

No. 73739-2-1

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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JAMES BRUCE Appellant,

v.

HOLLAND RESIDENTIAL, LLC and  
3850 KLAHANIE DR. SE INVESTORS, LLC,

Respondents.

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**BRIEF OF RESPONDENTS  
HOLLAND RESIDENTIAL, LLC and  
3850 KLAHANIE DR. SE INVESTORS, LLC**

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## I. INTRODUCTION

Appellant asserts Respondents owed him a duty to protect him from “freezing fog,” an obscure and unpredictable weather condition that “may” have existed at the incident scene and “may” have contributed to his fall event. The trial court properly dismissed the Appellant’s action finding Respondents owed no duty to protect him from unpredictable “freezing fog” or perform preemptive deicing. Laguna v. State, 146 Wn. App. 260, 263, 192 P.3d 374 (2008). This Court should affirm the dismissal.

## II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly grant summary judgment by finding the Respondents owed no duty to the Appellant?
2. Under Washington law, does a residential landlord have a duty to undertake preventative deicing based upon the mere prediction of a possible weather condition?
3. Could the trial court have granted summary judgment based upon the lack of evidence of an unreasonably dangerous condition and notice, two other required elements of a claim for premises liability under Washington law?

## III. COUNTERSTATEMENT OF THE CASE

### A. This Case Involves an Obscure Weather Phenomenon.

This appeal concerns liability for a fall that occurred in the parking lot of a residential apartment complex in Issaquah known as the Summerwalk at Klahanie (“Summerwalk”) at 5:15 a.m. on Monday, January 21, 2013. CP 3. The Appellant alleged that the surface of the parking lot was “slippery,” but admitted that he never saw or felt ice. CP 52; 54. There was no measureable rainfall in Western Washington for at least 10 days before Appellant’s fall event. CP 85-96. Critically, this case does not involve black ice or the presence of a measurable amount of water attributable to an obvious source. Rather, Appellant’s liability theory is based upon meteorological testimony about rime or microscopic water particle formation from freezing fog, an obscure and highly unpredictable weather phenomenon, about which most lay people know very little. CP 123;185-88.

Briefly, for several days preceding the Appellant’s fall event, Western Washington had been under a very stable air mass. CP 405 *compare with CP182-188; 87-396*. As a result, cold temperatures and moisture were trapped in the lowest layers of the atmosphere, resulting in areas of radiation fog. Id. The intensity of the fog and visibility limitations resultant therefrom would have varied considerably from location to location. Id.

When the outside temperature is below freezing, freezing fog (also known as fog depositing rime<sup>1</sup>) *may* form. Id. Rime in observable amounts is white or opaque in appearance and is more similar in composition to frost as opposed to clear ice. Id. Rime has a density of about 20% to 30% of that of clear ice. Id. Rime, like frost, is most likely to form over grassy areas and on metal surfaces like automobiles or airplanes. Id. In dense fog conditions, it may accumulate in patchy areas on roadways, but unlike black ice, should be visible by its white color. Id.

The areas where dense fog will form and especially where it may deposit rime cannot be predicted. Id. Renton, the closest complete weather station to the Summerwalk complex, did report fog depositing rime, but not until 7:56 a.m., three hours after Appellant's fall event. Id. According to the Appellant's own meteorologist, fog depositing rime is such an obscure phenomenon that conventional sources of public weather information, like local television and radio stations, would not have been reporting about it unless multiple accidents had resulted from the condition. CP 349. The record is devoid of any such reports.

Due to the patchy and highly unpredictable nature of fog, it is hypothetically *possible* that rime may have been deposited on the parking

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<sup>1</sup> Appellant's weatherman, Philip Brueser, was unfamiliar with the term "rime" and testified that his analysis was limited to whether ice could have formed. Brueser dep. at 30-31. Per Mr. Brueser, "[i]t never occurred to me to differentiate between one type of ice and another." Id. at 31:19-23.

lot at Summerwalk before the Appellant fell. CP 405; *compare with* CP182-188; 87-396. However, it is equally *probable* that no rime was deposited or that it formed only on grass and soil areas, metal surfaces, and roof tops.<sup>2</sup> Any water particle accumulation on the Summerwalk parking lot surface *could* also have also been in only “microscopic” trace amounts, which would not have been visible to the human eye. CP 395. In microscopic trace amounts, its presence would be largely undetectable and academic, not expected, and certainly not unreasonably dangerous from a premises liability standpoint. Rime is more akin to frost and is much less dense than clear ice. CP 405.

**B. The Appellant Fell Returning to the Apartment Complex to Warn His Fiancé About Weather Conditions.**

On the morning of his fall event, the Appellant exited the apartment of his girlfriend, tenant Mary Humphries, at approximately 5:15 a.m. and walked to his car, which was parked along a street adjacent to the complex. CP 46. To reach his vehicle, Appellant walked across a black asphalt parking lot and over a small grassy area to a public sidewalk. CP 47; 69-73; 75. He reached his car without incident. CP 46-49.

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<sup>2</sup> Per Mr. Breuser, freezing fog is too nebulous for anyone to measure where and how much ice accumulation forms. While he is confident that there was ice formation in the parking lot on the morning of the plaintiff’s fall, it may have been in “microscopic” levels. Breuser dep. at 55-56.

After reaching his car safely, the Appellant turned around and fell returning to the apartment complex to warn his fiancé about the weather. Id. At the time, it was foggy and Appellant was concerned about road conditions. CP 48. The Appellant fell stepping down off a curb and later testified that the parking lot surface was “slippery.” CP 52; 46-49.

The Appellant was alone and his fall event was unwitnessed. His fiancé, Mary Humphries, did not inspect the area where he fell and had no admissible testimony to offer about ground conditions in the area where the Appellant fell before or close in time to the event. The record is also devoid of evidence that any other resident or worker at the Summerwalk reported difficulty negotiating the parking lot on the day of the accident.

The area where the Appellant fell is used year-round, and at all times of the day and night, by Summerwalk tenants with dogs. Although the area is heavily used, there is no record of any other slip-and-fall event in this area. The Appellant is the only person believed to have fallen in the area at issue. At the time, James Bruce was 72-years-old, with a documented history of falls. CP 56-65. When asked whether he was taking extra precautions when walking through the parking lot on the morning of his fall, Mr. Appellant admitted he was not. CP 65-66.

Jonathan “Andy” Patterson, the former Maintenance Manager at Summerwalk, was deposed at length about snow and ice safety

precautions undertaken on the property during winter months and in January 2013. CP 100-108. Mr. Patterson testified that he would personally monitor the weather for reports of snow or freezing conditions. Id. He and his maintenance staff would physically walk the entire property at the beginning and end of every day, seven days a week, inspecting and spreading de-icer as needed. Id. The maintenance staff would also post signs around the property warning tenants of freezing conditions. Id. According to Patterson, “if there was any doubt we would normally err on the side of just putting out the ice melter, because it is not very expensive.” CP 104.

#### IV. ARGUMENT

##### A. Standard of Review

The Court of Appeals reviews a trial court’s ruling on summary judgment de novo, engaging in the same inquiry as the trial court. Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Thus, this Court “will affirm an order of summary judgment when ‘there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.’” Id. (quoting Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 358, 166 P.3d 667 (2007)); CR 56(c). This Court must “review the evidence in the light most favorable to the

nonmoving party and draw all reasonable inferences in that party's favor.”

Id.

**B. Washington Law Does Not Impose a Duty to Perform Pre-emptive Deicing.**

Here, taking all reasonable inferences in the Appellant’s favor, the Respondents would have had to preemptively apply deicer to every surface at the Summerwalk apartment complex where a pedestrian might walk, based upon the mere *possibility* of freezing fog, much less an actual prediction of the weather phenomenon, to prevent the claimed harm. *If, when and where* rime may form from freezing fog is entirely unpredictable. *If* rime deposited by freezing fog contributed to the Appellant’s fall, it could have formed over night or in as little as one hour before the fall event.

At the summary judgment stage, Respondents denied a duty to preemptively deice based upon a mere possibility of freezing fog, relying on Laguna v. State, 146 Wn. App. 260, 263, 192 P.3d 374 (2008), which holds that while the State of Washington has a duty to maintain its roadways so that they are safe for ordinary travel, this duty does not extend to performing preventative deicing, even when “weather conditions ... are likely, or even certain, to produce icy roads.” Id. at 265; see also LeRoy v. State, 124 Wn. App. 65, 70, 98 P.3d 819 (2004). The Laguna

court rejected the argument that weather conditions rendering ice formation foreseeable imposes a duty to engage in de-icing measures, holding that “foreseeability of harm does not create the duty to prevent it.” 146 Wn. App. at 265. The court reasoned that conditions likely to produce ice “do not make road travel treacherous. Moisture and freezing temperatures are only *potentially* dangerous.” Id. (emphasis added). The court further explained:

Freezing weather exists throughout much of the state for a good portion of the year. These conditions do not necessarily lead to ice on the roadway. Here, for example, the same conditions that produced ice before the accident had prevailed for days beforehand, without ice formation. Unfortunately, weather forecasts cannot pinpoint when or where ice will form, and it can form within minutes. If the fact that ice is predictable at some (uncertain) point were enough to create a duty to prevent it, the State would be required to apply anti-icing chemicals to hundreds of miles of roadway whenever moisture and freezing temperatures exist.

Id.

This Court should, as the trial court did, take judicial notice of the fact that weather patterns are difficult to predict in this region and not always reliable, as the Laguna court noted. Imposing a legal duty on landowners to preemptively apply deicer to every walkable surface based upon a mere prediction, not actual conditions, is simply not reasonable. Imposing such a mandate would open a veritable Pandora’s Box, which is

why the Laguna court rejected the standard. Laguna is still good law and the trial court appropriately followed its holding.

**C. The Record Is Devoid of Evidence of a Known or Obvious Rime Accumulation.**

Washington landlords have a general duty to keep common areas free only from known or obvious accumulations of snow and ice. Mucsi v. Graoch Assoc. Ltd. P'ship No. 12, 144 Wn.2d 847, 854-55, 31 P.3d 684 (2001); Iwai v. State, 129 Wn.2d 84, 915 P.2d 1089 (1996); Maynard v. Sisters of Providence, 72 Wash.App. 878, 882, 866 P.2d 1272 (1994). No court in this (or any other jurisdiction) has ever held that this duty extends to protecting invitees from rime or microscopic ice accumulations resultant from freezing fog. The imposition of such a duty would be tantamount to imposing strict liability.

Legally, liability attaches only if a landlord has become or should have become aware of a dangerous condition. Wiltse v. Albertson's Inc., 116 Wn.2d 452, 453-54, 805 P.2d 793 (1991). The Appellant, relying on testimony from his meteorologist, claimed the parking lot was rime coated from fog. However, his expert testified that the accumulation, could have been microscopic and not visible to the naked eye. CP 388; 395-96.

The mere fact of fog and low temperatures does not establish the existence of a dangerous surface condition capable of detection by

maintenance personnel exercising ordinary care. Again, *if* and *where* rime depositing fog may form is unpredictable. At the summary judgment stage the Appellant failed to establish the existence of a known, obvious, or even detectable accumulation of rime or ice capable of being identified and cured by Respondents, much less before 5:30 a.m. on a Monday morning in January.

**D. The Trial Court Did Not Err by Rejecting Appellant’s Claim that the Physical Design of the Area Where He Fell Was Unreasonably Dangerous.**

At summary judgment and on appeal, the Appellant improperly argues that the mere happening of his fall event is evidence that Summerwalk’s owners should have installed designated pedestrian walkways and hand rails. However, Appellant’s own architect testified that the area where he fell, unless ice coated as the Appellant claims, was free of defect. CP 80-83. The Appellant seeks to avoid this evidence by arguing, through human factors expert Rick Gill, that the parking lot could have been made *safer*. The Appellant essentially argues that “you can always build a better mousetrap” and that an alternative design of the premises is feasible and would be safer. However, the applicable legal standard is not “what would be safest.”

Washington follows the Restatement (Second) of Torts §343 with

regard to a landowner's duty to invitees<sup>3</sup>:

*A possessor of land is subject to liability for physical harm caused to his [or her] invitees by a condition on the land if, but only if, he [or she]*

- (a) *knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and*
- (b) *should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and*
- (c) *fails to exercise reasonable care to protect them against the danger.*

Iwai v. State, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996). “[A] landowner’s duty attaches only if the landowner ‘knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk . . . .’” Id. at 96 (quoting RESTATEMENT (SECOND) OF TORTS § 343(a)). Reasonable care requires the landowner to inspect a dangerous condition and repair or warn invitees of the condition. Tincani v. Inland Empire Zoological Society, 124 Wn.2d 121, 139, 875 P.2d 621 (1994). “Knowledge” requires the plaintiff to show actual or constructive notice of the dangerous condition. Iwai, 129 Wn.2d at 96.

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<sup>3</sup> “The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee.” Iwai v. State, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996). “The highest of the[se] three levels of duty is owed to an invitee, who may be either a business visitor or a public invitee.” Johnson v. State, 77 Wn. App. 934, 940, 894 P.2d 1366 (1995). “A business [invitee] is [one] who is invited to enter or remain on land for [the] purpose directly or indirectly connected with business dealings with the possessor of the land.” Younce v. Ferguson, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (quoting RESTATEMENT (SECOND) OF TORTS § 332 (1965)). Here, it is undisputed that the plaintiff was an invitee at the time of his fall. See Charlton v. Day Island Marina, Inc., 46 Wn. App. 784, 787-88, 732 P.2d 1008 (1987) (residential tenants and their guests are invitees).

Thus, to establish a duty owed, a plaintiff must show that (1) an unsafe condition existed; and (2) the property owner had actual or constructive knowledge of the condition. Pimental v. Roundup Co., 100 Wn.2d 39, 49, 666 P.2d 888 (1983).

Washington law holds that the mere happening of a fall, and the plaintiff's allegation of a defect, is insufficient to establish that a premises was dangerously unfit as a matter of law. Hansen v. Washington Natural Gas Co., 95 Wn.2d 773, 778, 632 P.2d 504 (1981); Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 448, 433 P.2d 863 (1967); Kalinowski v. Y.M.C.A., 17 Wn.2d 380, 391, 135 P.2d 852 (1943). In Washington, "the mere existence of an accident or an injury is not sufficient proof of a dangerous condition to hold a property owner liable to an invitee." Hansen, 95 Wn.2d at 778; see also Brant, 72 Wn.2d at 448; Kalinowski, 17 Wn.2d at 391; Miller v. Payless Drug Stores, 61 Wn.2d 651, 654, 379 P.2d 932 (1963). Liability may not be imposed for harm from a condition from which no unreasonable risk was to be anticipated. Coleman v. Ernst Home Center, Inc., 70 Wn. App. 213, 222, 853 P.2d 473 (1993); see also Prosser & Keeton, Torts (5th ed. 1984) at 426.

**E. The Trial Court Did Not Apply the Recreational Use Statute.**

At the summary judgment stage, the trial court accepted objectively verifiable scientific evidence as true and found that the ground

conditions on the morning of the fall event were “observable, natural, knowable, and obvious.” In Jewels v. City of Bellingham, 181 Wn.2d 1001, 332 P.3d 985 (2014), the Washington Supreme Court explained that a premises defect is not “latent” if it is observable or discoverable with the use of ordinary care. While these comments from our State’s highest court came in the context of a recreational land use case, the concept and legal definition of a “latent” defect applies across all types of premises defect claims. By following the Supreme Court’s common sense reasoning in Jewels, the trial court did not rule that the recreational land use applied and its ruling was not based upon that statute. The trial court found the Respondents had no duty to protect the Appellant from rime attributable to fog.

**F. The Trial Court Did Not Rule on the Affirmative Defense of Assumption of the Risk.**

The trial court granted summary judgment upon finding the Respondents owed no legal duty to the Appellant. The trial court did not grant summary judgment on the affirmative defense of assumption of the risk. However, this Court reviews a trial court’s ruling on summary judgment de novo, engaging in the same inquiry as the trial court. Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 922, 296 P.3d 860 (2013). The Appellant was not injured walking to his car, but rather returning to

the complex to warn his fiancé about the weather. CP 46-49. On summary judgment, the Appellant claimed that the potential for ice accumulation from freezing fog is common knowledge, thereby creating a duty on the part of the Respondents to act. CP 133-34. Respondents disputed this claim, but asserted that, if all of his claims were taken as true, as required by CR 56, then the affirmative defense of assumption of the risk should apply.

The affirmative defense of assumption of the risk applies in snow and ice removal cases. Hvolboll v. Wolff Co., 187 Wn. App. 37, 347 P.3d 476, 2015 Wash. App. (2015). In Hvolboll, the plaintiff fell on ice in a residential apartment complex in Spokane on his way to complain to the manager about the condition. Summary judgment was entered against him and upheld on appeal, because the fact that he was complaining about the hazard and chose to walk to the manager's office (not call), established knowledge and voluntariness. When, as in this case, "reasonable minds could not differ on knowledge and voluntariness, there is implied primary assumption of the risk as a matter of law." Jessee v. City Counsel of Dayton, 173 Wn. App. 410, 414, 293 P.3d 1290 (2013). The fact that a plaintiff has commented on a risk before encountering it is compelling evidence of knowing and voluntary assumption of the risk. Id. at a 412.

The facts of this case bear a strong resemblance to Hvolboll. The Appellant did not fall going out to his car, but rather while returning to the complex to warn his fiancé about the weather conditions. Weather conditions he and his experts insist were the same the weekend before his fall event. Appellant saw fog the morning of his fall and identified danger. Having safely made it to his car without incident, there was no reason for the Appellant to walk back across the parking lot. The fall would not have happened if he had simply gotten in his car and driven to his racquetball game or called his girlfriend to warn her about the weather on his cell phone. On these facts, the trial court could have granted summary judgment on the affirmative defense of assumption of the risk, but stopped at no duty.

**G. Appellant Failed to Establish Notice.**

At the summary judgment stage the Appellant failed to establish that Respondents "knew or should have known that a dangerous condition existed." Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 452, 433 P.2d 863 (1967). The Appellant's meteorologist testified that local weather reporters would not have been warning the public about ice accumulation resultant from fog unless there had been reported accidents. CP 394. Further, Bruiser bragged that, as a private forensic meteorologist, he and his paying clients have access to more accurate and comprehensive

weather data than the general public. Id. Given that the standard of care does not require landlords to pay for private meteorological services, how were maintenance staff supposed to know about the obscure risks attendant to this weather phenomenon? Moreover, how were they supposed to detect and cure the potentially microscopic condition before 5:15 a.m. on a Monday morning?

Again, the objectively verifiable scientific evidence establishes that if, where, and when freezing fog forms rime is unpredictable. While it may have been cold and foggy for several days, due to a stable air mass, this is not evidence that rime formed at the Summerwalk apartment complex. Appellant ignores the fact that weather conditions are not always uniform across and entire city or region. For example, the airport in Renton recorded rime on the day of Appellant's fall event, but not until hours later. The undisputed record establishes that weather conditions had been stagnant for several days, but Appellant produced no evidence that rime formed at the Summerwalk over the preceding weekend. The record was devoid of evidence of a continuing condition, making Appellant's reliance on Maynard v. Sisters of Providence, 72 Wash. App. 878, 866 P.2d 1272 (1996) misplaced. Sisters of Providence involved actual snow and ice accumulation, over several days, which was observable both by

Maynard and hospital staff. Here, the record reflects no measureable and no actual evidence of an accumulation visible to the naked eye.

Even ignoring the fact that detecting potentially microscopic ice particles before 5:15 a.m. in the dark would have been impossible, when and where were the Respondents supposed to look for rime? When and where it forms is unpredictable. CP 395. Even taking all of Appellant's claims as true, his own meteorologist opined that rime could have formed in the area where he fell the hour before his accident, making discovery of the natural condition virtually impossible in time to prevent his fall event. On this record, the trial court could have granted summary judgment on notice, but stopped at no duty.

**H. Appellant Materially Misstates the Record on Maintenance.**

The complete lack of proof of a known or obviously dangerous condition makes the maintenance practices at Summerwalk irrelevant to this appeal. However, disturbingly, the Appellant continues to materially misstate maintenance testimony by Summerwalk staff. The former Maintenance Manager at Summerwalk, testified at length about the snow and ice safety precautions they regularly undertook on the property during winter months and in January 2013. CP 100-08. Patterson testified that he personally monitored the weather for reports of snow or freezing conditions. Id. He and his team would physically walk the entire

Summerwalk property at the beginning and end of every day, seven days a week, inspecting and spreading de-icer as needed. Id.; CP 325-332. The maintenance staff would also post signs around the property warning tenants of freezing conditions. Patterson testified that “if there was any doubt we would normally err on the side of just putting out the ice melter, because it is not very expensive.” Id. at 23:20-22. The lack of written snow and ice procedures is not evidence the maintenance staff failed to exercise ordinary care or properly maintain the Summerwalk complex.

Summerwalk staff would have walked the entire property multiple times the weekend before the Appellant’s fall event, but the record is devoid of any evidence that the staff observed a problem in the area where the plaintiff later fell. Maintenance worker Howard Sand testified that there was very little precipitation or snow in January 2013, and that he never observed any freezing fog. CP 330. The Appellant and his fiancé never testified that they observed a problem at the complex before he fell. Rather, the undisputed record establishes that no one at the 354-unit complex actually observed the conditions the Appellant’s meteorologist claims existed and resulted in Appellant’s fall event.

Furthermore, the mere fact that deicer was on site at the Summerwalk does not establish that it was needed. The availability of deicer and the fact that a snow and ice removal company was on retainer is

evidence only of preparedness. Had it actually snowed, Patterson could have called Bison Gardens to remove it. The trial court appreciated this fact and appropriately rejected Appellant's red herring arguments from his alleged snow removal expert.

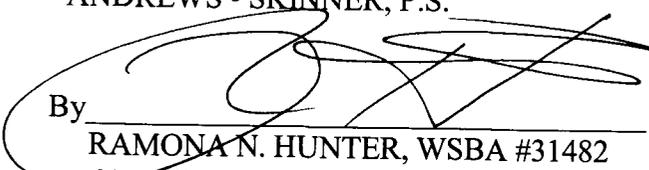
This case does not involve snow and the mere fact that Appellant's "expert" was deicing other properties on the day of his fall is not evidence that a dangerous condition, reasonably capable of detection and cure, existed at the Summerwalk, yet alone *when* it naturally occurred. The Summerwalk has 354 residential units, yet no maintenance worker or other tenant testified they had problems negotiating the parking lot at *any time* in January 2013. The Appellant himself admitted he never saw or felt ice at the time of his fall, making summary judgment appropriate. Under Washington law, owner/occupiers of land are not insurers against all happenings that occur on their premises. Fernandez v. State ex rel. Dept. of Highways, 49 Wn. App. 28, 741 p.2d 1010 (1967).

## V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's summary judgment dismissal.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of January 2016.

ANDREWS ▪ SKINNER, P.S.

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**DECLARATION OF SERVICE**

I, Gina Lu, hereby declare as follows:

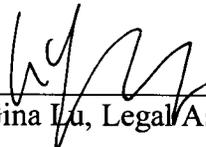
1. On the 22<sup>nd</sup> day of January, 2016, I caused a copy of the foregoing Brief of Respondents Holland Residential, LLC and 3850 Klahanie Dr. SE Investors, LLC to be sent for service upon the following in the manner indicated:

**Attorney for plaintiff:**

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**Via Email Only**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22<sup>nd</sup> day of January, 2016, at Seattle, Washington.

  
\_\_\_\_\_  
Gina Lu, Legal Assistant

2016 JAN 27 11:11:34  
STATE OF WASHINGTON  
COUNTY OF KING  
CLERK OF SUPERIOR COURT