

65533-7

65533-7

NO. 65533-7

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION ONE

---

AHMBUR BLUE, a single individual,

Appellant.

v.

MARKEE FOSTER and VERONICA FOSTER, individually and the  
marital community comprised thereof, and the CITY OF SEATTLE, a  
municipal corporation,

Respondents.

---

BRIEF OF APPELLANT

---

August G. Cifelli, WSBA No. 13095  
Amy F. Miller, WSBA No. 40620  
Jonathan M. Minear, WSBA No. 41377  
Of Attorneys for Appellant Ahmbur Blue

LEE SMART, P.S., INC.  
1800 One Convention Place  
701 Pike Street  
Seattle, WA 98101-3929  
(206) 624-7990

FILED  
SECTION 4  
2010 OCT 22 PM 1:23

**ORIGINAL**

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	2
III. STATEMENT OF THE CASE.....	3
A. Ms. Blue did not consider Mr. Foster to be her friend and agreed to watch his dog for free <i>after</i> he offered to pay her. .....	3
B. When leaving the Fosters' residence, she tripped on the uneven railroad ties and broke her shoulder. ....	4
C. The railroad-tie stairs at the Fosters' residence do not meet city building codes. ....	5
D. The Fosters had actual knowledge of the stairs' unsafe and dangerous condition. ....	6
E. Ms. Blue's declaration regarding her expectation of payment and arrangement with Mr. Foster supplemented and did not contradict her prior deposition testimony. ....	6
F. The trial court dismissed this case <i>after</i> deciding to disregard Ms. Blue's declaration. ....	9
IV. SUMMARY OF ARGUMENT .....	9
V. ARGUMENT .....	10
A. The trial court erred by disregarding Ms. Blue's declaration under the <i>Marshall</i> rule because her declaration supplemented and did not flatly contradict her earlier deposition testimony. ....	10
1. The standard of review is de novo. ....	10
2. Summary judgment should be granted sparingly and only after considering all the evidence. ....	11
3. The <i>Marshall</i> rule applies only where a witness's later statements flatly contradict his or her clear answers to unambiguous questions. ....	12

B.	Ms. Blue’s status on the Fosters’ premises is a disputed question of fact and was improperly decided on summary judgment. ....	22
1.	The standard of review is de novo. ....	22
2.	Based on Washington law, Ms. Blue was an invitee, not a licensee, at the time of the accident. ....	22
3.	Ms. Blue entered the Fosters’ premises for a business purpose that benefitted both parties. ....	25
a.	Ms. Blue’s work for Mr. Foster presents the same mix of disputed facts as in <i>Beebe</i> , where Division Three held that the status of an entrant was for trier of fact.....	26
b.	Unlike this case, <i>Thompson</i> involved familial benefit and does not apply here...	28
c.	The economic-benefit test supports classifying Ms. Blue as an invitee. ....	30
4.	Ms. Blue did not feed the Fosters’ dog for her own sole benefit or for a familial or social purpose. ....	31
C.	The trial court erred by ruling as a matter of law that the Fosters did not breach their duty to Ms. Blue as a licensee, when they knew that the stairs were dangerous and there was no way for her to protect herself from that danger. ....	32
VI.	CONCLUSION.....	35

**TABLE OF AUTHORITIES**  
**Table of Cases**

	<b>Page(s)</b>
<b>State Cases</b>	
<i>Amend v. Bell</i> , 89 Wn.2d 124, 129, 570 P.2d 138 (1977).....	11, 21
<i>Beebe v. Moses</i> , 113 Wn. App. 464, 54 P.3d 188 (2002) .....	24, 25, 26, 32
<i>Beers v. Ross</i> , 137 Wn. App. 566, 154 P.3d 277 (2007).....	11, 13, 20
<i>Brant v. Market Basket Stores, Inc.</i> , 72 Wn.2d 446, 433 P.2d 863 (1967).....	33
<i>Davis v. Baugh Indus. Contractors, Inc.</i> , 159 Wn.2d 413, 150 P.3d 545 (2007).....	10
<i>Duckworth v. Langland</i> , 95 Wn. App. 1, 988 P.2d 967 (1998), <i>rev.</i> <i>denied</i> 138 Wn.2d 1002, 984 P.2d 1033 (1999) .....	12, 13, 14, 20, 21
<i>Enersen v. Anderson</i> , 55 Wn.2d 486, 348 P.2d 401 (1969).....	23, 24, 32
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	10, 11
<i>Fredrickson v. Bertolino's Tacoma, Inc.</i> , 131 Wn. App. 183, 127 P.3d 5 (2005), <i>rev. denied</i> , 157 Wn.2d 1026, 142 P.3d 608 (2006) .....	33
<i>Grimwood v. Univ. of Puget Sound</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	18
<i>Henderson v. Tyrell</i> , 80 Wn. App. 592, 616 & n.10, 910 P.2d 522 (1996).....	18
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002).....	21
<i>King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County</i> , 123 Wn.2d 819, 872 P.2d 516 (1994).....	10
<i>Marshall v. AC&amp;S, Inc.</i> , 56 Wn. App. 181, 782 P.2d 1107 (1989).....	2, 12, 16, 17, 19, 20, 34
<i>McCormick v. Lake Washington School District</i> , 99 Wn. App. 107, 992 P.2d 511 (1999).....	21
<i>McKee v. Am. Home Prods. Corp.</i> , 113 Wn.2d 701, 782 P.2d 1045 (1989).....	10
<i>McKinnon v. Wash. Fed. Sav. &amp; Loan Assn.</i> , 68 Wn.2d 644, 414 P.2d 773 (1966).....	29, 30
<i>Meissner v. Simpson Timber Co.</i> , 69 Wn.2d 949, 421 P.2d 674 (1966)...	11

<i>Miniken v. Carr</i> , 71 Wn.2d 325, 328, 428 P.2d 716 (1967) .....	33
<i>Overton v. Consolidated Ins. Co.</i> , 145 Wn.2d 417, 38 P.3d 322 (2002).....	17, 18, 19, 20
<i>Public Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys.</i> , 104 Wn.2d 353, 705 P.2d 1195 (1985).....	11
<i>Safeco Ins. Co. of Am. v. McGrath</i> , 63 Wn. App. 170, 817 P.2d 861 (1991), <i>rev. denied</i> , 118 Wn.2d 1010, 824 P.2d 490 (1992).....	12, 13, 15, 16, 20, 21
<i>Smith v. Acme Paving Co.</i> , 16 Wn. App. 389, 558 P.2d 811 (1976) .....	11
<i>Sun Mountain Prods., Inc. v. Pierre</i> , 84 Wn. App. 608, 929 P.2d 494, <i>rev. denied</i> , 132 Wn.2d 1003, 939 P.2d 216 (1997) .....	12, 20
<i>Swanson v. McKain</i> , 59 Wn. App. 303, 796 P.2d 1291 (1990), <i>rev.</i> <i>denied</i> , 116 Wn.2d 1007, 805 P.2d 813 (1991) .....	31
<i>Thompson v. Katzer</i> , 86 Wn. App. 280, 936 P.2d 421, <i>rev. denied</i> , 133 Wn.2d 1020, 948 P.2d 387 (1997).....	21, 27, 30, 31, 32
<i>Tincani v. Little Empire Zoological Soc'y</i> , 124 Wn.2d 121, 875 P.2d 621 (1994).....	32, 33
<i>Younce v. Ferguson</i> , 106 Wn.2d 658, 724 P.2d 991 (1986) .....	23, 31
<b>Federal Cases</b>	
<i>United States v. Tipton</i> , 964 F.2d 650, 655 (7th Cir. 1992).....	18
<i>Van T. Junkins &amp; Assocs., Inc. v. U.S. Indus., Inc.</i> , 736 F.2d 656, 657 (11th Cir. 1984).....	12
<b>Rules and Regulations</b>	
CR 56(c).....	9
CR 56(e).....	11, 18
ER 602 .....	18
<b>Other Authority</b>	
BLACK'S LAW DICTIONARY 79 (6th ed. 1990).....	12
Restatement (Second) of Torts § 330 (1965) .....	23, 24
Restatement (Second) of Torts § 332 (1965) .....	23
Restatement (Second) of Torts § 342 (1965) .....	33

## I. INTRODUCTION

This is a premises-liability action. As requested by Markee Foster, her boss at Microsoft, Ahmbur Blue agreed to feed and care for Mr. Foster's dog while he and his wife vacationed out of town. She drove to his house after work and ascended one set of railroad-tie stairs up from the street and then another two sets of concrete stairs to the house.

It was still light out when she finished. After locking the door, she left, descending the concrete stairs. But after she reached the railroad ties, she slipped and fell backwards. The stairs broke her fall, as well as her shoulder. At the time, she wore tennis shoes, and there was nothing other than the uneven stairs to cause her fall.

Ms. Blue brought the present action, arguing that the Fosters were negligent for failing to warn her about these dangerous railroad ties when friends had specifically notified the Fosters of the danger that the stairs posed. Despite proof that the Fosters actually knew that the stairs were dangerous and that Mr. Foster paid Ms. Blue \$50 or \$75 cash, a \$100 gift card, and some bath soaps for her services, the trial court (1) granted defendants' request to strike her declaration that Mr. Foster offered to pay her; (2) ruled as a matter of law that she was not an invitee; and (3) ruled as a matter of law that, even as a licensee, the Fosters still did not breach any duty to her.

These rulings, individually and cumulatively, denied Ms. Blue a trial on the merits. Under de novo review, she requests that this court reverse the trial court's rulings and remand for trial.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred as matter of law by disregarding Ms. Blue's declaration under the rule set forth in *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989).

2. The trial court erred by ruling as a matter of law that Ms. Blue was not an invitee.

3. The trial court erred by ruling as a matter of law that the Fosters did not owe Ms. Blue a duty of care, even if she was a licensee.

### *Issues Pertaining to Assignments of Error*

1. Whether the trial court erred under the *Marshall* rule by disregarding at summary judgment Ms. Blue's declaration that Mr. Foster offered to pay her, when her declaration did not flatly contradict her earlier deposition testimony, but rather supplemented it.

2. Whether the trial court erred by granting summary judgment to the Fosters, ruling as a matter of law that Ms. Blue was not an invitee and denying her a trial on the merits.

3. Whether the trial court erred by granting summary judgment to the Fosters, ruling as a matter of law that, even if Ms. Blue

were a licensee, the Fosters did not breach their duty of care.

4. Whether these errors cumulatively denied Ms. Blue a trial on the merits, which is favored by Washington law.

### III. STATEMENT OF THE CASE

**A. Ms. Blue did not consider Mr. Foster to be her friend and agreed to watch his dog for free *after* he offered to pay her.**

Since 2004, Ms. Blue has worked at Microsoft Corporation as a human resources assistant and general manager/coordinator. CP 35-36. Mr. Foster was her supervisor at the time of her accident. CP 37, 152-53. They shared a circle of mutual friends, but all of their out-of-office contact was related to their association with Microsoft. CP 37, 152-53. Ms. Blue did not consider Mr. Foster to be her friend. CP 37-38, 42, 152.

Shortly before the accident, Mr. Foster approached her to feed and walk his dog while he and his wife were out of town so that he would not need to board the animal or pay anyone else to care for it. CP 43, 153. Ms. Blue had previously watched the dog while he was away and had been to his residence for work-related parties and get-togethers. CP 41-42, 153. Mr. Foster offered to compensate her for her services, but Ms. Blue declined any payment at that time. CP 43, 153.

**B. When leaving the Fosters' residence, she tripped on the uneven railroad ties and broke her shoulder.**

After work on February 13, 2006, Ms. Blue drove to the Fosters'

residence while wearing tennis shoes. CP 4, 42-44, 153. She parked her car and ascended the hill in front of the house first by climbing a makeshift set of railroad ties and then climbing a second and third set of cement stairs to the front door. CP 44. A visitor must ascend and descend these stairs to approach and leave the Fosters' residence. CP 153. The concrete stairs have a handrail, but the railroad ties do not. CP 44, 157.

After feeding and playing with the dog, Ms. Blue left the house and successfully descended the concrete stairs to the top of the railroad ties. *Id.* However, while making her way down the railroad ties, Ms. Blue fell and landed violently on her left back, shoulder, and head, causing severe and permanent injuries. CP 4, 45, 153. It was still light out, and there was nothing on the stairs to cause her to fall. CP 44-45, 153.

When he returned from his vacation, Mr. Foster gave her approximately \$50 or \$75, a \$100 gift card, and an assortment of bath soaps. CP 52, 153.

**C. The railroad-tie stairs at the Fosters' residence do not meet city building codes.**

The stairs in question do not meet the city building code's requirements for safe stairs. CP 336. At different locations along the stairway, the slope and rise and run of the railroad ties differ dramatically and act as a trap for the unwary traveler. CP 157, 335. Specifically, the

run of the stairs' treads varies from 17 inches to 26.5 inches, even though the standards call for a tread of no more than 12 inches. CP 156, 335. The elevation in the gravel behind the railroad-tie treads varies as much as two inches, whereas the standards require a smooth tread with one percent slope from front to back and a uniform depth of no more than 3/8 of an inch in variation. *Id.* Although the City's specifications call for a uniform rise of five to seven inches with a difference of no more than 3/8 of an inch between risers, the Fosters' stairs differ more than seven inches, varying from three inches at the sidewalk to ten inches on the first riser up from the curb. CP 156, 335. There are no handrails on either side of the stairway, which descends straight down to the cement city street below. CP 156, 335-36.

**D. The Fosters had actual knowledge of the stairs' unsafe and dangerous condition.**

Greg Williams is a former co-worker and long-time friend of Mr. Foster. CP 304-05. Meeting Mr. Foster in approximately 2001, Mr. Williams and his wife frequently visited the Fosters' residence until roughly 2005 to attend parties and occasionally to take care of the Fosters' dog. CP 305. To visit the house, Mr. Williams and his wife used the railroad-tie stairs. *Id.*

Both Mr. Williams and his wife have tripped and lost their balance

when ascending and descending these railroad-tie stairs. *Id.* The area surrounding the stairs is very poorly lit, and the stairs are uneven. *Id.* Mr. Williams told Mr. Foster about these falls and that the stairs were hazardous. *Id.*

**E. Ms. Blue's declaration regarding her expectation of payment and arrangement with Mr. Foster supplemented and did not contradict her prior deposition testimony.**

After sustaining her injuries, Ms. Blue filed suit against both the Fosters and the City of Seattle in a consolidated action. CP 3.

In Ms. Blue's April 20, 2010, declaration, she stated,

Prior to my injuries sustained on the Fosters' stairs, Mr. Foster approached me at work and asked me if I would feed and care for his dog while he and his wife were out of town. **Mr. Foster asked how much I charged for my services[.] I told him I did not know the costs of dog sitting services.** Mr. Foster stated he would have to find another person to watch the dog or pay to board and place the dog in a kennel if I could not care for him.

CP 153 (emphasis added).

In her earlier deposition on January 15, 2010, Ms. Blue was also questioned how she came to watch Mr. Foster's dog. Early on, counsel asked the following:

Q Okay. So one day at work, [Mr. Foster] asked you if you wouldn't mind watching his dog?

A Yes.

Q So tell me what he asked you to do.

A Just check on the dog, make sure he has food and water.

CP 210.

Later in the deposition, counsel returned to this topic, asking:

Q Okay. So the second time [you watched the dog], tell me how [the conversation] came about.

A He said, hey, I need a favor again. Can you watch the dog?

Q What was your response?

A "Yes."

.....

Q And during the second time, **did you have a discussion about whether he was going to pay you or not?**

A **Not that I can recall, no.**

Q **So were you expecting to be paid?**

A **No.**

CP 213 (emphasis added).

Finally, counsel asked:

Q Well, he [Mr. Foster] didn't pay you before he left, right?

A Correct.

Q And you guys didn't discuss **that you were going to be paid?**

A Correct.

Q And you weren't expecting to be paid?

A Correct.

Q This was still another favor –

A Correct.

Q – according to you?

Q Yes.

*Id.* (emphasis added).

In short, Ms. Blue's deposition testimony makes two things clear. First, Mr. Foster did not pay her before she watched his dog. CP 213. Second, she did not remember whether they discussed payment, so she did not perform this service with the belief that she would be paid (which he ultimately did). CP 52, 153, 210, 213. At no time did she testify that he never offered to pay her, a point which she clarified in her declaration that he did initially offer payment. CP 153.

**F. The trial court dismissed this case *after* deciding to disregard Ms. Blue's declaration.**

At the Fosters' motion for summary judgment, the trial court determined that Ms. Blue's declaration that he offered payment clearly contradicted her earlier deposition testimony and disregarded her entire

declaration in deciding the Foster's motion for summary judgment.<sup>1</sup> RP 33. Without Ms. Blue's additional declaration supplementing her prior testimony, the court ruled as a matter of law that Ms. Blue was a licensee on the Fosters' property and that the Fosters did not breach any duty of care to her. *Id.*; *see* CP 358-60.

#### IV. SUMMARY OF ARGUMENT

Washington courts have set a high bar under the *Marshall* rule before disregarding relevant evidence at summary judgment, a critical point in the proceedings. Summary judgment serves an important function -- to decide cases before trial when there is no dispute over the facts and the moving party is entitled to judgment as a matter of law. CR 56(c). Here, there are genuine issues of material fact regarding whether Ms. Blue was an invitee on her boss's property or whether he breached his duty of care to her as a licensee, so summary judgment here unfairly short-circuited trial. It was inappropriate for the trial court to decide that Ms. Blue has no recourse for her injuries given the nature of her professional relationship with Mr. Foster and the evidence that he and his wife knew of the danger their stairs posed. Summary judgment is too important to only consider a portion of the evidence, especially evidence going to the heart

---

<sup>1</sup> The trial court also granted summary judgment dismissal for the City of Seattle, but Ms. Blue does not challenge that ruling.

of the issue of Ms. Blue's status on the Fosters' property. This reinforces the need for the strict application of the *Marshall* rule.

## V. ARGUMENT

### A. The trial court erred by disregarding Ms. Blue's declaration under the *Marshall* rule because her declaration supplemented and did not flatly contradict her earlier deposition testimony.

#### 1. The standard of review is de novo.

"Trial court rulings in conjunction with a motion for summary judgment are reviewed de novo." *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007); see *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This line of cases overruled *sub silentio* earlier case law that used an abuse of discretion standard in these situations. See, e.g., *King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989).

Using a de novo standard here is consistent with requirements that the appellate court (1) conducts the same inquiry as a trial court and (2) views all evidence and inferences in the light most favorable to the nonmoving party. *Folsom*, 135 Wn.2d at 663. In fact, "[a]n appellate court would not be properly accomplishing its charge if [it] did not examine all the evidence presented to the trial court, including evidence

that had been redacted.” *Id.*

**2. Summary judgment should be granted sparingly and only after considering all the evidence.**

“Washington law favors resolution of cases on their merits.” *Beers v. Ross*, 137 Wn. App. 566, 570, 154 P.3d 277 (2007). When considering summary judgment, “it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom most favorable to the nonmoving party.” *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 951, 421 P.2d 674 (1966). A court cannot resolve credibility questions at that time. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977).

Although CR 56(e) makes no distinctions between affidavits of the moving and nonmoving parties, **the drastic potentials of a summary judgment motion compel the courts to indulge in leniency with respect to affidavits presented by the nonmoving party.**

*Public Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 361, 705 P.2d 1195 (1985) (emphasis added). Accordingly, courts must exercise “caution lest worthwhile causes perish short of a determination of their true merit.” *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 392, 558 P.2d 811 (1976). The summary judgment ruling in the Fosters’ favor was improperly harsh and deprived Ms. Blue of her right to a trial on the merits.

**3. The *Marshall* rule applies only where a witness’s later statements flatly contradict his or her clear answers to unambiguous questions.**

With these strictures in mind, the *Marshall* court crafted a limited rule permitting a trial court to discount evidence on summary judgment only when specific conditions are met. *See Marshall*, 56 Wn. App. at 185.

The *Marshall* court stated,

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.

*Id.* (emphasis added, alteration in original) (quoting *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984)). A question is ambiguous if it has more than one reasonable interpretation. *See* BLACK'S LAW DICTIONARY 79 (6th ed. 1990).

Since *Marshall*, Washington courts have adhered to this rule but emphasized its limitations. *See, e.g., Duckworth v. Langland*, 95 Wn. App. 1, 8, 988 P.2d 967 (1998), *rev. denied* 138 Wn.2d 1002, 984 P.2d 1033 (1999); *Sun Mountain Prods., Inc. v. Pierre*, 84 Wn. App. 608, 618, 929 P.2d 494, *rev. denied*, 132 Wn.2d 1003, 939 P.2d 216 (1997); *Safeco Ins. Co. of Am. v. McGrath*, 63 Wn. App. 170, 175, 817 P.2d 861 (1991), *rev. denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992). Most importantly, a declaration that is “arguably inconsistent” with prior testimony is not sufficiently contradictory for the purposes of the *Marshall* rule.

*Duckworth*, 95 Wn. App. at 8. Rather, statements must be in “**flat contradiction**” before a court may disregard otherwise admissible evidence. *McGrath*, 63 Wn. App. at 175 (emphasis added); *see also Beers v. Ross*, 137 Wn. App. 566, 571-72, 154 P.3d 277 (2007).

*Duckworth* illustrated the distinction between arguable inconsistency and flat contradiction. *Duckworth*, a real estate broker, sued for an accounting, share of profits, and land conveyance from an alleged partnership with two real estate developers, the Langlands. *Duckworth*, 95 Wn. App. at 3. *Duckworth*’s complaint stated that the parties had agreed to transfer a parcel in a real estate development as part payment for his partnership profits. *Id.* at 7. However, *Duckworth*’s later declaration provided that their original oral agreement was “‘subsequently modified’ to include that transfer of land.” *Id.* Based on the statute of frauds, the trial court granted summary judgment for the Langlands and disregarded *Duckworth*’s later declaration that ostensibly sought to resurrect an invalid agreement. *See id.* at 3, 7. On appeal, Division One reversed summary judgment. *Id.* at 4. Quoting the *Marshall* rule, the court held:

*Duckworth*’s declaration is **arguably inconsistent** with his pleadings, but his statements are **not directly contradictory**. Because this is a summary judgment appeal, **we do not weigh the parties’ credibility** but resolve all reasonable inferences in favor of the nonmoving party.

*Id.* at 8 (emphasis added). The court carefully examined the challenged statements and gave the nonmoving party the benefit of the doubt, as is appropriate under a summary judgment review. *See id.* The court concluded, “**We must accept Duckworth’s characterization of the agreement**, including the contention that it was subsequently modified.” *Id.* (emphasis added).

Here, as in *Duckworth*, Ms. Blue described her agreement with Mr. Foster and then, in response to a summary judgment motion, further explained the circumstances surrounding that agreement. *Id.* Although *Duckworth* involved a land deal and the instant case involved premises liability, the salient facts of both cases are similar because both later statements tell the rest of the story, even if they were arguably inconsistent.<sup>2</sup> *See id.* Importantly, Ms. Blue did not state at her deposition that she was not offered payment, but that the agreement was for her not to be paid. CP 213. This testimony is fully consistent with her later declaration that he initially asked what she charged.<sup>3</sup> CP 153.

---

<sup>2</sup> In her deposition, Ms. Blue was asked:

Q And during the second time [dog watching], did you have a discussion [with Mr. Foster] about whether he was going to pay you or not?

A **Not that I can recall, no.**

Q So were you expecting to be paid?

A No.

CP 213 (emphasis added).

<sup>3</sup> Her declaration stated,

In *McGrath*, Division One again carefully scrutinized challenged statements to distinguish mere inconsistency from direct self-contradiction. *See McGrath*, 63 Wn. App. at 174-75. There, following a parking lot shooting in which the shooter, McGrath, was found civilly liable for negligently injuring his victim, McGrath's two insurers brought a declaratory judgment action, arguing that he intended to cause injury and thus was excluded from coverage under the policy. *Id.* at 171-72. On the one hand, McGrath stated: (1) "I fired the gun in their direction to stop them, never intending to shoot them or hit them," and (2) "I did not expect to hit anybody." *Id.* at 174. Under these statements, his policy would cover his actions. *See id.* at 171-72. On the other hand, his insurer pointed to other statements as proof of his intent to injure: (1) "I thought I was aiming at his left shoulder," and (2) "[I pointed the gun] [i]n the general area of [the victim's] shoulder. I guess it would be his left shoulder." *Id.* at 174 n.11. The trial court granted summary judgment in favor of the insurers and dismissed the case. *Id.* at 174.

On appeal, Division One reversed summary judgment, concluding that the *Marshall* rule did not apply because the challenged statements

---

Prior to my injuries sustained on the Fosters' stairs, Mr. Foster approached me at work and asked me if I would feed and care for his dog while he and his wife were out of town. **Mr. Foster asked how much I charged for my services. I told him I did not know the costs of dog sitting services.**

were “**certainly not in flat contradiction.**” *Id.* at 172, 175 (emphasis added). Considering the statements favorable to McGrath, the court noted,

These statements, if believed, as we must on summary judgment, raise a material issue of fact as to McGrath’s intent, regardless of other statements suggesting he did intend to injure. **We acknowledge that read as a whole McGrath’s affidavit and testimony supports a compelling and persuasive argument that McGrath did, in fact, intend to injure.** However, we are not the trier of fact and **we are unable to say that reasonable minds could not reach a different conclusion,** and, hence, summary judgment is inappropriate.

*Id.* at 174 (emphasis added). The court also noted that McGrath explained part of his story by testifying that he had assumed a bullet hit his victim’s shoulder based on the victim’s reaction. *See id.* at 175.

Here, Ms. Blue’s statements are much more cohesive than those in *McGrath*, which survived the *Marshall* rule. Even after comparing “I did not expect to hit anybody,” with “I thought I was aiming at his left shoulder,” the *McGrath* court determined that the statements were “certainly not in flat contradiction.” *Id.* at 174-75. Unlike those two statements, which both relate to the same idea (McGrath’s intention), Ms. Blue’s statements covered different parts of her conversation with Mr. Foster. CP 153. While her deposition testimony focused on the

---

CP 153 (emphasis added).

discussion's result that she would watch the dog as a favor, her declaration explained that Mr. Foster originally offered to pay her. CP 153, 213.

In *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 429-31, 38 P.3d 322 (2002), the Washington Supreme Court examined the *Marshall* rule in a slightly different situation where an individual concluded that an event never happened because he denied any memory of it. *Overton* involved a lawsuit for contribution of costs for environmental cleanup of a property and a resulting suit against an insurer for bad-faith denial of coverage and other claims. *Id.* at 421. There, the Environmental Protection Agency (EPA) submitted documentary evidence that it had met with the insured, informing him that it found polychlorinated biphenyls (PCB) located on his property. *Id.* at 429. The insured testified during his deposition that he did not remember meeting with EPA agents. *Id.* at 430. In his later declaration in opposition to summary judgment, he stated that the visit did not occur because he did not remember it. *Id.* at 429. The trial court apparently rejected this declaration and granted summary judgment for the insurer. *Id.* at 429-31.

Although Division Three reversed this ruling, the Supreme Court reinstated the trial court's summary judgment order. *Id.* at 433. The *Overton* court ruled that the insured was incompetent under ER 602 to testify about the EPA meeting because he had no memory of its

occurrence. *Id.* at 430. Besides, his declaration posited “[u]ltimate facts or conclusions of fact” that are insufficient under CR 56(e). *Id.* (quoting *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988)). The insured’s “[l]ack of recall [was] not sufficient to controvert clear opposing evidence on a summary judgment motion,” namely, clear documentary evidence that EPA notified him of the chemical’s presence. *Overton*, 145 Wn.2d at 431.

Unlike *Overton*, where the insured completely forgot the incident and on that basis concluded that it never happened, here Ms. Blue did remember the majority of her conversation with Mr. Foster and testified about it at length. *Id.* at 429-30. Unlike the *Overton* insured, Ms. Blue had personal knowledge under ER 602 to give deposition testimony and a later declaration. A witness can have personal knowledge under ER 602 even if he or she is unsure about various details. *Henderson v. Tyrell*, 80 Wn. App. 592, 616 & n.10, 910 P.2d 522 (1996). In fact, a witness’s testimony that he or she is uncertain about some details is “the kind of statement we might expect from a **truthful witness** who wants to be careful to tell the whole truth and nothing but the truth.” *United States v. Tipton*, 964 F.2d 650, 655 (7th Cir. 1992) (emphasis added). Nonetheless, neither the trial court nor this court can weigh credibility when ordering or reviewing summary judgment. *See Duckworth*, 95 Wn. App. at 8.

Finally, unlike *Overton*, no “clear opposing evidence” exists here, and thus the *Marshall* rule does not apply, because Ms. Blue did not give entirely “clear answers to **unambiguous** [deposition] questions.” *Overton*, 145 Wn.2d at 431; *Marshall*, 56 Wn. App. at 185 (emphasis added). In particular, counsel asked Ms. Blue the following:

Q Well, [Mr. Foster] didn’t pay you before he left, right?

A Correct.

Q And you guys didn’t discuss **that you were going to be paid?**

A **Correct.**

Q And you weren’t expecting to be paid?

A Correct.

Q This was still another favor –

A Correct.

Q – according to you?

Q Yes.

CP 213 (emphasis added).

Although this testimony is arguably inconsistent with her declaration that he asked what she charged for pet-sitting, counsel's question can be interpreted in multiple reasonable ways. Here, Ms. Blue answered affirmatively for the following reason: Quite simply, they did not "discuss that [she] w[as] going to be paid" **because they had discussed and concluded otherwise.** *Id.* This is fully consistent with her other testimony that he did not pay her beforehand and that she decided to do him a favor. *See id.* The **result** that she would do her boss a favor does not negate his **initial offer** to pay her. Even if this court determines that her testimony is "arguably inconsistent" with her later declaration, that is still not sufficiently contradictory to disregard this relevant evidence at summary judgment. Because her statements are not flat contradictions, there is no need for her to offer any explanation of such contradiction.

The "law favors resolution of cases on their merits," so Washington courts have set a high bar before permitting the *Marshall* rule to preclude relevant evidence at summary judgment. *Beers*, 137 Wn. App. at 570, 572; *see, e.g., Overton*, 145 Wn.2d at 429-31; *Duckworth*, 95 Wn. App. at 8; *Sun Mountain Prods., Inc.*, 84 Wn. App. at 618; *McGrath*, 63

Wn. App. at 175. Without weighing credibility,<sup>4</sup> this court should determine, like it did in *Duckworth* and *Safeco*, that the trial court erred in disregarding Ms. Blue's later declaration because it did not flatly contradict her deposition testimony.

**B. Ms. Blue's status on the Fosters' premises is a disputed question of fact and was improperly decided on summary judgment.**

**1. The standard of review is de novo.**

Courts review de novo a trial court's decision on summary judgment and consider all evidence and reasonable inferences in the light most favorable to the nonmoving party, Ms. Blue. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 126, 52 P.3d 472 (2002). Only if the evidence and inferences taken in the light most favorable to Ms. Blue show that she could not have been an invitee, should the trial court's ruling that she was a licensee be affirmed. *See Thompson v. Katzer*, 86 Wn. App. 280, 284, 936 P.2d 421, *rev. denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997).

---

<sup>4</sup> Apparently creating a corollary to the *Marshall* rule, the court in *McCormick v. Lake Washington School District*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999), stated that "[s]elf-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact." However, unless "flat contradictions" are carefully distinguished from "arguable inconsistencies" as Washington law demands, this corollary may lead trial or appellate courts to weigh the affiant's credibility, a wholly improper determination at summary judgment. *Amend*, 89 Wn.2d at 129; *Duckworth*, 95 Wn. App. at 8; *McGrath*, 63 Wn. App. at 175. Besides, **any** affidavit or declaration made in response to summary judgment that bolsters one's own case would be "self-serving" by definition.

**2. Based on Washington law, Ms. Blue was an invitee, not a licensee, at the time of the accident.**

The entire crux of the analysis as to whether or not Mr. Foster breached his duty depends on what duty was owed. Based on the definitions and characterizations followed by Washington case law, Ms. Blue was an invitee and not a licensee at the time of the accident.

With respect to invitees, the Restatement provides:

§ 332. Invitee Defined

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Further, licensees are characterized under the Restatement as follows:

§ 330. Licensee Defined

A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.

Restatement (Second) of Torts §§ 330 (1965).

An invitee is “a person who is invited to enter or remain on land for a 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)). The invitee is invited onto the possessor's land for a purpose connected with the business in which the owner or occupant is engaged in, or is permitted to be conducted on his property. *Enersen v. Anderson*, 55 Wn.2d 486, 488, 348 P.2d 401 (1969).

The key to an invitee relationship is whether there was some real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates. *Id.* By contrast, "[a] licensee is defined as a 'person who is privileged to enter or remain on land only by virtue of the possessor's consent'" and includes a social guest "who has been invited on the premise but does not meet the legal definition of invitee." *Younce*, 106 Wn.2d at 667 (quoting Restatement (Second) of Torts § 330 (1965)).

Here, under the facts of Ms. Blue's accident and relationship with her boss Mr. Foster, the trial court erred by ruling as a matter of law that Ms. Blue was a licensee. At summary judgment, Mr. Foster contested the following material facts that Ms. Blue asserted:

- They were not friends or socializing on the day of her accident, CP 37-38, 42, 152;
- They had a business relationship in which he was her superior, CP 37, 152-53;
- Ms. Blue performed a service for Mr. Foster, CP 42-44, 153; and

- Mr. Foster benefitted from her services because he did not need to board the dog. CP 43, 153.

The Fosters sharply contested whether Mr. Foster offered to pay Ms. Blue to watch his dog and the status of her entry based on these facts. RP 6-7. The issues presented both in briefing and to the trial court clearly present genuine issues of material fact as to whether Ms. Blue's status on the Fosters' land was an invitee or licensee.

To determine whether an entrant is an invitee or licensee, courts must "differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social." *Beebe v. Moses*, 113 Wn. App. 464, 467-68, 54 P.3d 188 (2002).

**3. Ms. Blue entered the Fosters' premises for a business purpose that benefitted both parties.**

The determinative factor to establish an invitee relationship is whether there was some real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates. *Enersen*, 55 Wn.2d at 488. Just as the Restatement and Washington case law states, Mr. Foster invited Ms. Blue on his premises for the sole purpose of a business dealing that benefitted him and his wife. As Mr. Foster's employee, it was beneficial and in Ms. Blue's best interest to perform a

service for her boss outside of work when requested. Whether an entrant bestowed the requisite “benefit” that characterizes him or her as an invitee is a question, not for the court on summary judgment, but for the jury at trial. *Beebe*, 113 Wn. App, at 467.

- a. **Ms. Blue’s work for Mr. Foster presents the same mix of disputed facts as in *Beebe*, where Division Three held that the status of an entrant was for the trier of fact.**

Ms. Blue’s situation involves the same mix of disputed facts present in *Beebe* where on appeal the court refused to sustain the dismissal of the action on summary judgment. *Beebe*, 113 Wn. App. 464. In *Beebe*, Division Three reversed and remanded a trial court’s dismissal of a plaintiff’s premise liability action where the trial court ruled as a matter of law the injured party was a licensee. The court reasoned that when there exists any factual dispute regarding an entrants’ status and whether it was made for a business purpose or one primarily for familial or social required factual resolution by the jury. *Id.* at 467.

In *Beebe*, the plaintiff attended a Tupperware party at the home of the defendant and was injured when he fell down some stairs at the residence. *Beebe*, 113 Wn. App. at 466. The defendant received free Tupperware products for hosting the party, and the plaintiff purchased an item at the party. *Id.* On summary judgment, the trial court ruled as a

matter of law that the injured plaintiff was a licensee and dismissed the case. *Id.*

Division Three reversed and remanded for a trial on the merits, reasoning that the trier of fact must determine whether plaintiff entered with a business purpose or a primarily familial or social purpose. *Id.* at 467. Because there was question regarding whether the benefits were incidental or nominal, whether the Tupperware party was for business or a social gathering and if both parties were benefited by the gathering, the court reasoned that it was not appropriate to rule as a matter of law which category Mr. Beebe fit into. *Id.* at 467-68.

Here, Ms. Blue's situation involves similar disputed facts. On the one hand, there was no social engagement Ms. Blue was attending, she was there purely for the economic benefit of the Fosters, but she did not receive her economic benefit until following the dog sitting. CP 52, 153. Further, there was a certain expectation and career benefit for Ms. Blue to do a service for her boss, and Mr. Foster specifically offered to pay her at the onset of their negotiations, which Ms. Blue declined. CP 43, 153.

But for their business relationship and her decision to confer a benefit on Mr. Foster, she would not have been on his property. Further, she was not there for any social or familial purpose which would classify her as a licensee.

**b. Unlike this case, *Thompson* involved familial benefit and does not apply here.**

At summary judgment, the Fosters argued that *Thompson* was controlling authority in Ms. Blue's situation. *Thompson v. Katzer*, 86 Wn. App. 280, 936 P.2d 421 (1997). In *Thompson*, Mr. Berg was house-sitting for the defendants, Mr. and Mrs. Katzer. *Id.* at 281-83. Mr. Berg asked his son, Mr. Thompson to do him a favor and bring him his car. *Id.* at 283. Mr. Thompson did so, and when delivering the vehicle to his father, slipped and fell on the Katzers' icy driveway. *Id.* The son, Mr. Thompson, thereafter sued the homeowners for injury to his knee. *Id.* On appeal, the court affirmed the trial court's granting of defendants' motion to dismiss for insufficient evidence and ruling as a matter of law that Mr. Thompson was a licensee at the time of his fall. *Id.* at 288-89.

In *Thompson*, the facts presented showed that Mr. Thompson's only economic value was that of twenty dollars for the gas to drive the vehicle to his father. *Id.* at 286. The court specifically noted that this value was not "bargained for or promised." *Id.* at 284. Using the definition of invitee and licensee noted herein, the court determined that Mr. Thompson's trip to the Katzers' land at the request of his father was familial and no benefit to him was bargained for, therefore categorizing his status as a licensee. *Id.* at 287-88.

The *Thompson* court explained:

Thompson's argument rests on the assertion that **whenever** an entrant bestows an economic benefit on the occupier, the entrant is **automatically** a business visitor. We agree that the bestowing of an economic benefit is an important factor to consider when deciding whether an entrant is an invitee or licensee, and that one who bestows such benefit **may** be a business visitor. It does not follow, however, that the bestowing of an economic benefit is dispositive, or that one who bestows such benefit is **always** a business visitor. The ultimate goal is to differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social.

*Id.* at 286.

The Fosters' entire argument depended on the following proposition, stated by the court in postulating that Ms. Blue was merely a licensee: An "entrant will not be a 'business visitor,' even when he or she confers an economic benefit, if there is no 'real or supposed mutuality of interest in the subject to which the visitors business or purpose relates,' or if the benefit is merely incidental to an entry that is primarily familial or social." *Id.* at 286.

The Fosters' sole reliance on the facts of *Thompson* is misplaced. Mr. Thompson and Mr. Berg did not bargain for any service to be performed, but instead the purpose of the transaction was a familiar favor done for the benefit of a father from a son. Ms. Blue's dog-sitting,

walking, and feeding service to Mr. Foster had absolutely no familial or social value. Her interests in performing a requested task for her boss, as well as compensation received afterwards were more than incidental to the purpose to which she was on the land, because the performance of those services was the **only purpose** for which she was on the land.

There were absolutely no business dealings taking place between Mr. Thompson and his father or between the Katzers, whereas Mr. Foster and Ms. Blue both worked at the same company and every interaction was inevitably related to that business. CP 37-38, 42, 152. Further, Ms. Blue provided a service that was bargained for at the outset, and her decline of payment up front did not stop Mr. Foster from later conveying such benefit to Ms. Blue. CP 43, 52, 153.

**c. The economic-benefit test supports classifying Ms. Blue as an invitee.**

While not an exclusive test for determining status, courts routinely use the “economic benefit” test to determine whether an entrant is an invitee. *McKinnon v. Wash. Fed. Sav. & Loan Assn.*, 68 Wn.2d 644, 648-49, 414 P.2d 773 (1966). Under this test, an invitee is expressly or impliedly invited on the land for some purpose connected with the business in which the owner or occupant is then engaged. *Id.* To qualify, the business or purpose for which the visitor enters the premises must be

of “actual or potential benefit to the owner or occupier thereof.” *Id.*

The duty imposed on the landowner is one therefore because of their expectation to derive some economic benefit from the presence of the visitor. *Id.* The owner thereafter has an affirmative duty of reasonable care thrust on them as the *quid pro quo* for that expected benefit. *Id.*

*McKinnon* involved application of the economic benefit test in conjunction with the “invitation” test in a public invitee status determination. *Id.* While the court determined whether economic benefit conferred onto a owner was not conclusory in and of itself, it is but one factor to consider in characterizing Ms. Blue as an invitee for the benefit she conferred on the Fosters’ and their related duty stemming therefrom.

**4. Ms. Blue did not feed the Fosters’ dog for her own sole benefit or for a familial or social purpose.**

For Ms. Blue to be a licensee, she must have derived a sole benefit from her services and presence on the land, or been there for a familial or social purpose. *See generally Thompson*, 86 Wn. App. 280. Neither is true.

At a minimum, a licensee includes, (1) persons who come on the land solely for purposes of their own, (2) members of the occupier’s household (except a boarder, servant or other person whose relationship with the occupier is primarily economic), and social guests. *Id.* at 285.

Ms. Blue does not fall into any of these categories. Further, a licensee enters the land without an invitation or with an invitation but for a purpose unrelated to any business dealings between the two. *Id.* At a minimum, Ms. Blue was performing a business transaction for the benefit of Mr. Foster and rises above the status of a licensee. CP 43, 153.

In cases where the entrant on land has been characterized as a licensee, a social or familial purpose has been present. *See Younce*, 106 Wn.2d at 658; *Thompson*, 86 Wn. App. at 280; *Swanson v. McKain*, 59 Wn. App. 303, 306, 796 P.2d 1291 (1990), *rev. denied*, 116 Wn.2d 1007, 805 P.2d 813 (1991). Not one aspect of Ms. Blue's service provided to Mr. Foster fits within the definition of a licensee.

**C. The trial court erred by ruling as a matter of law that the Fosters did not breach their duty to Ms. Blue as a licensee, when they knew that the stairs were dangerous and there was no way for her to protect herself from that danger.**

The duty owed to a licensee by the occupier of land is one of ordinary care to repair, warn of, or otherwise make reasonably safe, a dangerous condition on the land, but only if the occupier knows or should know of the condition; the occupier should realize that the condition involves an unreasonable risk of harm to the licensee; and the occupier should expect that the licensee will not discover the condition or, upon discovering it, will not perceive the risk arising from it. *Thompson*, 86

Wn. App at 289.

A licensee is a person who is privileged to enter or remain on the premise or land by virtue of the consent of the possessor of the land, and this definition most often includes social guests. *Beebe*, 113 Wn. App. at 467. A licensee enters the premises of another for purposes not connected with any business on the property. *Enersen*, 55 Wn.2d at 488.

A possessor of land is liable for physical harm to licensees caused by a condition on the land if, but only 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) (alterations in original) (quoting Restatement (Second) of Torts § 342 (1965)).

“Even a licensee may be owed a duty by an occupier to warn him of concealed, dangerous conditions of which the occupier has knowledge, and of which the licensee does not know.” *Miniken v. Carr*, 71 Wn.2d 325, 328, 428 P.2d 716 (1967). Whether a condition is dangerous depends

on whether it presented an unreasonable risk of harm to the licensee. *See Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 190, 127 P.3d 5 (2005), *rev. denied*, 157 Wn.2d 1026, 142 P.3d 608 (2006). But the mere fact that an injury occurred is insufficient to prove that a dangerous condition existed. *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967).

A landowner has no duty to warn licensees about open and apparent dangers from natural or artificial conditions. *Tincani*, 124 Wn.2d at 134; *see also* Restatement § 342, illus. e.

Mr. Foster specifically knew of the risk of harm of falls and slips of the railroad-tie stairs from the notice given by at least Mr. Williams and his wife. CP 304-05. Even if the stairs were an “open and obvious” danger as ruled by the trial court and Ms. Blue discovered the condition, there was no way she could have perceived the risk arising from it or avoided it. The railroad-tie stairs are the only access she had to the property. CP 153.

## VI. CONCLUSION

The trial court committed reversible error by striking Ms. Blue's entire declaration and thus extending the *Marshall* rule to an instance where a declaration in opposition to summary judgment was not clearly contradictory to the declarant's earlier testimony. Further, in light of the

sharply disputed factual contentions surrounding Ms. Blue's dog sitting services for her boss, Mr. Foster the trial court erred in holding as a matter of law that she was a licensee. Even if she were a licensee, the trial court erred in holding as a matter of law that the Fosters had not breached their duty of care when they had specific knowledge of the dangerous condition of the stairs and she had no choice but to use them.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of October, 2010.

LEE SMART, P.S., INC.

By: Amy F. Miller  
August G. Gifelli, WSBA No. 13095  
Amy F. Miller, WSBA No. 40620  
Jonathan M. Minear, WSBA No. 41377  
Of Attorneys for Appellant Ahmbur Blue

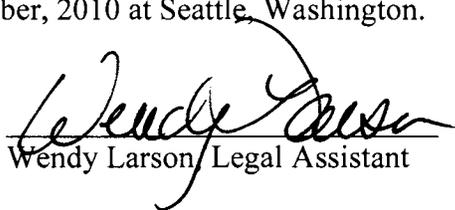
**CERTIFICATE OF SERVICE**

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on October 22, 2010, I caused service of the foregoing on each and every attorney of record herein:

**VIA LEGAL MESSENGER**

Andrea Holburn Bernarding  
Law Office of Andrea Holburn Bernarding  
1730 Minor Avenue, Suite 1130  
Seattle, WA 98101

DATED this 22<sup>nd</sup> day of October, 2010 at Seattle, Washington.

  
Wendy Larson, Legal Assistant