

69338-7

69338-7

No. 69338-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DEBRA FULWILER

Petitioner,

vs.

ARCHON GROUP, L.P., WHITEHALL STREET REAL ESTATE L.P.
W2007 SEATTLE OFFICE 10700 BUILDING REALTY, LLC, WA-
10700 BUILDING, LLC, CB RICHARD ELLIS, INC., BELLEVUE
COLLEGE (formerly BELLEVUE COMMUNITY COLLEGE, a division
of the STATE OF WASHINGTON

Respondents.

BRIEF OF RESPONDENTS ARCHON GROUP, LP, WHITEHALL
STREET REAL ESTATE LP, W2007 SEATTLE 10700 BUILDING
REALTY, LLC, WA- 10700 BUILDING, LLC, ("ARCHON)" AND
CB RICHARD ELLIS, INC. ("CBRE")

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COURT OF APPEALS
STATE OF WASHINGTON
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I. STATEMENT OF ISSUE

The trial court correctly granted Archon and CBRE's¹ motion for summary judgment when it determined that there were no genuine issues of material fact, and that Archon and CBRE were entitled to judgment as a matter of law. The trial court did not commit reversible error, and did not abuse its discretion.

II. STATEMENT OF CASE

A. Basic Facts: This is a premises liability personal injury case. On September 5, 2008 Fulwiler fell on a set of exterior steps at a commercial office building located at 10700 Northrup Way, Bellevue, WA. (CP 1 – 7) Archon is the owner of the building. Bellevue Community College (BCC) leased the building, inclusive of use of the exterior steps and parking lot. CBRE provided property management services. (CP 95 -96)

At the time of the incident, Fulwiler was showing a friend, Joyce Puerschner (“Puerschner”), the bookstore located inside the building. Fulwiler and Puerschner had arrived in separate cars, and parked in the parking lot near the exterior staircase in question. They walked up the staircase in question, and went into the building. They spent about 15 minutes inside and left. As they left, Puerschner was walking ahead of Fulwiler and descended the stairs. Fulwiler successfully negotiated the first section of the staircase. (CP 119) As she was walking down the

¹ There are numerous property owner defendants in this case. For brevity, “Archon” will be used to refer to all the property owner entities, and “CBRE” as the property management company.

second, or lower, portion of the staircase, she “lost her balance and fell.” (CP 3, complaint, paragraph 16) In her deposition, Fulwiler testified that she does not know what caused her to fall. (CP 119 – 121)

In her deposition, Fulwiler said she had gone up and down the stairs twice during the time when she was taking a class at the college a year or so earlier. (CP 118, pages 11 – 12).

B. Procedural Posture. Fulwiler fell on September 5, 2008. Her complaint, filed on September 2, 2011, alleges that she was walking down a set of stairs and “lost her balance and fell.” (CP 3) The complaint alleges that all defendants were negligent, and that such negligence was the proximate cause of her fall. Fulwiler was deposed on April 24, 2012.

On July 13, 2012, Archon & CBRE moved for summary judgment of dismissal on the basis that Fulwiler had no evidence of negligence, proximate cause, or notice. (CP 80 – 122) BCC also moved for summary judgment on similar grounds. (CP 8 – 79)

In response to Archon/CBRE & BCC’s summary judgment motions, Fulwiler, in complete contrast to her deposition testimony, signed a declaration providing a detailed explanation as to the reason she fell. (CP 207 – 209) In addition to her declaration, Fulwiler’s response to the summary judgment motions included declarations from two (2) experts, Thomas K. Baird and Gary D. Sloan, Ph.d., both of whom offered up an opinion as to the reason for Fulwiler’s fall. (CP 149 – 204; CP 214 – 245)

Concluding that Archon & CBRE were entitled to judgment as a matter of law, the trial court granted its motion for summary judgment on September 5, 2012, (CP 298 – 299). Similarly, the trial court also granted BCC’s motion for summary judgment on September 14, 2012. (CP 300 – 301)

This appeal followed.

III. SUMMARY OF ARGUMENT

1. Summary Judgment Standard: This court’s review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. If the pleadings, depositions, admissions on file and the affidavits submitted demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, then summary judgment is proper.

2. Fulwiler is a Licensee: Because she was visiting the college and bookstore for the benefit of her friend, Fulwiler’s visit was social in nature, which makes her a licensee. She was not there for the benefit of the college.

3. No Evidence of Proximate Cause: The trial court correctly granted Archon and CBRE’s motion for summary judgment because a claim of negligence relying only on speculative theories will not survive summary judgment.

4. Declarations of Two (2) Experts and Fulwiler: To the extent the trial court disregarded the conclusionary and speculative assertions of both of Fulwiler’s experts, the trial court did not abuse its

discretion. Nor did the trial court abuse its discretion in not considering the statements in Fulwiler's declaration which contradicted her deposition testimony.

5. Stairs Do Not Poss an Unreasonable Risk of Harm:

The photographs of the staircase speak for themselves, and as a matter of law, do not pose an unreasonable risk of harm.

6. Open and Obvious: Because the condition of the staircase was open and obvious, and Fulwiler had walked up them moments earlier, and descended the higher portion of the staircase seconds before her fall, Archon & CBRE do not owe her a duty of care.

7. No Notice: Fulwiler failed to provide evidence that the staircase at issue posed an unreasonable risk of harm and that Archon & CBRE had actual or constructive notice of the alleged dangerous condition.

IV. ARGUMENT

1. Summary Judgment Standard:

This court's review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-435, 13 P.3d 633 (2000). In a summary judgment proceeding, the reviewing court makes the same inquiry as the trial court. *Hontz v. State*, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986). If the pleadings, depositions, admissions on file and the affidavits submitted demonstrate that no genuine issue of material fact exists and that the moving party is

entitled to judgment as a matter of law, then summary judgment is proper. CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). A moving defendant may satisfy its burden by showing that there is an absence of evidence to support the non-moving party's case. The moving party is entitled to summary judgment when the non-moving party fails to make a sufficient showing on an essential element of its case in which it has the burden of proof. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

2. Fulwiler is a Licensee:

In her deposition, Fulwiler said she was not taking a class at the college. Rather, she was visiting the college to show her friend the bookstore. Her friend was interested in taking a class. "I was showing a friend of mine the....bookstore. Because I had taken a class a year or two before that, and she was interested in taking it now." (CP 117, page 7). "We were going to go to lunch afterward." (CP 117, page 8).

Washington follows the *Restatement (Second) of Torts* in defining an invitee and licensee and the duty of care owed by the landowner. A licensee is a person who enters premises with the owner's permission and with a purpose that either benefits only the entrant or is primarily familial or social. *Thompson v. Katzer*, 86 Wn. App. 280, 286, 936 P.2d 421 (1997); *Beebe v. Moses*, 113 Wn. App. 464, 468, 54 P.3d 188 (2002). Washington courts have consistently held that a social guest is a licensee. See *Younce v. Ferguson*, 106 Wn.2d 658, 668-69, 724 P.2d 991 (1986) (reaffirming premises liability categories and specifically holding that social guests are

licensees); *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. 709, 718, 965 P.2d 1112 (1998) (explaining that licensees include social guests); *Thompson*, 86 Wn. App. at 285. An invitee, on the other hand, is someone who enters premises for a business or economic purpose that benefits both the entrant and the occupier. *Thompson*, 86 Wn. App. at 286; *Beebe*, 113 Wn. App. at 468.

Fulwiler is a licensee. She went to the college with her friend for a social purpose, to show her friend the bookstore. It was her friend who was interested in taking a class, not her. There is no evidence that Fulwiler entered for a business purpose or a business purpose benefiting the college. Fulwiler's statement in her declaration (CP 207 – 209) that she would have bought a book if she'd seen one she'd like does not change her status as an licensee or create a genuine issue of material fact.

3. Negligence, Duty & Proximate Cause:

As in any negligence action, Fulwiler must establish (1) the existence of a duty owed, (2) a breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury. *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989); *Cameron v. Murray*, 151 Wn. App. 646, 651, 214 P.3d 150 (2009). The existence of duty is a question of law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991)

Duty: A possessor of land is liable for physical harm to licensees caused by a condition on the land if:

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he [or she] fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and the risk involved.

Tincani v. Little Empire Zoological Soc'y, 124 Wn.2d 121, 133, 875 P.2d 621 (1994) (quoting Restatement (Second) of Torts sec. 342 (1965)).

Proximate Cause: To establish proximate cause in a negligence action, Fulwiler must show that Archon & CBRE's actions were both the cause in fact, "but for" causation, and legal cause of her injuries. *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 357, 961, P.2d 952 (1998). The casual connection between defendant's actions and the alleged injury must not be left to surmise, speculation, or conjecture. *Wilson v. Northern Pacific Railway Co.*, 44 Wn2d, 122, 127-128, 265 P.2d 815 (1954); *Almquist v. Finely School District*, 114 Wn. App. 395, 57 P.3d 1191 (2002).

Here is Fulwiler's deposition testimony:

Q. But in terms of -- I guess I'm trying to figure out what the -- you were in the process of stepping down? Was your -- did you misstep? Or how -- what actually -- do you have any recollection --

A. I don't know.

Q. -- of where your feet were? Or what?

A. I do not know.

Q. Okay. So you don't know if you, in looking at No. 1, if you overstepped, went too far, or not far enough, or what?

A. I do not know. (CP 121, page 70)

Q. Well, you walked -- looking at photograph No. 1, you walked down the first few steps --

A. Um-hmm.

Q. -- without any difficulty, right?

A. Um-hmm.

Q. Okay. And then you -- did you take a step?

A. No.

Q. Okay. You kept going and then you put your hand on the lower rail?

A. Correct.

Q. So what happened from that point on? Did your feet keep going in front of you?

A. The only thing I could tell you I couldn't see the step.

Q. But did you keep walking?

A. I fell at that point, very first step. There's a really big -- I don't know if you can see it in here, oh, yeah, you can. There's a big gap between here -- when you put your hand on here, and this first step. So I don't know what happened.

Q. What I'm trying to figure out is the mechanism of your feet. Did you put your right foot first or left foot first? Do you have any recollection about what actually

--

A. I don't have any recollection.

Q. -- physically happened?

A. I do not. (CP 119, pages 19 – 20)

In her declaration filed in response to Archon/CBRE & BCC's summary judgment motions, Fulwiler offers up a much more detailed description of the mechanics of her fall. "I grasped the handrail and, as my foot was in motion leaving the first step, I naturally looked down for cues about where to place her (my) foot on the next step. As I did so, the individual steps of the stairs blended together so that her steps

were indiscernible from one another.” (CP 208) **This testimony directly contradicts her deposition. She was asked explicitly, “Were you stepping down?” “I don’t know.” Do you know where your feet were? “I don’t know.”**

Both of Fulwiler’s experts rely on Fulwiler’s changed testimony for the basis of their opinions.

Fulwiler’s theory is completely speculative. That is, had the end of each step been painted yellow, she would not have fallen. Her deposition testimony is clear. Although she said she could not see the steps, she does not know what happened; she does not know why she fell. She said she did not know where her feet were, if she was lowering her foot, or what. She does not know. She simply lost her balance. Therefore, neither she, nor her experts can speculate about that had something been different, it would not have happened. A cause of action is speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another. Here, by her own admission, Fulwiler does not know why she fell. If she does not know what happened, there is absolutely no reasonable basis upon which to infer negligence. As such, her negligence claim fails as a matter of law.

In *Wilson v. City of Seattle*, 146 Wn App. 737, 194, P.3d 977 (2008), the trial court’s dismissal of plaintiff’s claim was also upheld. In *Wilson*, the plaintiff was unable to provide any evidence regarding how the manhole cover was improperly placed, and the jury cannot find

causation simply on the basis of speculation and conjecture. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 29 P.3d 56 (2001).

Proof of proximate cause must rise above speculation, conjecture, or mere possibility. *Nejin v. Seattle*, 40 Wn. App. 414, 420-22, 698 P.2d 615 (1985), *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986), *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999). A claim of liability resting only on a speculative theory will not survive summary judgment. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995).

In *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947), the WA Supreme Court explained the difference between a **reasonable inference from the evidence** and **conjecture**. In *Gardner*, an employee fell down a freight elevator shaft and died. His widow sued the employer. Employees in the 6-floor building could avoid using the stairs when the freight elevator was on another floor by manipulating elevator cables to bring the elevator platform to their floor. The elevator doors on the floor where the elevator had just been would then be left standing open. Nobody saw the employee fall. He could have fallen down the shaft through the open doors if another employee had manipulated the cables to move the platform to another floor; it was equally likely that he could have been manipulating the cables himself, lost his balance, and fallen into the empty shaft.

The Supreme Court ruled that the widow **failed** to provide sufficient evidence from which a jury could infer that the employer's

negligence was the proximate cause of the accident. The Supreme Court explained that "no legitimate inference can be drawn that an accident happened in a certain way by simply showing that **it might have happened in that way, and without further showing that it could not reasonably have happened in any other way.**" Gardner, page 810. (Emphasis Added)

Fulwiler's theory is simply an explanation that her accident could have happened a certain way. That is precisely the point. **Just because an accident could have happened a certain way does not mean it did.** Fulwiler has long standing neuropathy, and it is just as likely that she simply lost her balance for no reason at all.

The public policy behind the Supreme Court's analysis is sound. It is completely unacceptable and inequitable to infer that Archon & CBRE were negligent and/or the proximate cause of an incident based on a "could have" theory. It is precisely because the jury would be required to speculate that Fulwiler's case must be dismissed. As the Court in *Gardner, Supra*, said,

if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

The mere fact that Fulwiler was injured does not entitle her to put Archon & CBRE through the expense of trial. *Marshall*, 94 Wn. App at 377; *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006). That is the purpose of a summary judgment

motion, to dispose of a case that will not survive trial. **Not every slip and fall is the result of someone or some entity's negligence.** *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 433 P.2d 863 (1967).

The issues in Fulwiler's case, and the way in which the case was postured before the trial court, are nearly identical to that in *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn.App. 731, 150 P.3d 633 (2007). In *Seiber*, the plaintiff fell down some steps going from the boardwalk (in Poulsbo, WA) to the street. Like here, the plaintiff claimed the stairs posed an unreasonable risk of harm, and among other things, lacked distinguishing colors or textures. As Fulwiler, Seiber did not recall the specifics of how she fell, that is, she did not know what caused her fall. Like Fulwiler here, Seiber submitted a Declaration to supplement her deposition, explaining in more detail what happened. Like Fulwiler here, Seiber retained an expert who concluded that the stairs were unreasonably dangerous (strikingly, for the exact same reason), and Seiber's fall was a result of defendant's negligence. Just as Division II in *Seiber* rejected such arguments, so too should this Court. Speculative and conclusory assertions are insufficient to defeat a summary judgment motion. Seiber's assertion that, "had everything been right, I would not have fallen," *Seiber*, 136, Wn.App.734, is strikingly similar to Fulwiler's theory here, that is, had there been yellow paint on each nose, she would have seen the step, and would not have fallen. **This is classic speculation.**

4. Declarations:

In opposition to Archon/CBRE & BCC's motions for summary judgment, Fulwiler submitted her own declaration, along with the declaration of two (2) experts. Pursuant Local King County Local Rule 56 (e), Archon & CBRE, in its Reply Brief, objected to all three of the declarations. (CP 247 – 249) While the trial court did not specifically rule on the Motion to Strike, to the extent it disregarded the declarations, it did not abuse its discretion. All three (3) Declarations are utterly self-serving, and contain nothing but conclusional and speculative statements.

Fulwiler Declaration: The contradictions between Fulwiler's deposition and her declaration are pointed out above. When clear deposition testimony negates the existence of a material fact, the deponent cannot establish a factual dispute in response to a summary judgment by signing off on a self-serving declaration prepared by her attorney. *Kefmehl v. Baseline Lake, LLC*, 167 Wn App.677, 275 P.3d 328 (2012) "When a party has given clear answers to unambiguous (deposition) questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Klontz v. Puget Sound Power & Light Co.*, 90 Wn.App 186, 192, 951 P.2d 280 (1998) (quoting *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)).

Baird & Sloan Declarations: Conclusions of law stated in an affidavit filed in a summary judgment proceeding are improper and should be disregarded. *Hash v. Children's Orthopedic Hosp. & Medical*

Ctr., 49, Wn. App. 130, 741, P.2d 584 (1987), *aff'd* 110 Wn.2d 912, 757 P.2d 507 (1988); *Orion Corp v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985, cert denied, 486 S. Ct 1996, 100 L.Ed. 2d 227 (1988)); Conclusory statements and legal opinions cannot be considered in a Declaration in response to a summary judgment motion, and the trial court will not abuse its discretion by excluding an affidavit because it contains conclusory assertions rather than factual allegations. *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999). *Marks v. Benson*, 62 Wn. App. 178, 813 P.2d 180, review denied, 118 Wn.2d 1001, 822 P.2d 287 (1991). An expert opinion is insufficient to establish duty as a matter of law. *Hyatt v. Sellen Constr. Co.*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985).

Baird's declaration is nothing but a string of conclusional statements. "This hazardous condition presented an unreasonable risk of injury." "This risk was foreseeable..." (CP 150 – 151, paragraph 6 & 7).

Sloan's declaration is similarly full of conclusional statements, and inadmissible hearsay. (CP 215 – 223, paragraphs 15 - 33) For example, in paragraph 23 of his declaration, Sloan states, "she securely gripped the handrail with her left hand, lifting her trailing foot (most likely her right), and began her descent." "While lowering her foot onto the tread of the first step below the middle landing, (she) lost her balance." (CP 219) This is simply not what Fulwiler said at her deposition. A court may not consider inadmissible evidence when ruling on a summary judgment motion. *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn. 2d 819, 826, 872 P.2d (1994).

Lastly, the opinions of Sloan and Baird as to the cause of Fulwiler's fall are complete and total speculation. Their opinions - that Fulwiler would not have fallen had the end of each step been painted yellow - is complete speculation, and based on Fulwiler's changed and contradictory testimony.

The trial court did not abuse its discretion in disregarding portions of all three (3) declarations offered in support Fulwiler's opposition briefs. Nothing in these declarations creates a genuine issue of material fact. As such, the trial court did not err in granting Archon & CBRE's motion for summary judgment.

5. Staircase is Not Unreasonably Dangerous:

The trial court was correct in granting Archon & CBRE's motion on the basis that the stairs in questions are not unreasonably dangerous as a matter of law. The lack of yellow paint at the front of each step does not, as a matter of law, render a staircase unreasonably dangerous. Staircases that are all the same color or texture are ubiquitous in King County & Seattle. (CP 254 – 266) Archon and CBRE's duty of care did not rise to the level of requiring yellow paint on the nose of each step.

6. Open and Obvious:

The condition of the stairs were open and obvious to Fulwiler. Not only had she ascended the steps a few minutes before, she had walked down the first section of the stairs without falling. Having walked up the entire staircase, and having walked down the top section without a problem, she was on notice of the condition of the staircase.

Relying on *Mele v. Turner*, 106 Wn.2d 73, 80, 720 P.2d 787 (1986), the Court in *Seiber*, Supra, said, “Seiber had ascended the stairs to get to the boardwalk and was therefore on notice that she was on notice...Where an alleged dangerous condition is both obvious and known to a plaintiff, the defendants owe no duty to warn of this condition.” 136 Wn. App, 731, 740. As such, Archon and CBRE do not owe Fulwiler a duty of care, and the trial court did not err in granting summary judgment.

7. No Notice:

The trial court was correct in granting Archon & CBRE’s motion on the basis that Fulwiler failed to prove notice. A possessor’s duty attaches only if the possessor knows or should have become aware of the dangerous condition. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994). Fulwiler offers no evidence of notice. When BCC is in session, the stairs are used by many students, faculty and others on a daily basis. There have been no prior incidents on the subject staircase (CP 96 & 103)

V. CONCLUSION

For the foregoing reasons, the trial court’s dismissal of Fulwiler’s claims against Archon & CBRE should be upheld.

Respectfully submitted this 5th day of June 2013

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Gregory G. Wallace, WSBA 29029
Counsel for Respondent Archon

No. 69338-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DEBRA FULWILER

Petitioner,

vs.

ARCHON GROUP, L.P., WHITEHALL STREET REAL ESTATE L.P.
W2007 SEATTLE OFFICE 10700 BUILDING REALTY, LLC, WA-
10700 BUILDING, LLC, CB RICHARD ELLIS, INC., BELLEVUE
COLLEGE (formerly BELLEVUE COMMUNITY COLLEGE, a division
of the STATE OF WASHINGTON

Respondents.

CERTIFICATE OF SERVICE

Gregory G. Wallace, WSBA No. 29029
Attorney for Respondents Archon Group, LP, Whitehall Street
Real Estate LP, W2007 Seattle, Office 10700 Building Realty, LLC, WA-
10700 Building, LLC, CB Richard Ellis, Inc.
LAW OFFICE OF WILLIAM J. O'BRIEN
800 Fifth Avenue, Suite 3810, Seattle, WA 98104
(206) 515-4800

The undersigned declares as follows:

I am over the age of 18, not a party to this action, and competent to be a witness herein.

On the 5th day of June, 2013, I caused to be served a true and correct copy of *Brief of Respondents Archon Group, Whitehall Street Real Estate, W2007 Seattle Office 10700 Building Realty, WA-10700 Building, CB Richard Ellis, Inc.* as indicated:

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Signed and dated at Seattle, Washington this 5th day of June, 2013.

LAW OFFICE OF WILLIAM J. O'BRIEN



Sheila Schlorer