

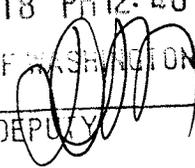
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COURT OF APPEALS  
DIVISION II

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No. 39562-2

STATE OF WASHINGTON

COURT OF APPEALS  
DIVISION II

BY   
DEPUTY

OF THE STATE OF WASHINGTON

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MARILYN DENISE SMITH

Appellant,

v.

WINTHER PROPERTIES, LLC, ROBERT A.  
MATTSON, and CATHERINE M. MATTSON

Respondents.

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BRIEF OF RESPONDENTS

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**I. Response to Appellant's Assignments of Error and Issues Pertaining to Assignments of Error**

A. Response to Assignments of Error

1. The trial court correctly granted Respondents' Motion for Summary Judgment.

2. The trial court correctly found that Appellant did not raise a genuine issue of material fact that Respondents were negligent by allegedly allowing a flight of stairs to remain in disrepair.

3. The trial court correctly found that Appellant did not raise a genuine issue of material fact that Respondents were negligent by allegedly not providing a handrail along the stairs.

4. The court did not find that Respondents Robert Mattson and Catherine Mattson were members of Winther Properties LLC and correctly dismissed the Mattsons individually.

B. Issues Pertaining to Response to Appellant's Assignment of Error

Did the trial court correctly find that Appellant failed to establish the existence of a genuine issue of material fact that Respondents knew or should have known that the staircase was in need of repair or replacement where there is no evidence that Respondents knew or reasonably should have known about the loose

step that allegedly caused Appellant's injury? (Assignments of Error Nos. 1 and 2.)

Did the trial court correctly find that Appellant did not establish that the Respondents negligently failed to provide a handrail along the staircase at issue where Appellant provided no evidence that Respondents breached such a duty or that any alleged breach proximately caused Appellant's injury? (Assignment of Error No. 3.)

Did the trial court correctly dismiss Appellant's claims against Respondents Robert and Catherine Mattson individually where Washington law provides protection for people in the Mattsons' position from such lawsuits and where there is no evidence that the Mattsons were using the corporate form to evade a duty to Appellant? (Assignment of Error No. 4.)

## **II. Statement of the Case**

As Appellant Smith noted in her opening brief, this lawsuit arose out of an incident on or about August 23, 2005, in which Ms. Smith allegedly fell down an exterior concrete staircase after leaving the office where she worked. Respondent Winther Properties LLC purchased the building in which Ms. Smith worked in 2004. CP 18-19. Winther Properties LLC is a limited liability company owned by the RA & CM Mattson living trust. CP 19. The RA & CM Mattson

living trust is the sole member of the LLC. CP 19. Respondents Robert and Catherine Mattson are trustees of the living trust. CP 19. The living trust was formed for estate planning purposes only. CP 19.

Ms. Smith slipped on the third step from the top of the stairs. CP 17. In her deposition Ms. Smith acknowledged that she traveled up and down that same staircase to get to and from her office every day, and that she used the staircase about 20 times each week. CP 22. The day that she allegedly fell was the first time that she had had a problem with the step on which she slipped:

- Q. Okay. Was that the first time that the stair had moved under your feet?
- A. Yes.
- Q. Either going up or down?
- A. This particular stair?
- Q. Yeah.
- A. Yes.
- Q. You had never had a problem with this particular stair wiggling prior to around three o'clock on August 23<sup>rd</sup> of 2005. Would that be fair?
- A. That would be fair.
- Q. For example, when you went up to work in the morning of August 23<sup>rd</sup>, 2005, you didn't have any problems with that stair?
- A. No.

CP 15. Ms. Smith had never heard of anyone else coming to the business complain about the stairs:

- Q. Did you ever hear of anybody else who would come up to your office to conduct business, or for any other reason, complain about wiggling in that particular

stair?  
A. No.

CP 16.

Ms. Smith also admitted in her deposition that she is not aware of anyone else falling down the stairs before her incident:

Q. Before August 23<sup>rd</sup>, 2005, the date that you slipped on the third step down from the top, had anybody else before fallen on these stairs?

A. Not that I'm aware of.

CP 17.

Respondent Robert Mattson testified that he visited the building in which Ms. Smith worked

almost on a daily basis. I would routinely walk up and down each of the stairways to the various office suites. I weigh approximately 225 pounds. I never felt any wobble in any of the stairs that would give me cause for concern as a property manager.

CP 20. Catherine Mattson testified that, to her knowledge, Mr. Mattson would visit the building on almost a daily basis and "never reported any wobble in any of the stairs that would give us cause for concern as a property manager." CP 24.

Mr. and Mrs. Mattson have been managing properties for over 42 years. CP 19, 23. They understand that when a person is in a position of responsibility for a piece of property, the person must maintain the property not only for purposes of the investment, but also

for the safety of the tenants. CP 19, 23. Prior to the incident involving Ms. Smith on August 23, 2005, neither Winther nor Robert Mattson nor Catherine Mattson had ever heard of or received any reports regarding problems with any of the stairs on the staircase at the property at issue. CP 20, 24.

On March 11, 2009, Ms. Smith filed a First Amended Complaint naming Winther Properties LLC as a defendant as well as Robert and Catherine Mattson individually and the marital community thereof. CP 1-5. On May 15, 2009, Defendants filed a Motion for Summary Judgment Regarding Liability. CP 25-43. On June 22, 2009, the Honorable Katherine M. Stolz, Pierce County Superior Court, granted Defendants' motion and dismissed Ms. Smith's lawsuit against all Defendants with prejudice. CP 111-113.

### **III. Argument**

#### **A. Summary Judgment Standard**

A summary judgment is properly granted if the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Capitol Hill Methodist Church of Seattle v. Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958); CR 56(c). In ruling upon a summary judgment motion, it is the duty of the trial

court to consider all evidence and all reasonable inferences therefrom most favorable to the nonmoving party. Reed v. Streib, 65 Wn.2d 700, 399 P.2d 338 (1965).

If the moving party meets its initial burden, the nonmoving party in its response cannot rely on the allegations made in the pleadings. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989). “The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain.” Marshall v. Bally’s Pacwest, Inc., 94 Wn. App. 372, 377, 972 P.2d 475 (1999). The nonmoving party may not rely on “having its affidavits considered at face value.” Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Bare allegation of fact by affidavit without any showing of evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. Meissner v. Simpson Timber Co., 69 Wn.2d 949, 421 P.2d 674 (1966). Conclusory statements in a plaintiff’s affidavit are insufficient; the plaintiff must demonstrate the basis for his or her assertions. Doty-Fielding v. Town of South Prairie, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008).

A defendant who moves for summary judgment meets its initial burden by demonstrating that an essential element of the

plaintiff's claim has not been established. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). The inquiry then shifts to the plaintiff, who has the burden of proof at trial. Young, 112 Wn.2d at 225. If at this point

the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion.

Id., quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

**B. Response to Appellant's Assignments of Error**

1. The trial court correctly granted Respondents' Motion for Summary Judgment.

The trial court correctly found that Ms. Smith did not raise a genuine issue of material fact that Respondents (referred to collectively herein as "Winther") knew or should have known that the staircase was in need of repair or replacement. Ms. Smith relies solely on speculation that issues of material fact remain, but speculation is insufficient to defeat summary judgment.

Ms. Smith claims that Winther was negligent in maintaining the staircase upon which she fell. The first step in analyzing whether Winther was negligent is to determine what kind of duty, if any,

Winther owed to Ms. Smith; this is a question of law. Hutchins v. 1001 Fourth Ave. Assoc., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). In premises liability actions, a person's status determines the scope of the duty of care owed by the owner or occupier of that property. Van Dinter v. Kennewick, 121 Wn.2d 38, 41, 846 P.2d 522 (1993). A person's status is based on the common law classifications of persons entering upon real property, i.e., that of an invitee, licensee, or trespasser. Id. Where the facts regarding a visitor's entry onto property are undisputed, the visitor's status is a question of law. Ford v. Red Lion Inns, 67 Wn. App. 766, 769, 840 P.2d 198 (1992), review denied 120 Wn.2d 1029 (1993). Winther and Ms. Smith agree that Ms. Smith's status was that of an invitee at the time of her fall. CP 35; Smith's Appellate Brief at 10.

A possessor of land owes a duty of reasonable care to invitees with respect to dangerous conditions on the land. Ford, 67 Wn. App. at 770. 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.

Ford, 67 Wn. App. at 770, citing Restatement (Second) of Torts § 343 (1965).

As the court in Ford stated, the duty owed by a possessor of land to an invitee is one of reasonable care. Id. A possessor of land is not a guarantor of safety of those on the premises:

we must emphasize that this does not make the landlord a guarantor of the safety of those lawfully on the premises. Instead we require that he exercise reasonably [sic] care in keeping all common areas reasonably safe from hazards likely to cause injury.

Geise v. Lee, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975). A plaintiff “must demonstrate that the landlord had actual or constructive notice of the danger, and failed within a reasonable time to exercise sensible care in alleviating the situation.” Id.

The invitee also has a duty to exercise reasonable care. Mucsi v. Graoch Associates Ltd. Partnership No. 12, 144 Wn.2d 847, 860, 31 P.3d 684 (2001).

To summarize Washington law, in a premises liability case a plaintiff must first show that the landlord knew or by the exercise of reasonable care would discover the allegedly problematic condition. In this case there is no issue of material fact—Winther had no actual

knowledge that the third step on the staircase was loose or that the staircase generally was wobbly. Mr. Mattson stated that in 2005 he was at the building “almost on a daily basis” and would routinely walk up and down each of the stairways to the various office suites. He never felt any wobble in any of the stairs that would give him cause for concern. Thus, there is no issue of material fact regarding whether Winther had actual knowledge about the alleged wobble in the third step.

Moreover, there is no issue of material fact regarding whether Winther reasonably should have known about the third step. There is no evidence to support the allegation that Winther had constructive knowledge about the third step. Ms. Smith admitted that she had never noticed that the third step was wobbly before she fell and had never heard of anyone else having any problems with that step. She has no evidence that anyone informed Winther about the third step. Ms. Smith has no evidence whatsoever to create an issue of material fact regarding whether Winther should have known about the third step. Rather, the evidence shows that no one knew of any stability problems with the third step. If no one knew about any stability problems with the third step, including Ms. Smith, who used the stairs on a daily basis, then there is no issue of material fact that Winther reasonably

should have known about any stability problems. Ms. Smith merely speculates that Winther should have known about the third step, but speculation is insufficient to create an issue of material fact.

Ms. Smith is unable to create an issue of material fact by submitting a self-serving declaration. CP 49-53. She admits in her declaration that she testified under oath in her deposition that she “did not know the steps that caused me to fall were loose until the morning of my fall.” CP 49. She claims that she told her employer of the alleged condition of the lower steps before her fall (CP 49), yet she offers no evidence that she, her employer, or anyone else ever contacted Winther to inform it of the allegedly loose lower steps.

Ms. Smith also fails to create an issue of material fact by trying to mince the words of Robert Mattson’s declaration. She relies on pure speculation and conjecture in arguing that Mr. Mattson actually noticed that some of the steps were wobbly, but not wobbly enough to concern him. As noted above, a party cannot rely on speculation or argumentative assertions that unresolved issues of fact remain, and that is exactly what Ms. Smith is attempting to do here. Because Ms. Smith has no basis in fact for her allegation that Robert Mattson knew that the steps were wobbly, her speculative allegation cannot survive summary judgment.

Moreover, Ms. Smith loses her argument that Winther breached a duty to inspect because the law upon which Ms. Smith relies is inapplicable here. Specifically, Ms. Smith relies on Coleman v. Ernst Home Center, Inc., 70 Wn. App. 213, 853 P.2d 473 (1993), which dealt with constructive notice based on the “self-service” exception established in Pimentel v. Roundup Co., 100 Wn.2d 39, 666 P.2d 888 (1983), for retail establishments such as Ernst Home Center, and so it does not apply here. Further, the unsafe condition must be inherent in the nature of the self-service operation: the “Pimentel exception is a narrow one, limited to specific unsafe conditions in specific areas that are inherent in the nature of self-service operations.” Arment v. Kmart Corp., 79 Wn. App. 694, 698, 902 P.2d 1254 (1995). Ms. Smith does not offer any evidence that the “self-service” exception applies to office buildings. Therefore, as a matter of law, the “self-service” exception does not apply here.

Ms. Smith also fails in her attempt to defeat summary judgment by arguing that she need show only that the unsafe condition was reasonably foreseeable. According to our Supreme Court, the reasonably foreseeable exception to the notice requirement applies only where “the nature of the proprietor’s business and his methods of operations are such that the existence of unsafe conditions on the

premises is reasonably foreseeable.” Iwai v. State, 129 Wn.2d 84, 100, 915 P.2d 1089 (1996), quoting Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 654, 869 P.2d 1014 (1994). Ms. Smith has not provided any evidence or testimony that the nature of Winther’s business is such that her accident was reasonably foreseeable. Rather, she relies purely on speculation, and speculation does not create a genuine issue of material fact.

Ms. Smith also claims that the fact that other stairs were allegedly loose before she fell on the third step proves that Winther had constructive notice “that the steps on the staircase had become loose.” Brief of Appellant at 11. However, this argument is unsuccessful for several reasons. As Ms. Smith noted in her brief, in order to prove constructive notice, the plaintiff must prove that

the specific unsafe condition had existed for such time as would have afforded [the landowner] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.

Mucsi, 144 Wn.2d at 859 (internal quotations omitted). The specific unsafe condition that Ms. Smith claims is the proximate cause of her injury is the third step from the top. There is no evidence that anyone knew that this step had been loose before Ms. Smith allegedly fell on it or that the step actually was loose before she fell. In fact, Ms. Smith

testified that she had never noticed that the third step was loose before she fell. Thus, Ms. Smith cannot meet her burden of showing that the step was loose for any period of time before she fell.

Ms. Smith attempts to argue that because there were other allegedly loose steps, Winther was negligent. However, her argument fails because even if Ms. Smith could show that the bottom steps were loose before her accident and that Winther had actual or constructive knowledge of this, those bottom steps are not a proximate cause of her injuries. Ms. Smith did not fall on the bottom steps; rather, she fell on the third step from the top. Even if Winther breached a duty as to the bottom steps, there is no issue of material fact regarding whether that alleged breach was the proximate cause of Ms. Smith's injuries—any alleged breach as to the bottom steps could not be the proximate cause of her injuries because she fell on the third step from the top. Therefore, the condition of the bottom steps before the fall is irrelevant, and so whether Winther had actual or constructive knowledge of the allegedly loose bottom steps is also irrelevant.

As noted above, a defendant can meet its burden by demonstrating that an essential element of the plaintiff's claim has not been established, and Winther has done that here. Plaintiff cannot establish that Winther breached any duty as to the third step or that any

alleged breach by Winther as to the third step proximately caused her injuries.

Moreover, Ms. Smith's statement that Winther "should have known that the staircase was deteriorating because other steps were loose for a period of a month prior to the Appellant's fall" is misleading and not based on the evidence. Appellant's Brief at 12. There is no testimony in this case, including expert testimony, that the staircase was "deteriorating." And even if a few of the lower steps were loose, one cannot infer from a few loose steps that the entire staircase was deteriorating. Because there is no evidence that the staircase was deteriorating, Winther could not have any such actual or constructive knowledge that the staircase was deteriorating.

Ms. Smith argues that alleged subsequent remedial measures taken by Winther after her accident somehow create an issue of fact regarding Winther's negligence. However, subsequent remedial measures are inadmissible to prove negligence. ER 407. Therefore, none of the actions taken by Winther as to the staircase after the accident would be admissible at trial, and so these actions do not create a genuine issue of material fact regarding Winther's negligence.

2. The trial court correctly found that Appellant did not raise a genuine issue of material fact that Respondents were negligent by allegedly not providing a handrail along the stairs.

The trial court correctly found that Ms. Smith did not raise a genuine issue of material fact that Winther was negligent in allegedly not providing a handrail along the stairs. Plaintiff bases her claim on mere speculation; she does not offer any qualified testimony supporting her claim that the handrail alongside the stairs was “apparently” constructed in violation of the “Washington Regulations for Barrier-Free Facilities” or any other building code. She offers no testimony or evidence that there were any problems with obtaining an occupancy (or other similar) permit after the building was constructed or that anyone in a position of authority ever indicated to Winther that there was a problem with the staircase.

Ms. Smith referred to the staircase as having a “banister” in her response to Winther’s summary judgment motion. CP 77. Yet, Ms. Smith did not offer a definition of “banister” in her response. So, Winther looked to Webster’s Dictionary for a definition of “banister,” which is defined as “a handrail held up by balusters, as along a staircase.” Webster’s New World Collegiate Dictionary 108 (3<sup>rd</sup> ed. 1997); CP 102. Thus, according to the dictionary definition, a banister

is a type of handrail. And plaintiff provides no admissible evidence to the contrary.

The authority cited by Ms. Smith does not help her. The quotation from Dickinson v. Edwards, 105 Wn.2d 457, 476, 716 P.2d 814 (1986), a case addressing claims of negligent serving of alcohol, is taken from the concurring opinion of Justice Utter. The subject matter of Dickinson and the fact that the quote is not from the leading opinion make Ms. Smith's reference to the case meaningless. Moreover, Ms. Smith presents no evidence that any court in Washington has adopted the Am. Jur. section (57A Am. Jur. 2d Negligence § 709 (1989)) she cites in her opening brief at page 20. In addition, the Hawaii case she cites has no precedential value here in Washington.

Ms. Smith has failed to cite to controlling authority or offer any qualified testimony, for example that of an expert, in support of her allegation that a claimed lack of a proper handrail proximately caused her fall. Rather, she relies on mere speculation that a genuine issue of material fact exists regarding the banister, and this is insufficient to defeat a summary judgment motion. Therefore, the trial court properly found that there is no issue of material fact regarding this claim.

3. The trial court correctly found that there was no genuine issue of material fact as to whether Robert and Catherine Mattson are members of Winther Properties LLC and correctly dismissed the Mattsons individually.

Winther Properties LLC owns the building in which Ms. Smith was working when she fell. Winther Properties LLC is owned by the RA & CM Mattson living trust, and the trust is the sole member of the LLC. Robert and Catherine Mattson are not members of Winther Properties LLC; rather, they are trustees of the living trust. Because the Mattsons do not own the building at issue and are not members of the LLC, they cannot be held personally liable.

Winther Properties LLC was formed according to Washington law pursuant to chapter 25.15 RCW. CP 58-60. The chapter states that members of an LLC cannot be held personally liable for any liabilities of the LLC, even where a tort is involved:

**Liability of members and managers to third parties**

- (1) Except as otherwise provided by this chapter, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.
- (2) A member or manager of a limited liability company is personally liable for his or her own torts.

RCW 25.15.125.

The only possible way to reach the members or managers of a limited liability company is to pierce the corporate veil.

Piercing the corporate veil requires the establishment of two essential factors:

Piercing the corporate veil is an equitable remedy imposed to rectify an abuse of the corporate privilege. In general, a corporation is considered a separate entity, even if it is owned by a single shareholder. To pierce the corporate veil, two separate, essential factors must be established. First, the corporate form must be intentionally used to violate or evade a duty. Second, the fact finder must establish that disregarding the corporate veil is necessary and required to prevent an unjustified loss to the injured party.

Dickens v. Alliance Analytical Laboratories, LLC, 127 Wn. App. 433, 440-41, 111 P.3d 889 (2005) (internal citations omitted).

Ms. Smith appears to be arguing that because the Mattsons are neither members nor managers of Winther Properties LLC, they are not protected by RCW 25.15.125. This argument is illogical. Ms. Smith is, in essence, claiming that anyone associated in any way with an LLC who is not a member or manager may be sued for liabilities of the LLC. If we applied this argument to other people within the LLC, then even employees of the LLC could be held personally liable for the LLC's liabilities. This would be completely false, and Ms. Smith has

no basis in law for this argument. The statute protects members and managers; it does not open up all others associated with an LLC to personal liability for liabilities of the LLC.

Ms. Smith acknowledges that she is not trying to pierce the corporate veil yet argues that the Mattsons committed a personal tort for allegedly failing to maintain the stairs. Since she is not attempting to pierce the corporate veil of the LLC, Ms. Smith cannot reach the Mattsons personally. The protection of a corporate entity is maintained unless a party has facts that would support piercing the corporate veil. Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 645 P.2d 689 (1982). Because Ms. Smith has no facts that would support piercing the corporate veil, the protection from liability of Winther Properties LLC is maintained, and Ms. Smith cannot reach Robert and Catherine Mattson personally.

Moreover, there is no evidence that either Robert or Catherine Mattson allegedly committed any personal tort against Ms. Smith that would allow for liability under RCW 25.15.125(2). Both Robert and Catherine Mattson were acting on behalf of Winther Properties LLC at all times regarding their actions relating to the building in which Ms. Smith worked, and Ms. Smith has not offered any evidence or testimony showing otherwise.

At all times Robert and Catherine Mattson were acting as trustees of the living trust that is the sole member of the LLC, and Ms. Smith is not attempting to pierce the corporate veil. Therefore, neither Robert nor Catherine Mattson may be held personally liable for this incident.

#### **IV. Conclusion**

The trial court should be affirmed; it was justified in granting Winther's Motion for Summary Judgment. Ms. Smith cannot create a genuine issue of material fact regarding whether Winther had actual or constructive notice regarding the third step from the top of the staircase, which is the step upon which she allegedly fell. Ms. Smith has no evidence or testimony to support her claim that Winther failed to provide an adequate handrail. Finally, the evidence clearly shows that the Mattsons are not individual members of the LLC and cannot be held individually liable in this case. Therefore, Winther respectfully requests that the Court affirm the trial court.

DATED: November 17<sup>th</sup>, 2009

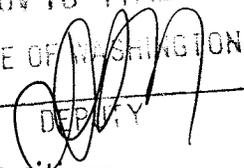
Respectfully submitted,

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FILED  
COURT OF APPEALS  
DIVISION II

09 NOV 18 PM 12:45

STATE OF WASHINGTON  
BY   
DEPUTY

**PROOF OF SERVICE**

The undersigned, declares as follows:

I am now, and at all times herein mentioned was, a citizen

of the United States, a resident of the State of Washington, and

over the age of eighteen years. I arranged to have the foregoing

**BRIEF OF RESPONDENTS**

filed (original and one copy) by legal messenger on

November 18, 2009, addressed to the following:

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Of the State of Washington  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

and served by legal messenger on November 18, 2009,

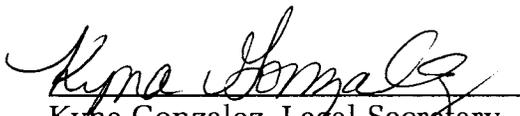
addressed to the following:

Gary Preble  
Preble Law Firm, P.S.  
2120 State Avenue, Suite 101  
Olympia, WA 98506

I declare under penalty of perjury under the laws of the

State of Washington that the foregoing is true and correct.

Dated this 18<sup>th</sup> day of November, 2009, at Seattle, WA

  
Kyna Gonzalez, Legal Secretary