

68145-1

68145-1

No. 681451- I

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

---

EVANGELINE SALDE AND MAGNO SALDE

Appellants,

vs.

ARNOLD YAGEN AND ELIZABETH YAGEN,

Respondents.

---

BRIEF OF RESPONDENTS

---

Timothy A. Reid, WSBA #13840  
Attorney for Respondents  
Arnold Yagen and Elisabeth Yagen  
370 East Sunset Way  
Issaquah, Washington 98027  
(425) 313-9414

68145-1  
COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
RECEIVED  
MAY 18 2011  
10:45:50  
A

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii, iii
I. STATEMENT OF THE CASE.....	1
II. ARGUMENT .....	4
A. Absent Notice of an Unreasonably Dangerous Condition on the Premises, a Landlord Has No Liability for Injuries to a Tenant. ....	4
1. Common Law Liability.....	4
2. The Rental Agreement .....	5
3. Liability Under the Residential Landlord Tenant .....	7
4. There Was No Constructive Notice to the Yagens of Any Unreasonably Dangerous Condition in the Rental Property .....	8
B. The Declaration of Christopher Bollweg Does Not Raise any Triable Issues of Fact .....	15
III. CONCLUSION.....	17

**TABLE OF AUTHORITIES**

**CASES:**

*Howard v. Horn*, 61 Wn.App. 520, 524, 810 P.2d 1387  
(Div. 3 1991) ..... 7

*Lian v. Stalick*, 106 Wn.App. 811, 820, 25 P.3d 467  
(Div. 3, 2001) ..... 5, 9

*Lincoln v. Farnkoff*, 26 Wn. App. 717, 719-20, 613 P.2d 212  
(1980). ..... 13, 14

*Miller v. Linkin*, 104 Wn. App. 140, 34 P3d 835 (2001) ..... 16

*O'Brian v. Detty*, 19 Wn. App. 620, 576 P.2d 1334 (1978)..... 11

*Pinckney v. Smith*, 484 F.Supp. 2d 1177 (W.D. WA 2007)..... 9, 10

*Safeco v. McGrath*, 63 Wn. App. 170, 177, 817 P2d. 861 (1991) ..... 16

*Tucker v. Hayford*, 118 Wn.App. 246, 252, 75 P.3d 980  
(Div. 3 2003) ..... 6

**STATUTES**

RCW 59.18.060 ..... 4, 7, 8, 11

**OTHER AUTHORITIES**

International Property Maintenance Code, § 305.3 ..... 8

16 D. DeWolf & Allen, Washington Practice, Tort & Law Prac. 3d,  
§ 1714, p. 572-73 (2006)..... 4, 7

**I. STATEMENT OF THE CASE**

Defendants, Arnold and Elizabeth Yagen, are the owners of a single family residence located at 4012 S. 176<sup>th</sup> Street, SeaTac, Washington. The Yagens purchased this home in 2001, and resided there until renting the home to the plaintiffs in November 2007 (CP 44). On or about November 18, 2007, Magno Salde, and his daughter, Hope I. Love, signed a six month lease for the home at 4012 S. 176<sup>th</sup> Street, SeaTac, Washington. (Dec. of A Yagen, Ex 1; CP 47-51.)

Constructed in the home is a large fireplace, the exterior veneer of which is covered by large stones held in place by mortar. (CP 3-6) The plaintiffs have alleged that on or about June 6, 2009, while at the home performing day care duties, Evangeline Salde noticed a large stone that was starting to fall from the fireplace toward a child who was playing under her supervision. Ms. Salde then put herself between the child and the stone, which ultimately fell on Evangeline Salde, allegedly injuring her. (CP 8) The plaintiffs have further alleged that the defendants' negligently failed to properly maintain their property, specifically to maintain the stone fireplace, which resulted in injury to plaintiff Evangeline Salde. (CP 8, 9).

The Saldes have asserted, without reference to the record, that “(c)racks were visible in the chimney surface near the area of the loose stone.” (Brief of Appellant, p. 5) There is no support in the record for this assertion.

At his deposition, Magno Salde first reviewed the photographs attached to his wife’s deposition. (Exhibit 1, CP 3-6) During the 1-1/2 years the Saldes resided in the home, Mr. Salde never saw any chips, cracks, or anything in the mortar, the rocks, or the fireplace that indicated anything was wrong, or that the rock could fall. (CP 33) During that same time Mr. Salde did not see any adhesive, glue, brown material, or anything else that may have been used to repair the rock that had fallen. (CP 33) Mr. Salde cleaned and dusted the fireplace and mantle, and had had opportunities to view the fireplace and rocks. Despite this, between the time they moved in the home in November 2007 and June 6, 2009, Mr. Salde had no reason to believe that the rock which injured his wife might fall. (CP 34, 35)

After the incident, Mr. Salde looked at the rock and the fireplace, and saw what appeared to be epoxy glue around the edges of the rock. However, prior to the rock coming loose, the substance that was observed by Mr. Salde was not visible on the outside of the rock while the rock was

in place. (CP 35, 36, 37)

During her deposition, Ms. Salde testified that prior to the incident in question she did not observe any evidence of repair to the rock or fireplace (CP 19, 20), nor did Ms. Salde ever observe any glue or adhesive holding any of the rocks to the fireplace. (CP18, 19) Ms. Salde further testified that had she seen cracks in the mortar, or something that would indicate that the rock could fall, she would have notified her landlords. (CP 23, 24) Finally, Ms. Salde testified that the rock that fell was always clear, unobstructed, and there to be seen. Again, she never saw anything such as cracks or adhesive that might have indicated the rock might fall. (CP 25, 26)

Similarly, during the six years the Yagens had lived in the home, neither Arnold or Elizabeth Yagen had seen any cracks, loose rocks, loose mortar, or any other indication the rocks on the exterior of the fireplace might be loose, might fall, or might be in need of repair or maintenance. (CP 45) The Yagens had not performed any repairs, nor were they aware of any signs of prior repair. (CP 45)

## II. ARGUMENT

### A. Absent Notice of an Unreasonably Dangerous Condition on the Premises, a Landlord has No Liability for Injuries to a Tenant.

A Tenant may base an action for personal injury against a landlord under any of three legal theories: the Residential Landlord Tenant Act (RCW 59.18.060), the Rental Agreement, or Common Law. *See* 16 D. DeWolf & Allen, Washington Practice, Tort & Law Prac. 3d, § 1714, p. 572-73 (2006). Under any one of these theories, notice to the landlord of an allegedly dangerous condition is a predicate to liability.

#### 1. **Common Law Liability**

Generally, Washington common law has limited the landlord's liability to a tenant for harm caused by:

- (1) latent or hidden defects in the leasehold,
- (2) that existed at the commencement of the leasehold,
- (3) of which the landlord had actual knowledge,
- (4) and of which the landlord failed to inform the tenant.

*Frobig v. Gordon*, 124 Wash.2d 732, 735, 881 P.2d 226 (1994).

The latent defect theory does not impose upon the landlord any duty to discover obscure defects or dangers. Nor does it impose any duty to repair a defective condition. Under the latent defect theory, the landlord is liable only for failing to inform the tenant of known dangers which are not likely to be discovered by the tenant.

*Aspon*, 62 Wash.App. at 826-27, 816 P.2d 751  
(citing *Flannery v. Nelson*, 59 Wash.2d 120, 123,  
366 P.2d 329 (1961)).

*Lian v. Stalick*, 106 Wn.App. 811, 820, 25 P.3d 467 (Div. 3, 2001).

Thus, under a common law theory, the Saldes' case was properly dismissed because there was no evidence the Yagens knew that the rock which injured Ms. Salde could loosen and fall. The Yagens had lived in the home for six years and had not noticed anything about the fireplace, or the rock on the fireplace that would indicate it might fall or come down. Similarly, the plaintiffs, themselves, lived in the home for 1-1/2 years, and had no reason to believe the rock would eventually loosen and fall. There were no cracks in the mortar, no visible signs of repair, no visible signs of any glue or adhesive; absolutely nothing that would lead a reasonable person to believe that the rock might loosen and fall, possibly injuring a person.

## 2. **The Rental Agreement.**

The trial court had the Yagen Salde lease agreement (CP 47 – 51). This lease agreement contains no covenant to repair, therefore, there is no cause of action based upon the contract. However, even if such a

covenant was in the lease, liability there under is predicated upon notice to the landlord of an unreasonably dangerous condition.

*Brown* did rely on *Teglo v. Porter*. *Brown*, 105 Wash. App. at 804, 21 P.3d 716. *Teglo* in turn adopted portions of the *Restatement of Torts* which are relevant to the claims here:

“The lessor’s duty to repair ... is not contractual but is a tort duty based on the fact that *the contract gives the lessor ability to make the repairs and control over them*. ... *Unless the contract stipulates that the lessor shall inspect the premises to ascertain the need of repairs*, a contract to keep the *interior* in safe condition subjects the lessor to liability if, but *only if, reasonable care is not exercised after the lessee has given him notice of the need of repairs.*”

*Teglo v. Porter*, 65 Wash.2d 772, 774-75, 399 P.2d 519 (1965) (emphasis added) (quoting RESTATEMENT OF TORTS § 357 cmt. a (1934)).

Notice then under this provision of the *Restatement* becomes an issue when the particular condition under consideration is *inside* the residence where the landlord has no right to enter.

*Tucker v. Hayford*, 118 Wn.App. 246, 252, 75 P.3d 980 (Div. 3 2003).

The alleged dangerous condition was a stone which unexpectedly came loose inside the Saldes’ residence. Clearly, there was no notice to the Yagens about this condition and, as a result, there is no liability based upon the rental agreement.

### 3. **Liability Under the Residential Landlord Tenant Act**

Again, any cause of action based upon our Residential Landlord Tenant Act, RCW 59.18.060, is dependent upon notice to the landlord of the allegedly dangerous and defective condition.

Finally, the Howards contend a duty was imposed on Mr. Horn under the Residential Landlord-Tenant Act--the warranty of habitability. We disagree. Prior to the adoption of this act, the landlord's duty to the tenant was governed by an implied warranty of habitability. See discussion in *Lincoln v. Farnkoff*, 26 Wash.App. 717, 613 P.2d 1212 (1980). This warranty was later codified by the Legislature in the act. RCW 59.18.

This statute incorporates into all residential leases a covenant to repair. **However, the landlord's duty is predicated upon notice and a reasonable time to repair.** *O'Brien v. Detty*, 19 Wash.App. 620, 622-23, 576 P.2d 1334, review denied, 90 Wash.2d 1020 (1978); RCW 59.18.070. Here, it is undisputed there was no notice to Mr. Horn. (emphasis added)

*Howard v. Horn*, 61 Wn.App. 520, 524, 810 P.2d 1387 (Div. 3 1991); *See also, DeWolf & Allen, supra* at § 1714, p. 573.

The Saldes argue for liability based on the Yagens' alleged violation of RCW 59.18.060(1) and (2). Again, the evidence before the trial court was that no one, not the Saldes or the Yagens, were aware of any violation of an applicable building code or condition which might render the premises unfit for human habitation. More particularly, with

respect to subsection (2), the alleged dangerous condition here is a rock that is used to construct the veneer or exterior surface surrounding the fireplace and chimney. However, it was not the fireplace, nor was it the chimney, thus it was not an element of construction addressed by RCW 59.18.060(1) or (2). A review of the photographs attached to the deposition of Evangeline Salde shows that this rock was not part of the structure which contained the firebox in which you would light a fire, nor was it part of the structure which would carry the smoke and heat from the firebox to the exterior of the home. These are the elements of the “fireplace” and “chimney” to which the statute refers. The argument based upon the International Property Maintenance Code, § 305.3 is similarly flawed. There is no evidence that Ms. Salde was injured by a defective surface condition such as cracked or loose plaster, decayed wood, flaking or abraded paint, etc., etc., etc.

**4. There Was No Constructive Notice to the Yagens of Any Unreasonably Dangerous Condition in the Rental Property.**

Washington law is very clear in its requirement that before a landlord can be liable for injuries to a tenant, someone must provide notice to the landlord of an unreasonably dangerous condition which causes injury. This notice is most usually in the form of a direct notification to

the landlord of an unreasonably dangerous condition, i.e., actual notice. Constructive notice can also form a basis of liability under Restatement (Second) of Property (Landlord & Tenant) §17.6 (1977), but “the tenant must show: (1) that the condition was dangerous, (2) that the landlord was aware of the condition **or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition,** and (3) that the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation. (emphasis added)” *Lian v. Stalick*, 115 Wash App. 590, 595, 62 P.3d. 933 (2003)

In this regard, the Saldes seriously overread *Pinckney v. Smith*, 484 F.Supp. 2d 1177 (W.D. WA 2007). There, the court found constructive notice because a handrail required by the building code was absent, and had been absent for some thirty years. The absence of the handrail was open and obvious, and the violation of the building code was similarly open and obvious.

*Pinckney* does not stand for the proposition that “landlords are deemed to have constructive notice of all building code violations.” *Brief of Appellant*, p. 9. Rather, *Pinckney* carefully reviewed the requirements for liability under the Restatement (Second) of Property (Landlord &

Tenant) § 17.6, and held that evidence of a statutory violation is insufficient to create liability in a landlord.

Plaintiff cannot survive summary judgment solely by demonstrating a violation of a statute. The statutory violation portion of the restatement rule is predicated on the assumption that a statutory violation constitutes negligence per se. *See* Rest.2d Property § 17.6 cmt. a (“[T]he rule of this section is based on the assumption that the statute or regulation represents a legislative determination of the standard of conduct required of the landlord, so that a violation constitutes negligence per se . . .”). In Washington, “[a] breach of duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence. . . .” RCW 5.40.050 (2004). Therefore, with the abolition of the negligence per se doctrine in Washington, evidence of a statutory violation is insufficient to satisfy the final element of the restatement rule.

*Pinckney v. Smith*, at 484 F.Supp. 2d 1181.

Essentially, the Saldes are left to argue that evidence of a building code violation creates some type of strict liability in the landlord. This, again, has been rejected by the Washington courts. What the plaintiffs propose is a form of strict liability where any time an injury occurs on leased premises, the landlords are somehow responsible for that injury because they failed to “inspect” for building code violations. Not only does plaintiffs’ theory lack any legal support, it runs contrary to established Washington law.

In *O'Brian v. Detty*, 19 Wn. App. 620, 576 P.2d 1334 (1978), the plaintiffs argued a form of strict liability arising under various provisions of our Residential Landlord Tenant Act, RCW 59.18.010 et seq. Rejecting plaintiffs' arguments, the court went to some length to explain the reason for the notice requirement, and to reject the idea of strict liability under the Landlord Tenant Act.

The Residential Landlord-Tenant Act of 1973, RCW 59.18, modified the common law so as to require decent, safe and sanitary housing. RCW 59.18.040(4). It also requires a landlord to maintain a dwelling unit in reasonably weather-tight condition. RCW 59.18.060(8). The sole issue is: Was the statute violated by the mere existence of a prohibited defect in the rented premises, or does the statute instead give a landlord a reasonable time to effect repairs? Plaintiff argues that the defendant violated these sections of the Act by allowing the defect to exist, and that such a violation is negligence per se. She thus claims the right to recover for any injuries resulting from the violation.

Specifically, the plaintiff assigns as error that part of the court's instruction No. 11 which stated:

Before the landlord can be held to have violated this statute, he must know or in the exercise of reasonable care should know of the existence of a condition which does not conform to the statutory requirements. It is for you to determine whether such a condition existed. After notice of such condition, the landlord has a reasonable time in which to effect repairs.

The trial court apparently instructed on the principles expressed in *Franklin v. Fischer*, 34 Wash.2d 342, 348, 208 P.2d 902, 905 (1949):

Under the general rules of law applicable to such situations, a lessee, before any damages can be recovered from a lessor for breach of a covenant to keep in repair, would have to establish timely notice to the lessor of the need for repairs, and that the lessor failed to make them within a reasonable time under the circumstances. The rule is well stated by Judge Hay in *Asheim v. Fahey*, 170 Or. 330, 133 P.2d 246, 145 A.L.R. 861, in these words:

"In the absence of a special agreement to make repairs upon the demised premises, a landlord is under no duty to do so." 32 Am.Jur., Landlord and Tenant, section 705.

He may, of course, by the terms of his lease, covenant to make repairs, but the law in that connection is that he must have timely notice of the need for repairs before he is obliged to make them. If, after such notice and a reasonable opportunity to make the repairs, the landlord fails to do so, and damage to the tenant or his invitees results, the landlord may be held liable. *Ashmun v. Nichols*, 92 Or. 223, 234, 180 P. 510 ((1919)); *Teel v. Steinbach Estate*, 135 Or. 501, 504, 296 P. 1069 ((1931)).

The statute essentially adds such a covenant to repair, on the part of the landlord, to most residential rental agreements. RCW 59.18.070 states that "reasonable time for the landlord to commence remedial action," after notice, is not more than 30 days in all cases, except for certain enumerated emergencies not applicable here. The published version of the Act contained this provision during the trial and appeal. However, after the appeal was perfected, our Supreme

Court in *Washington Association of Apartment Ass'ns, Inc. v. Evans*, 88 Wash.2d 563, 564 P.2d 788 (1977), restored to the Act certain provisions which the Governor had ostensibly, but invalidly, vetoed.

One vetoed provision was the last paragraph of RCW 59.18.070, which provides that where there are circumstances beyond a landlord's control, he shall endeavor to remedy a defective condition with all reasonable speed. In holding that veto invalid, the court stated that that vetoed portion had taken away an excuse from timely compliance which otherwise would have been available to the landlord, *Washington Association of Apartment Ass'ns, Inc. v. Evans*, supra at 567, 564 P.2d 788.

Evidence presented at trial by the defendant indicated that he promptly investigated the trouble, but had difficulty determining the cause. The jury could have found that he endeavored to remedy the condition with all reasonable speed. We believe, since the statute gives a landlord such leeway, that no violation arises until a reasonable time has passed. The notice and time provisions in the statute negative the idea that a landlord is absolutely liable for any defects, which would be a far departure from common law. A landlord's present position and duties are no different than those of a landlord who covenants to repair, as set out in *Franklin v. Fischer*, supra. There was no error in the trial court's instruction.

The judgment is affirmed.

*O'Brien v. Detty*, 19 Wn. App. 621-22.

These rules were again concisely stated in *Lincoln v. Farnkoff*, 26 Wn. App. 717, 719-20, 613 P.2d 212 (1980).

At common law under the principle of caveat emptor, the landlord had no duty to repair rental property, the tenant taking it as he found it. *Hughes v. Chehalis School Dist.* 302, 61 Wash.2d 222, 225, 377 P.2d 642 (1963). With time, however, this legal position gave way to modern realities and residential tenants were afforded the protection of an implied covenant of habitability. *Foisy v. Wyman*, 83 Wash.2d 22, 25-8, 515 P.2d 160 (1973), and cases cited. Following this lead, the legislature enacted the residential landlord-tenant act in 1973. This act "modified the common law so as to require decent, safe and sanitary housing," and "adds . . . a covenant to repair" to most residential rental agreements. *O'Brien v. Detty*, 19 Wash.App. 620, 621-22, 576 P.2d 1334, 1335 (1978); see RCW 59.18.060(2).

This statute, however, does not render the landlord strictly liable as Mrs. Lincoln contends. Instead, RCW 59.18.060 speaks in terms of maintaining the demised premises in "reasonably good repair" and we have held that no violation occurs until a reasonable time after notice of the defect. *O'Brien v. Detty*, supra, at 622-23, 576 P.2d 1334.

*Lincoln v. Farnkoff*, supra, 26 Wn. App. at 719 – 20.

Both the law of the State of Washington and common sense require that a landlord be given notice of an unreasonably dangerous condition on the leased premises before liability for injury can attach. Otherwise, you create a form of strict liability, or you change Washington Landlord/Tenant law such that the landlord is given a reasonable opportunity to conduct "inspections" to look for potentially injury-causing conditions. The common law does not require a landlord to "inspect" the

property during the leasehold, nor does the Residential Landlord Tenant Act. Simply put, the plaintiffs' legal theory does not exist, nor should it.

**B. The Declaration of Christopher Bollweg Does Not Raise any Triable Issues of Fact**

In an attempt to avoid dismissal, the Saldes offered the Declaration of an architect, Christopher Bollweg. Mr. Bollweg has inspected the stone veneer on the fireplace and made some comments which the plaintiffs believe support their "Failure to Inspect" theory of liability.

First, Mr. Bollweg states "there are large cracks in the masonry obvious to a non-professional." (CP, 59.) Mr. Bollweg did not identify the location of these "large cracks," or, at the very least, whether the cracks would have been in an area that should have given rise to a suspicion that the rock which fell was somehow unstable or unreasonably dangerous.

Second, Mr. Bollweg also points to "extensive water damage" in the ceiling "near the fireplace." (CP 60.) However, Mr. Bollweg again fails to explain why this area of alleged water damage would somehow put the Saldes (or the Yagens) on notice that a rock from the fireplace might fall.

Third, Mr. Bollweg is of the opinion that based upon the discoloration of the ceiling, and the size of the cracks in the mortar, the defects appear to be old and predate June 2009. (CP 60) However, both the Yagens and the Saldes, the families who resided in the home for at least eight years before June 2009, have testified that there were no such "visible cracks" in the mortar near the rock which fell. These direct observations of the state of the mortar surrounding the rock which fell preclude Mr. Bollweg's "opinion" that the "cracks" existed prior to the Saldes' lease, and thus, Mr. Bollweg's opinion is based on nothing more than speculation and the trial court ruled appropriately.

The trial court has wide discretion in ruling on the admissibility of expert testimony; *Miller v. Linkin*, 104 Wn. App. 140, 34 P3d 835 (2001) An appellate court will not disturb the trial court's ruling " ' [i]f the reasons for admitting or excluding the opinion evidence are both fairly debatable'; *id.* at 144." It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Safeco v. McGrath*, 63 Wn. App. 170, 177, 817 P2d. 861 (1991)

### III. CONCLUSION

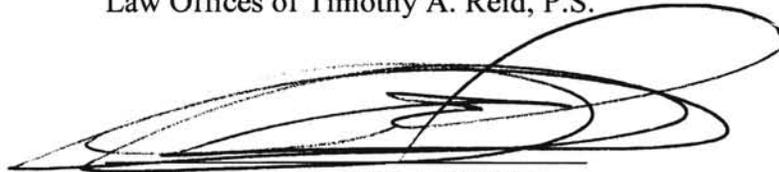
There is nothing in the record that indicates the Yagens had any notice of a dangerous or defective condition in their rental home. The law requires actual or constructive notice of the unreasonably dangerous condition in order to provide the Yagens a fair opportunity to make any needed repairs. In this way, the Saldes are provided with a habitable residence and the Yagens have a fair opportunity to avoid liability which might arise from the condition of the leased premises.

On the other hand, the plaintiffs would impose both strict liability on the Yagens, and all other landlords, and a form of "notice" which is provided by an after-the-fact inspection by an expert, who draws his conclusion not from the evidence, but from a desire to manufacture a claim for his clients.

The record is clear that there was absolutely no notice to the Yagens that the rock which allegedly injured Ms. Salde was in such a state that it might come loose and fall. The law simply does not provide Ms. Salde an action against her landlords under these circumstances. The case was properly dismissed.

Respectfully submitted this 24<sup>th</sup> day of May, 2012.

Law Offices of Timothy A. Reid, P.S.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom, positioned over a horizontal line.

Timothy A. Reid, WSBA #13840  
Attorney for Respondents

DECLARATION OF SERVICE

I, Julie Waitt, under penalty of perjury under the laws of the State of Washington declares as follows:

That I am a U.S. citizen and over the age of 18 years; I am not a party to the foregoing entitled action and am competent to be a witness herein. On the 24 July, 2012, I caused to be served in the following manner, a copy of the following pleading:

BRIEF OF RESPONDENTS

addressed to:

Court Administrator/Clerk  
Court of Appeals, Div. I  
One Union Square  
Seattle, Washington 98101

**VIA MESSENGER**

Edward J. Callow  
Callow Law Offices PLLC  
7101 MLK Jr. Way S., Ste. 208  
Seattle, WA 98118  
206-659-4706 – phone  
206-659-4710 – fax  
Tedcallow@gmail.com

**VIA EMAIL  
VIA US MAIL**

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JUL 24 PM 4:50

Executed at Issaquah, Washington, this 24<sup>th</sup> day of July, 2012.

*Julie Waitt*

\_\_\_\_\_