and Iwai v. State, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996), are not instances in which the defendants asserted (or the court addressed) the negation of a duty by assumption of risk; the cases instead outline a landowner's duty when he had knowledge of a dangerous condition and should have anticipated the harm, despite the obviousness. In neither case did the defendant landowner take the next step and assert that the duty owed was negated by the plaintiff's assumption of the risk, which as a matter of law precludes the duty.

Here, the undisputed evidence is that Appellant chose to encounter the icy condition despite knowledge of the specific risk. The trial court did not err in applying the assumption of risk, and so long as there are no disputed issues of fact on the voluntary nature of the encounter with a known danger (as outlined below), summary judgment was proper.

B. It is undisputed that Mr. Hvolboll voluntarily encountered the icy conditions, of which he had knowledge.

To establish implied primary assumption of a risk, the evidence must show that plaintiff: (1) had full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk. Erie, 92 Wn.App. at 302; see also, Jessee, supra. Appellant asserts that he cannot be found to have assumed any risk, because he did not have knowledge of the specific condition of the ice on which he slipped, and because he speculatively asserted there were no other options but for him to travel over an icy path. Neither is in accord with the undisputed facts, and summary judgment remains proper.

1. It is undisputed Mr. Hvolboll had knowledge that the ice berm was slippery.

Appellant's claim of lack of knowledge of the **exact** degree of slipperiness of the ice and snow on the day he fell fails to create any issue of fact for trial on his knowledge of the dangerous condition.

Generally, for assumption of the risk, the plaintiff must have knowledge of the risk, appreciate its nature, and voluntarily choose to encounter it. Martin v. Kidwiler, 71 Wn.2d 47, 49-50, 426 P.2d 489 (1967). Plaintiff has knowledge of a dangerous condition if "at the time of decision, actually and subjectively knew...all facts that a reasonable person in the plaintiff's shoes would want to know and consider" at the time he or she chose to incur the risk. Jessee, supra at 1292-93.

Appellant's assertion that he did not have the information of how slippery the ice and snow were "**that day**," apparently because of a thaw and a freeze, is not the necessary level of knowledge required to defeat assumption of risk. The specific risk was that the snow and ice condition in the exact location that Appellant fell was slippery; snow and ice may have a variety of "slipperiness" qualities depending upon temperature, whether it is slush, whether it is sleet, and virtually an infinite number of other variables, but ultimately the risk is that it is slippery. That a partial melt "made it even more slippery" does not absolve Mr. Hvolboll of the knowledge of the condition at the location of the injury, even subjectively. This would be akin to asserting that walking in front of a speeding car requires knowledge of the make and model of that particular car, its weight, and its likelihood to cause injury depending upon its engineering,

as opposed to the subjective knowledge that encountering a speeding car is dangerous.

There is no authority that suggests that level of knowledge necessary for assumption of risk, and it remains undisputed that Mr. Hvolboll had knowledge that the snow and ice in the exact location where he was injured were slippery. Indeed, he had previously walked across the exact ice berm in the days prior to his accident, and documented it with pictures taken by walking across it. The condition of the icy berm remained fully visible to Mr. Hvolboll and was not disguised in any way. The trial court properly found that he "had prior experience" of the condition, that there was "quite a bit of evidence in the record that Mr. Hvolboll, in fact, had this route before, had a concern about it, and done it before, was aware of it, but then did it again..." (RP 23-24) The trial court recognized the issue is whether he had an understanding of a particular spot that he had experience with...What the evidence shows is that Mr. Hvolboll definitely had an understanding about the specific problems in this specific area." (RP 24) The judge thus properly analyzed the issue of Appellant's knowledge and the evidence in the record establishes that it is undisputed that Appellant knew of the slippery condition of the icy berm.

2. The undisputed facts establish Mr. Hvolboll's alternative courses of action, which in turn establishes the voluntary encounter of the risk as a matter of law.

Contrary to Appellant's contention, there were alternatives available to his decision to clamber across an ice berm, which establishes the voluntary nature of his encounter of the risk.

Whether a plaintiff has voluntarily decided to encounter a risk depends on whether he or she knows of a reasonable, alternative course of action. Wirtz v. Gillogly, 152 Wn.App. 1, 8-9, 216 P.3d 416, 420 (2009). A plaintiff's actions are voluntary if he or she voices concern about a risk, but ultimately accepts the risk. Jessee, 137 Wn.App. 410, 415 [quoting Restatement (Second) of Torts, §496E, cmt. b]. A plaintiff's actions are voluntary even when he or she feels compelled by outside considerations to take the risk. Id.

And while Mr. Hvolboll's claim that his only alternative was not to leave his apartment is not accurate, even returning to his apartment is an alternative that establishes the voluntariness of his conduct as a matter of law. The facts are that Mr. Hvolboll could have returned to his apartment to use the phone to call the property office, or he could have driven to the office, or waited until the conditions were addressed or changed before choosing to encounter them. There is no evidence that there was any economic or emergent necessity to require his walking across the ice

berm. There instead existed a "reasonable opportunity to act differently," which can include simply foregoing a desired course of action until the situation is made safe. See, *Armstrong v. State*, 2009 WL 2992585 (Wash.App. 2009) (inmate had choice of not utilizing recreation time until she had received requested shoes; her decision to not wait constituted voluntary encounter with a risk for which there were alternative courses of action).

Even Mr. Hvolboll's assertion that this was the exclusive path of travel does not avoid the voluntariness of his encounter of the risk. In *Jessee*, the plaintiff argued that her choice was involuntary because she was expected to attend the meeting at the location in which she encountered the stairs which were dangerous, and did not choose the meeting place. *Jessee*, 293 P.3d at 1293. However the court determined that the defendant did not impose those conditions on her. And like *Jessee*, Appellant here commented on the risk, had slipped in the same area, and he and his roommate discussed the risk; in fact, he testified he was going to report the risk in person at the office by voluntarily encountering the risk.

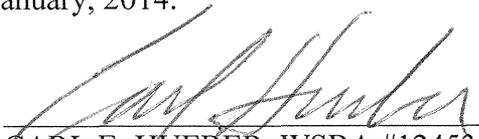
Further, Mr. Hvolboll's testimony that there were no "safer routes" and that he would have encountered the same conditions on the roadway at some point, even if he did not choose to cross the ice berm, is speculative,

and his assertion via affidavit that an alternative path was also dangerous cannot be taken at face value to create an issue of fact. See, Seven Gables, supra. It remains undisputed that there were clear routes which would have potentially led him to a different location on the roadway surface, and with this and other alternatives, his voluntary encounter with the ice berm is the condition that establishes assumption of risk as a matter of law.

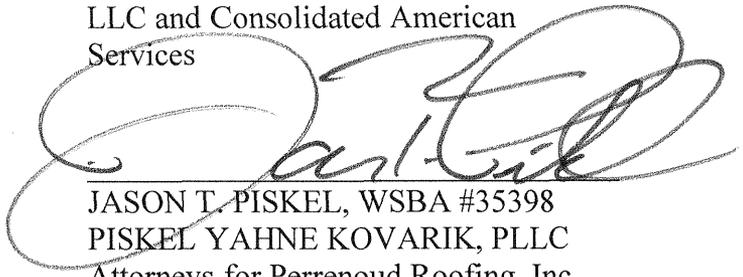
V. CONCLUSION

For the foregoing reasons, Respondents request that the Court affirm the summary judgment dismissing Appellant's action.

DATED this 31st day of January, 2014.



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DECLARATION OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on January 31, 2014, I caused a true and correct copy of the foregoing document to be served on the following counsel in the manners indicated:

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DATED at Spokane, Washington, on January 31, 2014.


Cheryl R. Hansen

APPENDIX

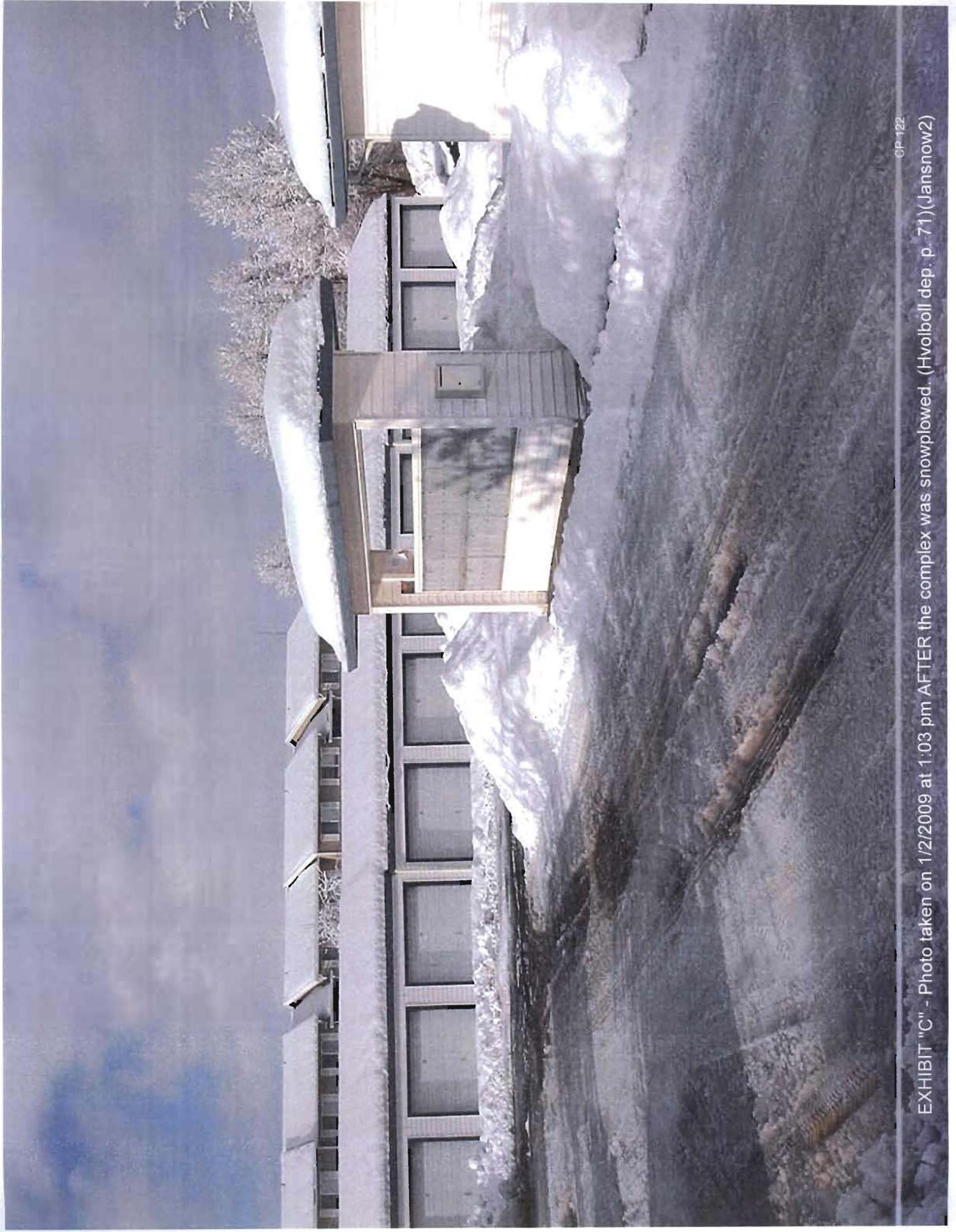


EXHIBIT "A" - Photo shows condition of the sidewalk on the day of the incident. (Hvoiboll dep. p.94)(Photo #6)



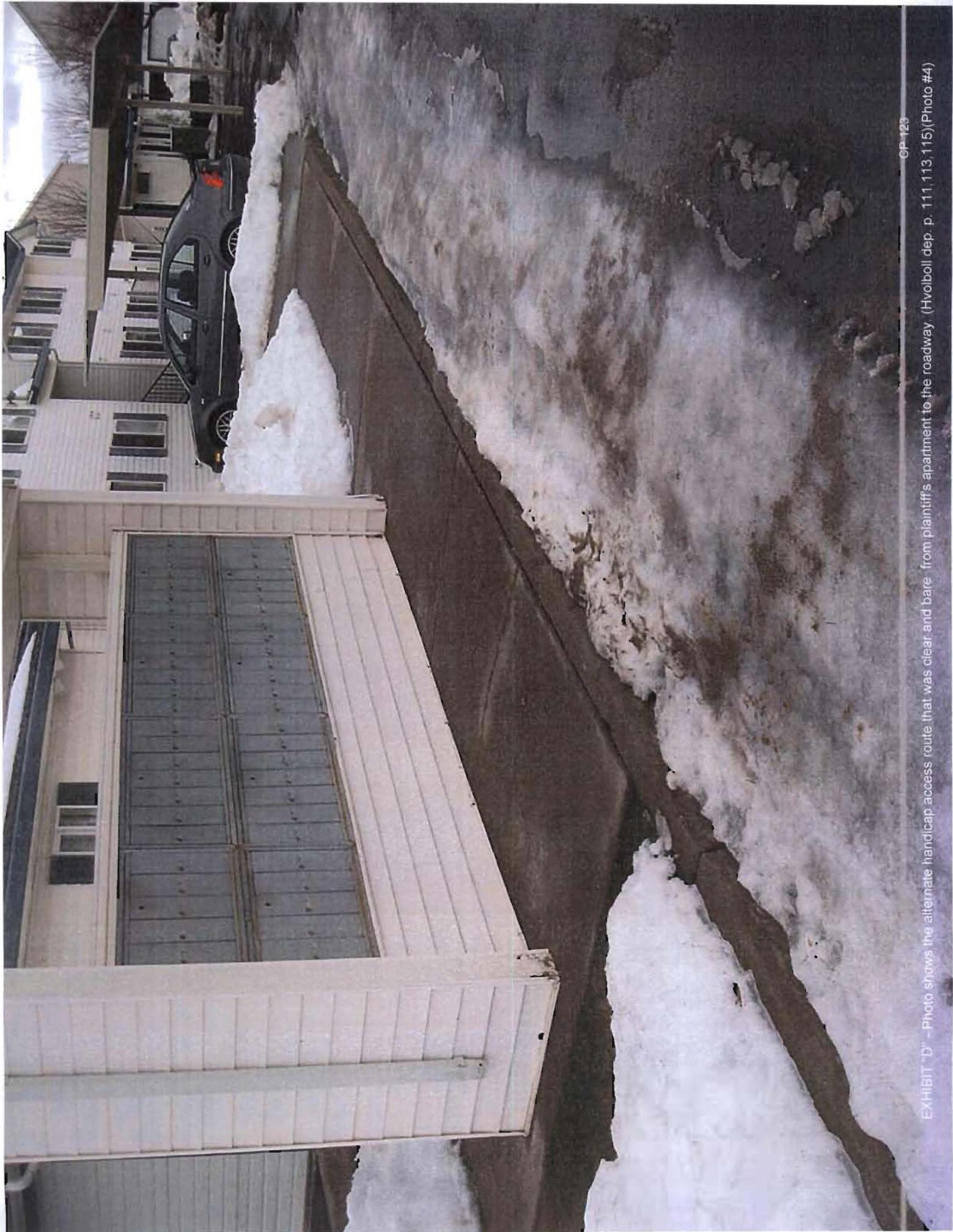
CP 121

EXHIBIT "B" - Photo taken on 1/2/2009 at 11:41 am PRIOR to the complex being snowplowed. (Hvolboll dep. p. 71)(Jansnow1)



CP-122

EXHIBIT "C" - Photo taken on 1/2/2009 at 1:03 pm AFTER the complex was snowplowed. (Hvolboll dep. p. 71)(Jansnow2)



CP-123

EXHIBIT "D" - Photo shows the alternate handicap access route that was clear and bare from plaintiff's apartment to the roadway. (Hvolboll dep. p. 111, 113, 115)(Photo #4)



CP 124

EXHIBIT "E" - Photo taken on 12/3/2012 to show where plaintiff fell. (Hvolboll dep. p. 96)