

NO. 69338-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

DEBRA FULWILER,

Appellant,

v.

ARCHON GROUP L.P., WHITEHALL STREET REAL ESTATE L.P.,
CB RICHARD ELLIS, INC., BELLEVUE COLLEGE (formerly
BELLEVUE COMMUNITY COLLEGE ("BCC")), a division of the
STATE OF WASHINGTON,

Respondents.

BRIEF OF RESPONDENT BELLEVUE COLLEGE

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Appendices

Appendix A: CP 95 - 101

Appendix B: Exhibit 1 of Fulwiler Deposition

I. INTRODUCTION

In September 2008, Debra Fulwiler fell as she was walking down the exterior stairs of the leased office building that housed Bellevue College's north campus. She was leaving the building after accompanying a friend to the college bookstore. At the time Ms. Fulwiler fell, she was not a student at Bellevue College, although in her deposition she testified that she had traveled up and down the stairs on at least two prior occasions and had traveled up the stairs on the day of her fall. In her complaint, Ms. Fulwiler stated that she "lost her balance and fell." In her deposition, she repeatedly stated that she did not have any recollection as to why she fell or the mechanics of her fall.

Bellevue College requests that this court affirm the trial court's dismissal of Ms. Fulwiler's cause of action against Bellevue College because no admissible evidence supports her negligence claim. The stairs were not a hidden, dangerous condition and it would be speculative to conclude, on the basis of the admissible evidence, that Bellevue College was the proximate cause of any harm experienced by Ms. Fulwiler.

II. COUNTERSTATEMENT OF ISSUE

1. Should the trial court's dismissal of this case be affirmed where Bellevue College satisfied its duty to a licensee by refraining from willfully or wantonly injuring Fulwiler?

2. Does Fulwiler fail to establish she is an exception to the standard generally applicable to licensees because she has failed to introduce evidence that Bellevue College knew (or should have know) there was a dangerous condition on its leased property and failed (where she testified to prior use of the stairs) to introduce evidence that she was unaware of the stairs' dangerous condition or had grounds for failing to realize the danger posed by the stairs?
3. Alternatively, should the trial court's dismissal of this case be affirmed where Bellevue College satisfied its duty to invitees (both public and business) to keep the stairway at its north campus in reasonably safe condition?
4. Alternatively, should the trial court's dismissal of this case be affirmed where the Fulwiler's admissible testimony (and consequently that of her experts) fails to establish that Bellevue College was the proximate cause of her injury?

III. COUNTERSTATEMENT OF THE CASE

A. Counterstatement Of Facts

On September 5, 2008 at about 10:45 a.m., Debra Fulwiler (DOB 7/14/50) visited an office building located at 10700 Northrup Way, Bellevue, Washington, with her friend, Joyce Puerschner. Beginning in December 2000, Bellevue College¹ (then Bellevue Community College) leased the 10700 Northrup Way building from Spieker Properties² (CP at

¹ Washington's community and technical college system is created by RCW 28B.50. RCW 28B.50.020 provides that "community colleges are, for purposes of academic training, two year institutions, and are an independent, unique, and vital section of our state's higher education system, separate from both the common school system and other institutions of higher learning." RCW 28B.50.040 divides the State of Washington into thirty college districts. Bellevue, the eighth district, is an agency of the State of Washington. Title 132H of the Washington Administrative Code describes the policies applicable to the eighth district.

² The successor owner / lessor is identified as the "10700 Building." CP at 103. Bellevue Community College provided an Estoppel Certificate to the new owner in 2006.

27-51), a California limited partnership, for use as the college's north campus (CP at 3). One of the other defendants to this action, CB Richard Ellis, managed the property for the owner. CP at 96, 103.

Ms. Fulwiler testified at her deposition (on April 24, 2012) that Bellevue College was not in session at the time she and Ms. Puerschner visited the north campus building: "There was no school at that time.... No, it was too early in the year." CP at 117 (9). In her deposition, Ms. Fulwiler also testified that she was not attending or registering for class herself on September 5, 2008:

Q: And what were you doing there? Were you taking a class?

A: No. I was showing a friend of mine the library—not the library but the bookstore. Because I had taken a class a year or two before that, and she was interested in taking it now.

CP at 117(7).³

Ms. Fulwiler testified that after she showed her friend the bookstore, they emerged from the building (about fifteen minutes later)⁴ to

CP at 53-56. The lessor's maintenance obligations included all stairways. CP at 29. This lease provision has not been at issue in this litigation as all defendants have asserted similar legal defenses to Fulwiler's claim: lack of duty, failure to produce admissible evidence establishing proximate cause.

³ Ms. Fulwiler's complaint states that: "Plaintiff was a student at BCC and was on campus to attend classes and meet a friend." CP at 3. In her deposition, Ms. Fulwiler stated she had taken a "Certified Professional Coder" class at Bellevue College "the year or two before." CP at 118(10, 11). She was not a Bellevue College student at the time of her fall.

go toward their parked cars. Her friend preceded her down the stairs. CP at 119(18). Ms. Fulwiler testified that she walked down the upper section of the stairs herself without incident. CP at 119(18). Ms. Fulwiler states that she then “lost her balance and fell”⁵ on the lower section of the stairs.⁶ CP at 95-101 (Appendix A), 119. Prior to her fall, Ms. Fulwiler and Ms. Puerschner had been planning to go to lunch together “just around the corner.” CP at 117 (8); 119 (18).

The stairs of the 10700 Building are divided into two sections. Appendix A (CP at 95-101), 122. There is a landing between the upper and lower section of the staircase. Appendix A (CP at 95-101), 122. The staircase is wide enough to accommodate entry to classes by a large number of students. Appendix A (CP at 95-101), 122. There are four handrails: one at each side of the staircase and two in the center of the staircase. Appendix A (CP at 95-101), 122.

⁴ The timing is not exact. Ms. Fulwiler state in her deposition she fell at 11:15 a.m. CP at 117(7). But she also stated in her deposition that she and her friend arrived at 10:45 a.m. and were in the bookstore for about fifteen minutes. CP at 117(8), 118(10).

⁵ CP at 3.

⁶ In her deposition, Ms. Fulwiler testified that she had been diagnosed with neuropathy “10 or 15 years ago” and as a result of that diagnosis her physician authorized a handicapped parking sticker. CP at 118(12). Peripheral neuropathy is a disease or degenerative state of the peripheral nerves in which motor, sensory, or vasomotor nerve fibers may be affected and which is marked by muscle weakness and atrophy, pain, and numbness. *Merriam-Webster*, available at <http://www.merriam-webster.com> (visited May 23, 2013). Ms. Fulwiler’s human factors expert stated that Fulwiler’s peripheral neuropathy resulted in a “loss of sensation in both her feet.” CP at 218.

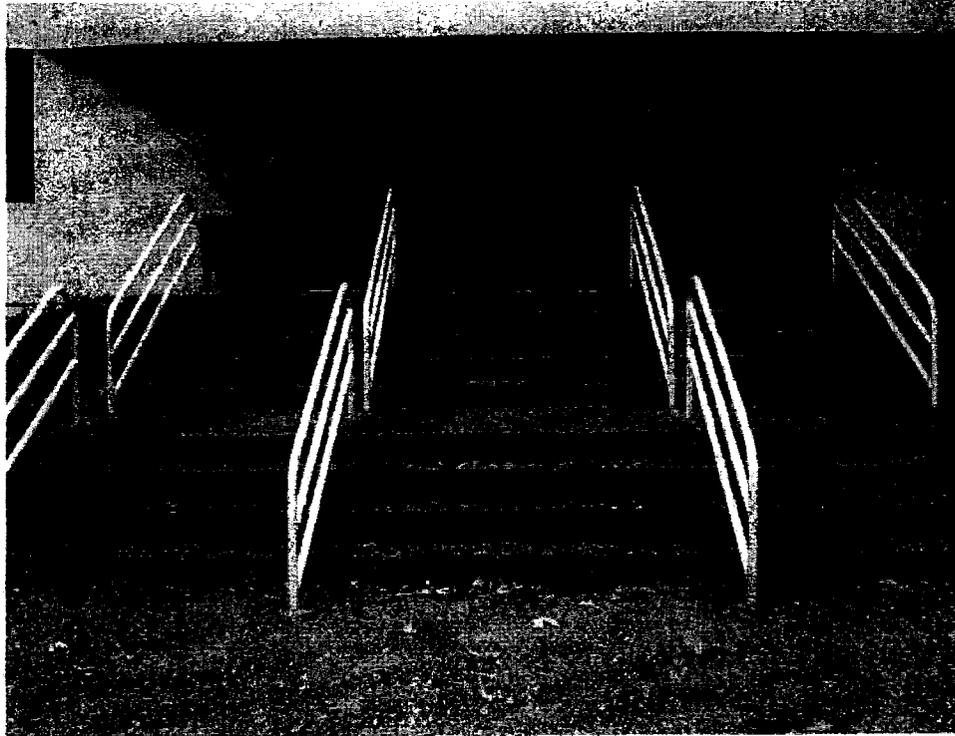


Exhibit 1 to the Deposition of Debra Fulwiler (Appendix B)

Ms. Fulwiler testified in her deposition that she had gone up and down the stairs twice during the period in which she was taking a class at Bellevue College. CP at 118 (11 and 12). She had also gone up the stairs—and down the upper section of the stairs—successfully on September 5, 2008. CP at 119 (18).

In her complaint, Ms. Fulwiler does not describe her fall. CP at 3. She says only that she “lost her balance and fell.” CP at 3. At the time of her deposition, Ms. Fulwiler stated that she could not see the stairs⁷ (CP at

⁷ Ms. Fulwiler’s human factors expert testified that she had a prescription for bifocals and was wearing her eyeglasses when she fell on the stairs. CP at 218.

120 (69)) but she also repeatedly stated that she “did not know” the reason she fell down the stairs or the mechanism of her injury. CP at 119-21:

Q. But do you -- so you looked down and did you see the stairs or not?

(Objection to form.)

A . No, I did not.

Q. So if you didn't see the stairs, why did you keep on stepping?

(Objection to form.)

A. Because I just got done walking down this group of stairs here and I assumed the stairs were the same way. I, at one point, was in the middle of the stair and I couldn't see. So I immediately walked over and put my hand up here because I could tell I was going to have trouble seeing the stairs. And then I walked down.

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

A. I don't know.

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

A. I do not know.

Q: Okay, so you don't know if you, in looking at No. 1⁸, if you overstepped, went too far, or not far enough, or what?

A: I did not know.

⁸ Included as Appendix B.

CP at 121 (70); Appendix B (CP at 122).

B. Procedural Posture

Debra Fulwiler fell on September 5, 2008. She filed her complaint in this case on September 2, 2011.

On July 13, 2012, Bellevue College and the other defendants (collectively the Archon Group) moved for summary judgment. Two weeks later (July 26, 2012), Ms. Fulwiler met at the north campus stairs with her attorney and the experts she had retained to assist her with raising an issue of fact (Thomas K. Baird and Gary Sloan, Ph.D.). CP at 150, 217. On July 30, 2012, four days after meeting with her experts, Ms. Fulwiler signed a declaration in opposition to summary judgment. CP at 207-13. The declarations of Mr. Baird and Dr. Sloan incorporate the statements and assumptions Ms. Fulwiler makes in her July 30, 2012 declaration. CP at 207-13, 214-45.

The trial court heard oral argument in this case on August 10, 2012. ROP 1-27. At the hearing, the trial court requested additional briefing from all parties on *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 150 P.2d 633 (2007).

In September 2012, the trial judge entered orders granting summary judgment to both the Archon Group and Bellevue Community College.

Ms. Fulwiler has appealed the orders dismissing her complaint.

IV. ARGUMENT

A. Standard Of Review

This court reviews the trial court's decision *de novo*. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

As it did in the trial court, Bellevue College “bears the initial burden of showing the absence of an issue of material fact.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once Bellevue College made this showing, Ms. Fulwiler was required to come forward with competent evidence showing the existence of a genuine issue of material fact for trial. If Ms. Fulwiler “fails to make a showing sufficient to establish the existence of an element [of her] case, and on which [she] bears the burden of proof at trial,” then this court should affirm the trial court's award of summary judgment. *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). “‘In such situations, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.’” *Young*, 112 Wn.2d at

225 (quoting *Celotex* at 322-23).

The rule in *Young* applies in negligence cases. “When reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). If it can be said as a matter of law that reasonable persons could reach but one conclusion, after considering all of the admissible evidence and the reasonable inferences most favorable to Ms. Fulwiler, summary judgment should be affirmed. *Mejia v. Erwin*, 45 Wn. App. 700, 705, 726 P.2d 1032 (1986).

This court does not have to accept as true allegations that are contradicted by the record and which no reasonable finder of fact would believe. *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L.Ed.2d 686 (2007).

B. The Facts Of This Case Are Determined By Fulwiler’s Complaint And Deposition Not Her Declaration

A declaration that contradicts a prior deposition cannot be used to create an issue of material fact. ““When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.”” *Klontz v. Puget Sound Power & Light*

Co., 90 Wn. App. 186, 192, 951 P.2d 280 (1998) (quoting *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)).

This court's discussion of a post-deposition declaration in *McCormick v. Lake Washington Sch. Dist.*, 99 Wn. App. 107, 111-12, 992 P.2d 511 (1999) makes it clear why a declaration like that filed by Fulwiler does not create a material issue of fact. In *McCormick*, a terminated employee (Laurie McCormick) testified in her deposition that she did not know whether a particular individual had the authority to offer her a position; in her post-deposition declaration, she stated unequivocally that the individual had the apparent authority. In her deposition, McCormick stated that the "job offer" was merely a question about whether she still wanted the job; in her post-deposition declaration, she described a specific offer of employment. In her deposition, McCormick stated she had been told "there was no way they could offer me anything;" in her post-deposition declaration, she stated that the offer of "permanent employment" was "revoked" immediately after receipt of negative references. 99 Wn. App. at 112. McCormick's post-deposition declaration included expansions and alterations of her deposition testimony. The declaration was precise in areas where McCormick's deposition had been vague and imprecise. This court concluded in *McCormick*, as it should in this case:

McCormick's declaration presents new information and a different recollection of events. Her declaration represents a change in testimony and does not merely explain her prior deposition. McCormick's declaration is in "flat contradiction" to her deposition and therefore may not be used to determine whether issues of material fact exist.

McCormick, 99 Wn. App. at 112.

The trial court in this case looked to a more recent fall case as the basis for its decision. *Seiber v. Poulsbo Marine Center, Inc.*, *supra*, is a Division II case in which the Court of Appeals affirmed the award of summary judgment to defendants where the plaintiff (Carol Seiber) failed to remember "any specifics" about her fall in her deposition but in a subsequent supplemental declaration (filed after the defendants had moved for summary judgment) described specific details about the boardwalk and handrails. In opposition to summary judgment, Seiber, like Fulwiler, filed expert declarations (in Seiber's case from an accident investigator and architect) that relied on Seiber's more detailed memory of her fall.⁹

The declaration Ms. Fulwiler filed after meeting at the stairway with her experts and her attorney differs from her deposition testimony in two important respects: (1) it alters the reason she was visiting the Bellevue College north campus; (2) it describes the mechanism of her

⁹ This court recently distinguished *Seiber* in *Millson v. City of Lynden*, ___ Wn. App. ___, 298 P.3d 141 (2013). The issue in *Millson* (a municipality's duty to maintain its sidewalks) is not apposite to the present case.

injury in a manner consistent with her experts' testimony and directly contradicts her deposition testimony that she "did not know" why or how she fell. In its reply brief, Bellevue College requested that these contradictory and expansive statements in Fulwiler's declaration be stricken, or, be discounted in accordance with *Klonz*, *Marshall* and *McCormick* as failing to raise an issue of fact.

1. Fulwiler's declaration does not alter her "status" as a licensee.

Ms. Fulwiler testified in her deposition that she accompanied her friend Joyce Puerschner to Bellevue College because Ms. Puerschner was considering registering for a coding class Fulwiler had taken in the past. In her deposition, Ms. Fulwiler did not mention that *she* was there to purchase a book (or anything else). CP at 115-21. In its reply brief, Bellevue College moved to strike the statements in Ms. Fulwiler's declaration that stated she "intended to purchase a book if I found something that I liked" (CP at 208) and seemed aimed at shifting Ms. Fulwiler's legal status under the common law from a licensee (a person who was merely accompanying her friend on an outing prior to lunch) to an invitee (a person who had a business purpose of her own). CP at 268.

2. Fulwiler's declaration provides details that support the opinions of her experts but were not part of her own description of her fall.

In its reply brief, Bellevue College described Ms. Fulwiler's declaration as an impermissible attempt to alter her deposition testimony, and, in particular, to state, in accordance with the expert declarations filed with her opposition to the defendants' motions for summary judgment, that she was looking down for "cues" and the steps "blended together."¹⁰ In her complaint and deposition, Ms. Fulwiler did not know what caused her fall (beyond the bare statement that she "lost her balance and fell"). Ms. Fulwiler's amplified and contradictory testimony is inadequate to establish that her fall was proximately caused by Bellevue College. Under *Klonz, Marshall* and *McCormick*, both summary judgment and *de novo* review of Ms. Fulwiler's negligence claim is properly based upon the testimony she gave before she met extensively with her human factors and safety consulting experts. On the basis of her untutored testimony that she "lost her balance" and did not know why she fell, judgment should properly be awarded to Bellevue College.

Ms. Fulwiler's opening brief ignores *Klonz, Marshall* and *McCormick*. It is premised on the assumption that she is allowed to re-

¹⁰ Ms. Fulwiler's declaration was dated July 30, 2012, almost four years after her fall in September 2008, but only four days after she had spent the morning (July 26, 2012) with her attorney and experts at the stairs. CP at 209, 217.

shape the facts of her claim, four years after her fall, after extensive consultation with experts she did not retain until after her deposition (CP at 121(70)). Br. of App. at 9-23. This court would be required to significantly depart from the rules of fair play that generally guide judicial proceedings in order to find Ms. Fulwiler has raised a material issue of fact under the circumstances of this case.

C. Fulwiler Has Abandoned Her Res Ipsa Loquitur Claim And Is Obligated To Introduce Evidence Supporting Her Negligence Claim

Res ipsa loquitur is a rule of evidence that allows the trier of fact to draw an inference that the defendant was negligent where (1) the plaintiff is not in a position to explain the mechanism of injury, and (2) the defendant has control over the instrumentality and is in a superior position to control and to explain the cause of injury. *Robison v. Cascade Hardwoods, Inc.*, 117 Wn. App. 552, 72 P.3d 244 (2003) (doctrine applied where plaintiff received an extreme electrical shock while operating a trailer loader at a lumber mill).

Although Ms. Fulwiler initially requested that her complaint be decided on res ipsa loquitur grounds (CP at 5-6), after the matter was briefed, Ms. Fulwiler abandoned any claim for application of this evidentiary rule. ROP at 17. She has not appealed this issue. Br. of App. at 9-23.

1. Under Washington Law, Fulwiler's "Status" Determines The Duty Owed By Bellevue College

In accordance with common law, Washington courts continue to classify entrants as invitees, licensees or trespassers to determine the standard of care that a landowner owes to them. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 467-8, 296 P.3d 800 (2013); *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996); *Younce v. Ferguson*, 106 Wn.2d 658, 659, 724 P.2d 991 (1986).

An invitee can be either a public invitee or a business invitee. *Home v. North Kitsap Sch. Dist.*, 92 Wn. App.709, 717, 965 P.2d 1112 (1998). A public invitee is a person 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. *Home*, 92 Wn. App. at 717. A business invitee is a person invited to enter or remain on land for purposes directly or indirectly connected with business dealings with the possessor of the land. *Home*, 92 Wn. App. at 718.

A licensee, by contrast, enters real property with the possessor's permission, or tolerance, for the licensee's own purpose or business rather than the possessor's benefit. *Home*, 92 Wn. App. at 718; *see also* Restatement (Second) of Torts § 330 (1965); *Dotson v. Haddock*, 46 Wn.2d 52, 278 P.2d 338 (1955); WPI 120.08.

The status of an entrant determines the standard of care that a landowner owes to the entrant. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). If an entrant is an invitee, the landowner owes an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996). If, on the other hand, an entrant is a licensee or a trespasser, the landowner owes the entrant only the duty to refrain from willfully or wantonly injuring her. *Degel*, 129 Wn.2d at 49.

There is one exception to the standard generally applicable to a licensee. If a landowner knows, or should know, of a dangerous condition on his property and can reasonably anticipate that a licensee is unaware of the danger or will fail to realize it, then he has a duty to exercise reasonable care toward the licensee. *Younce*, 106 Wn.2d at 667. This is the same standard of care a landowner owes to invitees.

The status of a visitor is ordinarily a question of law. *Beebe v. Moses*, 113 Wn. App. 464, 467, 54 P.3d 188 (2002).

2. Fulwiler Was A Licensee; Bellevue College Met Its Duty To Her Under Washington Law

Ms. Fulwiler was a licensee visiting Bellevue College's north campus for her own purpose rather than for the Bellevue College's benefit.

Singleton v. Jackson, 85 Wn. App. 835, 935 P.2d 644 (1997); WPI 120.08.

Ms. Fulwiler testified in her deposition that she was not taking a class, but was visiting Bellevue College in order to show a friend the bookstore because her friend was interested in taking a class. CP at 117(7).

As noted above, the general duty a possessor owes a licensee is only the duty to refrain from willfully or wantonly injuring her. But the Washington Supreme Court has adopted the exception articulated by the Restatement (Second) of Torts § 342 (1965) which provides that a possessor owes a duty to exercise reasonable care to a licensee if (1) there is a known dangerous condition on the property; and (2) the possessor can reasonably anticipate the licensee either will not discover the condition or will not realize the risks that the known dangerous risk poses. *Memel v. Reimer*, 85 Wn.2d 685, 538 P.2d 517 (1975); WPI 120.02.01; WPI 120.03.

Ms. Fulwiler cannot demonstrate that she qualifies for the exception articulated by Restatement § 342 because she cannot provide evidence of either prong of the Restatement § 342 test: Bellevue College did not know the stairs to be a dangerous condition and Fulwiler's two or more prior trips down the stairs ensured that she was aware of any potential danger posed by the stairs.

Ms. Fulwiler states in her complaint that she "lost her balance and

fell.” CP at 3. The occurrence of a fall alone is not enough to prove the existence of a dangerous condition. *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967). Even if Bellevue College can be assumed to have constructive knowledge that its stairs were dangerous, constructive knowledge of an unsafe condition is not enough to satisfy the requirements of Restatement §342. The possessor must also have reason to know the condition presents an unreasonable risk of harm, which includes:

not only the existence of a risk, but also its extent. Thus “knowledge” of the risk involved in a particular condition implies not only that the condition is recognized as dangerous, but also that the chance of harm and the gravity of the threatened harm are appreciated.

Restatement (Second) of Torts § 342, cmt. a (1965).¹¹

Ms. Fulwiler testified that she used the same set of stairs to enter and exit the building and on two prior occasions, she knew the stairs were there, she had used them to enter the building only a few minutes before, and she had already successfully descended the top section of steps prior to beginning to walk down the second section. CP at 116-22. In addition, Ms. Fulwiler testified that, immediately prior to her fall, she observed her friend descending the stairs. CP at 119(18). Ms. Fulwiler also stated that

¹¹ It should be noted that neither CB Richard Ellis (the property manager of 10700 Northrup Way) nor the Archon Group (asset manager for the owner) was “aware of any other falls or other incidents on the exterior stairs.” CP at 96, 103.

she could not see the stairs, but continued to step down them holding on to the hand rail. CP at 119 (19, 20).

Summary judgment is proper where a plaintiff fails to prove the existence of a dangerous condition. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 189, 127 P.3d 5 (2005) (coffee shop patron injured when chair broke; summary judgment appropriate because plaintiff was unable to prove that the chair was a dangerous condition). Ms. Fulwiler's failure to prove the presence of a hidden dangerous condition necessarily results in dismissal of the cause of action, since she is a licensee and, without the protection of the Restatement § 342 exception, her claim fails under a willful and wanton injury standard. *See Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 831 P.2d 744 (1992) (claim for foot injury as a result of removing a frying pan from a stack of pans dismissed on summary judgment for no evidence of a dangerous condition); *Watters v. Aberdeen Recreation, Inc.*, 75 Wn. App. 710, 879 P.2d 337 (1994) (claim for slip and fall at bowling alley dismissed for no evidence of a dangerous condition).

Because Ms. Fulwiler was a licensee who has not provided admissible evidence that Bellevue College's external stairway was a hidden dangerous condition, her negligence claim must be dismissed.

3. In The Alternative, Should This Court Find That Fulwiler Was An Invitee, Bellevue College Also Met Its Duty To Her Under Washington Law and There Was No Breach.

a. Fulwiler was not a public invitee of Bellevue College.

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. *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 650, 414 P.2d 773 (1966) (adopting Restatement (Second) of Torts § 332(2)); *Younce*, 106 Wn.2d at 667. The statutory mission and purpose of the Bellevue College, as defined by RCW 28B.50.020(2), is to:

[O]ffer thoroughly comprehensive educational, training, and service programs to meet the needs of both the communities and students served by combining high standards of excellence in academic transfer courses; realistic and practical courses in occupational education, both graded and ungraded; community services of an educational, cultural, and recreational nature; and adult education, including basic skills and general, family, and workforce literacy programs and services

Bellevue College leased 10700 Northrup Way as its north campus for the purpose of educating students enrolled at the college. Ms. Fulwiler was neither a current student of Bellevue College nor did she state, either in her deposition or her declaration, that she was visiting Bellevue College's north campus to enroll in a course a program. Ms. Fulwiler was not, as a matter of law, a public invitee of Bellevue College.

b. Fulwiler was not a business invitee of Bellevue College.

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 land. *McKinnon*, 68 Wn.2d at 650 (adopting Restatement (Second) of Torts § 332 (3)); *Younce*, 106 Wn.2d at 667. In her complaint and deposition, Ms. Fulwiler offered no evidence that her purpose on September 5, 2008, was related to business dealings with Bellevue College, or members of its faculty, staff, or student body. She testified that she was showing her friend the Bellevue College bookstore. Only in her post-deposition declaration did she state that she intended to purchase a book at the Bellevue College bookstore if she found one she liked. There are no admissible facts in the record that would support categorizing Ms. Fulwiler as a business invitee.

Generally, only persons invited to enter the property of a landowner are invitees.¹² An invitation is conduct that justifies others in believing that a landowner desires them to enter his property.

¹² Washington has adopted the definition of an invitee in the Restatement (Second) of Torts § 332 (1965). *McKinnon*, 68 Wn.2d at 650. A business invitee is defined as “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.” Restatement (Second) Of Torts § 332 (1965); *Younce*, 106 Wn.2d at 667; *McKinnon*, 68 Wn.2d at 650.

Assuming, solely for purposes of argument, that this court determines that Ms. Fulwiler is an invitee and not a licensee, Bellevue College met its duty and there was no breach. A possessor of land is subject to liability for physical harm caused to its invitees by a condition on the land if it: (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; (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 at 93-94 citing Restatement (Second) of Torts § 343 (1965).

As noted above (in discussing the exception to the willful / wanton standard applicable to a licensee), because Ms. Fulwiler cannot establish the existence of a dangerous condition through admissible evidence her claim must fail. In addition, assuming solely for purposes of this argument that a dangerous condition existed at the time of Ms. Fulwiler's fall, Fulwiler cannot establish that Bellevue College had actual or constructive notice of a dangerous condition. It is Ms. Fulwiler's burden to establish that Bellevue College had actual or constructive notice of a dangerous condition. Until the College had notice, it had no duty to correct the condition or warn Ms. Fulwiler of the danger.

Washington law requires plaintiffs to show the landowner had actual or constructive notice of the unsafe condition. (Citation omitted.) Plaintiffs did not claim Defendants had actual notice of the ice on which Iwai slipped. To prove constructive notice, Plaintiffs carry the burden of showing the specific unsafe condition had “existed for such time as would have afforded [the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.” (Citations omitted.) The notice requirement insures liability attaches only to owners once they have become or should have become aware of a dangerous situation. (Citations omitted.)

Iwai, 129 Wn.2d 84 at 96-97.

Ms. Fulwiler has provided expert declarations that describe the external stairway of Bellevue College’s north campus as “vanishing stairs,” but those declarations are based entirely on the post-deposition details Ms. Fulwiler recalled for the first time in her July 30, 2012 declaration. CP at 150, 217. Both Mr. Baird and Dr. Sloan make it clear that the following precise description by Ms. Fulwiler was central to their assumptions and opinions about the stairs:

After negotiating the first flight of stairs I walked across the middle landing and began to descend the next flight. I grasped the handrail and, as my foot was in motion leaving the first step, I naturally looked down for cues about where to place [my]¹³ foot on the next step. As I did so, the individual steps of the stairs blended together so that the

¹³ In Ms. Fulwiler’s declaration, she inexplicably uses the third person “her” to describe her own foot. This appears to be because Fulwiler’s declaration merely copies and transposes many of the paragraphs of her counsel’s brief in opposition to summary judgment into the form of a declaration. Compare CP 126 and CP 208.

steps were indiscernible from one another. I subsequently fell on the cement....

CP at 208. Dr. Sloan's opinion in particular (CP at 218-19) is guided by dramatic details that were completely unavailable in any form to Bellevue College: "At this point she was facing north and had a view of both where she parked and her friend. She wanted to cry out to Joyce Puerschner, but was unable."

The expert testimony Ms. Fulwiler uses to support her claim that a dangerous condition existed on Bellevue College's north campus does not raise a material issue of fact because it is based upon an inadmissible, expansive, and contradictory declaration.

D. In The Alternative, Should This Court Find That Bellevue College Breached Its Duty To Fulwiler, Fulwiler Cannot Establish That The College Was The Proximate Cause Of Her Injury

Assuming, solely for purposes of argument, that this court does find Bellevue College breached a duty to Ms. Fulwiler, she cannot establish Bellevue College was the proximate cause of her injury.

For legal responsibility to attach to negligent conduct, the claimed breach of duty must be a proximate cause of the resulting injury. *Pratt v. Thomas*, 80 Wn.2d 117, 119, 491 P.2d 1285 (1971); *Ferrin v. Donnellefeld*, 74 Wn.2d 283, 285, 444 P.2d 701 (1968). Summary judgment is proper where the plaintiff lacks evidence that his injuries

stemmed from the negligence of the defendant. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006) (plaintiff injured in fall from a ladder and cannot remember details of accident). The mere fact that a plaintiff sustains an injury does not entitle her to put the defendant through the expense of trial. 132 Wn. App. at 781, *citing Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999) (an accident does not necessarily lead to an inference of negligence). When “the facts are taken as undisputed and the inferences therefrom are plain and do not admit of reasonable doubt or difference of opinion, the question of proximate cause becomes a question of law for the court.” *Porter v. Sadri*, 38 Wn. App. 174, 176, 685 P.2d 612, 613 (1984), *citing Cook v. Seidenverg*, 36 Wn.2d at 262, 217 P.2d 799 (1950); *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 558 P.2d 811 (1976).

Ms. Fulwiler claims that Bellevue College breached its duty “to operate, inspect, and maintain the Stairs in a safe condition.” CP at 6. In addition, she states that the College breached its duty to “maintain, repair and correct deficiencies in the design and construction of the Stairs,” failed to “make a reasonable inspection of the Stairs for defects,” failed to “adequately warn Plaintiff of the defects in the Stairs,” failed to “establish a system or policy to inspect the Stairs and provide warning to invitees of unsafe conditions and defects” and failed to “supervise agents and

contractors who design, maintain and construct the Stairs.”¹⁴ CP at 1-7.

But, Ms. Fulwiler failed to provide admissible evidence of a defect in the stairs of which Bellevue College was under any obligation to warn. Even if Ms. Fulwiler can identify a defect of which she should have been warned, she lacks admissible evidence establishing that any failure to warn by the College was a proximate cause of her injury.

To establish cause in fact under this theory, Ms. Fulwiler would have to prove that she would not have fallen ‘but for’ the warning of some heretofore unnamed defect. Ms. Fulwiler has no clear recollection of what caused her to fall and cannot credibly maintain that her descent down the stairs would have been in any way affected by a warning. CP at 120(18). Ms. Fulwiler’s post-deposition speculation about the cause of her injury does not rise to the level of admissible evidence and is insufficient to defeat summary judgment. *Schneider v. Rowell's, Inc.*, 5 Wn. App. 165, 167-68, 487 P.2d 253, 254 (1971) (“Causation which is based upon circumstantial evidence is subject to the well-established rule that the determination may not rest upon speculation or conjecture.”). There is not sufficient admissible information regarding Ms. Fulwiler’s fall to determine whether a warning of a “defect” would have prevented her fall. Ms. Fulwiler’s

¹⁴ Although summary judgment is based on different legal grounds, Bellevue College leased the premises and was under no obligation to maintain, repair or correct any deficiencies in the design and construction of the stairs. CP at 23-56.

negligence cause of action against Bellevue College must be dismissed.

V. CONCLUSION

Bellevue College respectfully requests that this court affirm the trial court's award of summary judgment.

RESPECTFULLY SUBMITTED this 23rd day of May, 2013.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Catherine Hendricks", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the state of Washington that I caused the foregoing document to be served on counsel of record as follows:

via U.S. Mail:

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VALDEZ MALCOLM, PLLC
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cc: sean@valdezmalcolm.com

via hand delivery:

GREGORY G. WALLACE
LAW OFFICE OF WILLIAM J. O'BRIEN
800 FIFTH AVENUE, SUITE 3810
SEATTLE, WA 98104

DATED this 23rd day of May, 2013, at Seattle, Washington.


NERISSA RAYMOND
Legal Assistant

Appendix A

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SUPERIOR COURT CLERK
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THE HONORABLE MONICA J. BENTON
NO. 11-2-30324-1 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBRA FULWILER,

Plaintiff,

v.

ARCHON GROUP, L.P., a foreign entity;
WHITEHALL STREET REAL ESTATE L.P.,
a foreign entity; W2007 SEATTLE OFFICE
10700 BUILDING REALTY, LLC, a Delaware
limited liability company; WA-10700
BUILDING, LLC., a Delaware limited
liability company; CB RICHARD ELLIS,
INC., a Delaware corporation; and
BELLEVUE COLLEGE (formerly
BELLEVUE COMMUNITY COLLEGE
("BCC")), a division of the STATE OF
WASHINGTON,

Defendants.

NO. 11-2-30324-1 SEA

**DECLARATION OF
STEVE PENN**

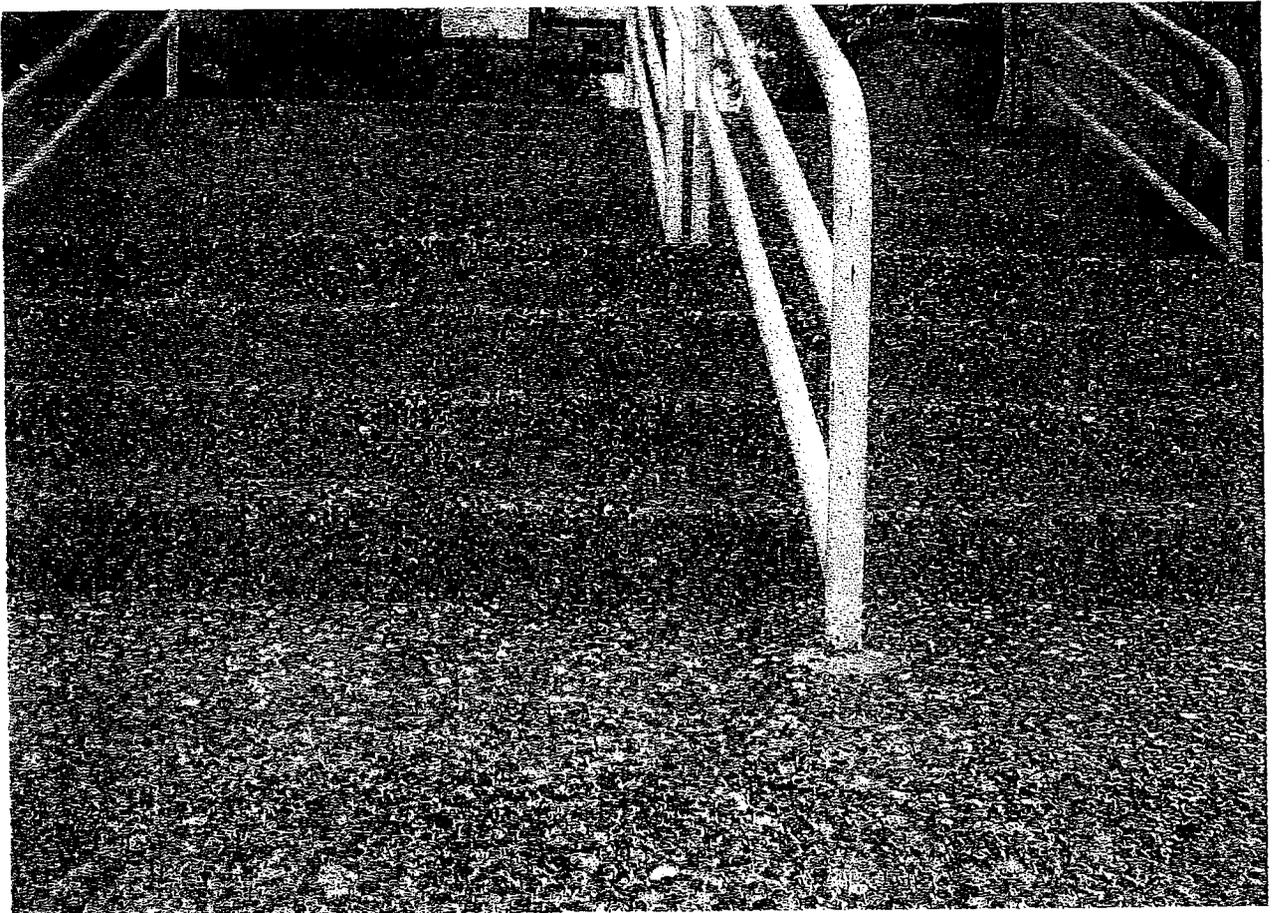
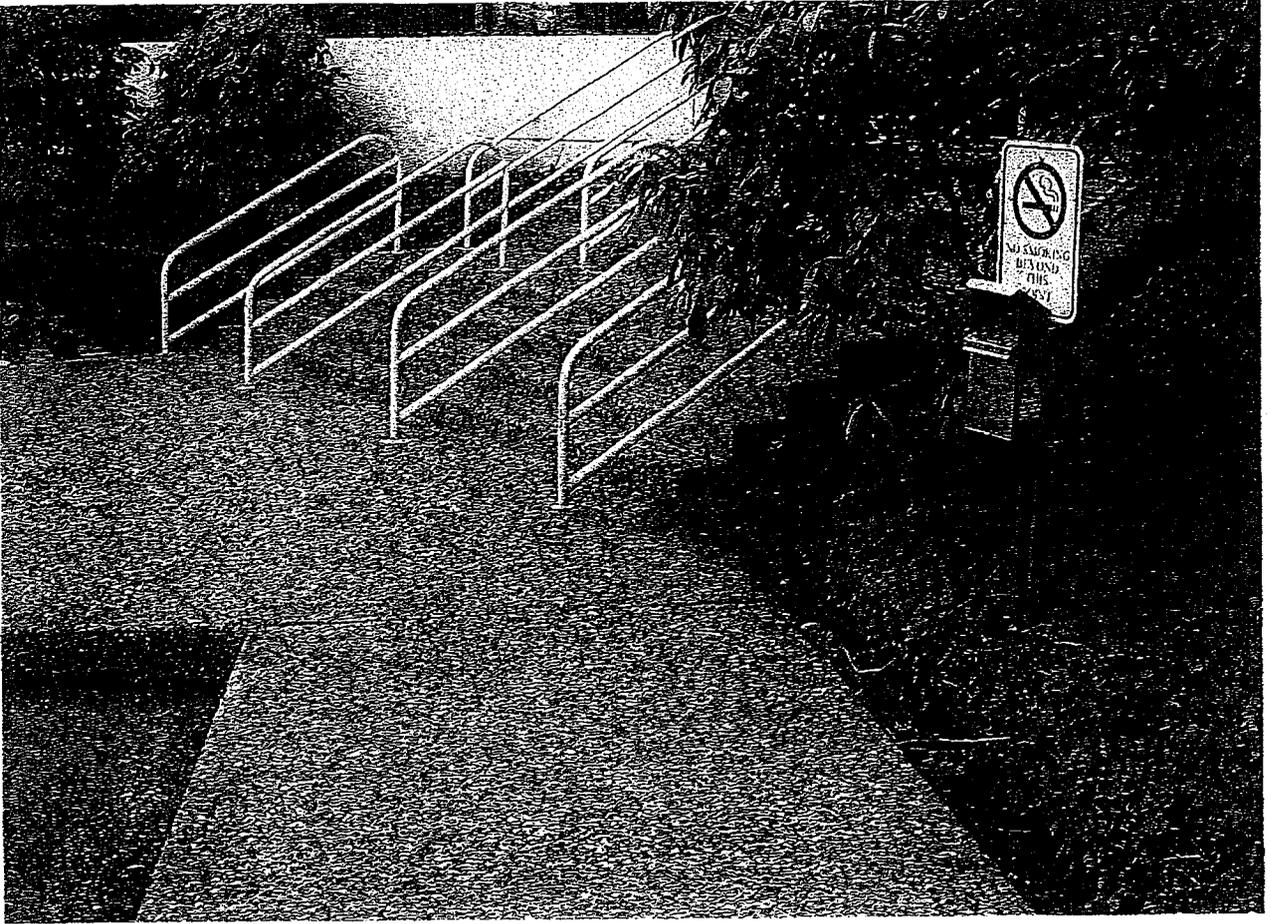
I, Steve Penn, state and declare as follows:

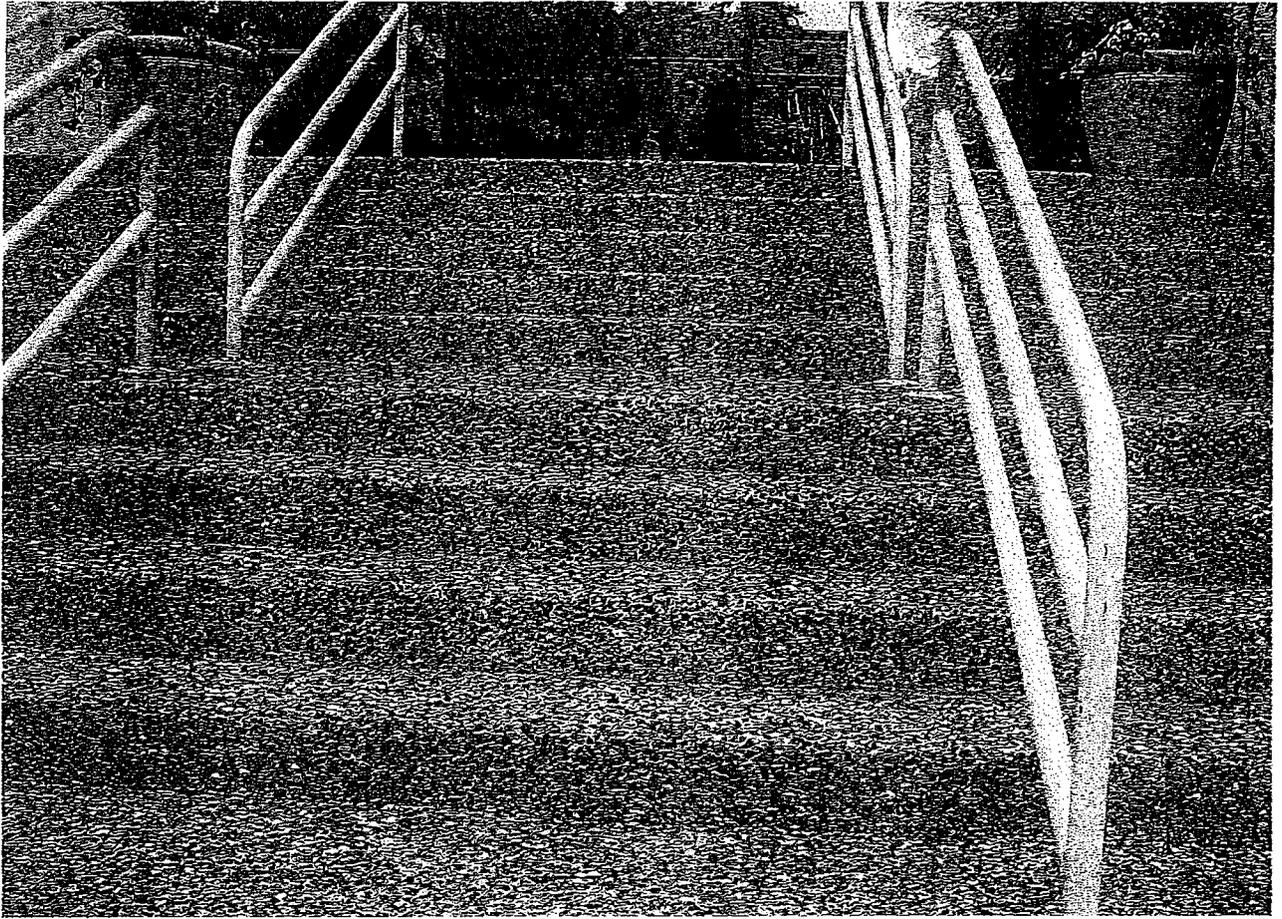
1. I am over eighteen years of age, am competent to testify, and base this
declaration on my personal knowledge.

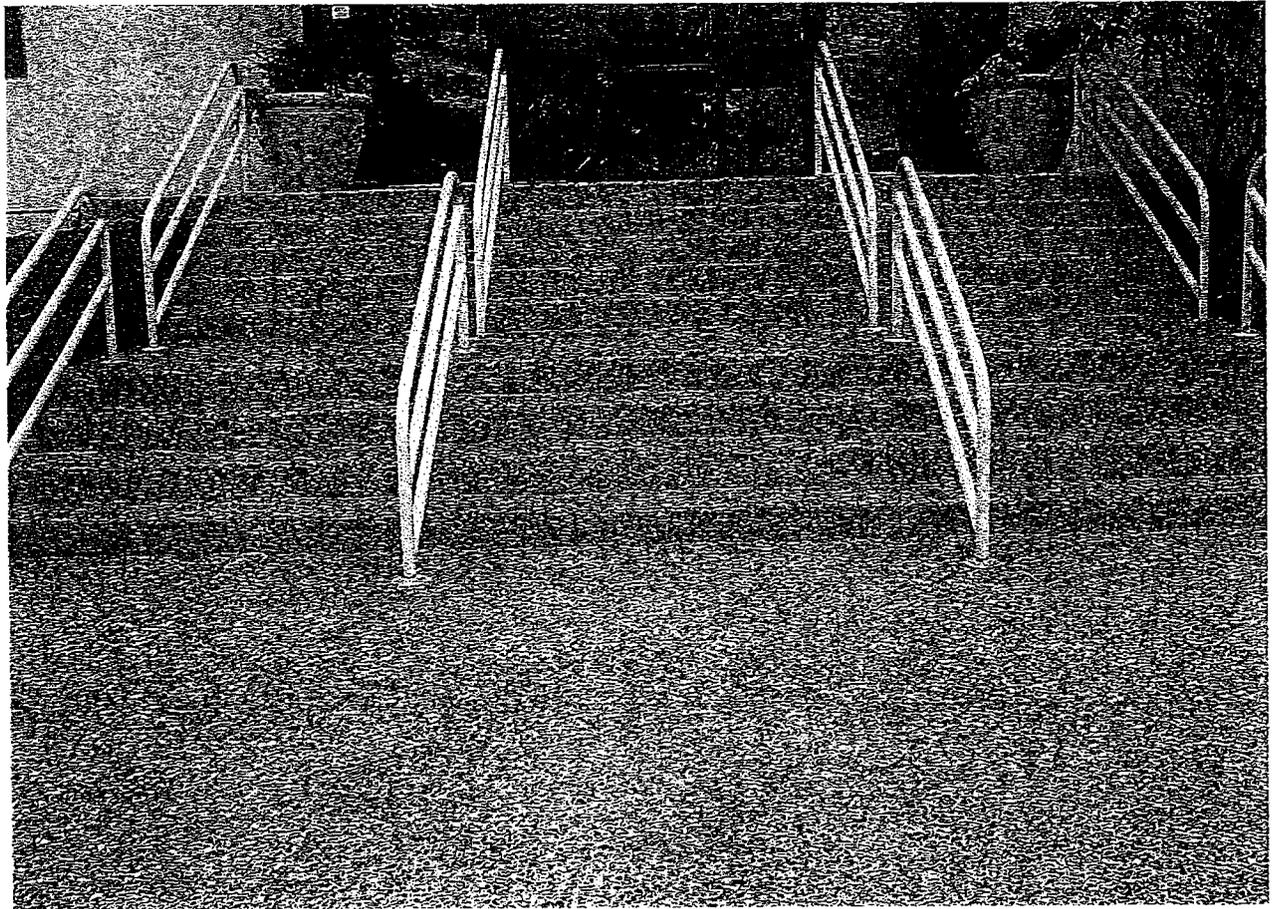
2. I am employed by CB Richard Ellis, Inc., one of the defendants herein. In
2008, I was Managing Director with CB Richard Ellis, Inc.

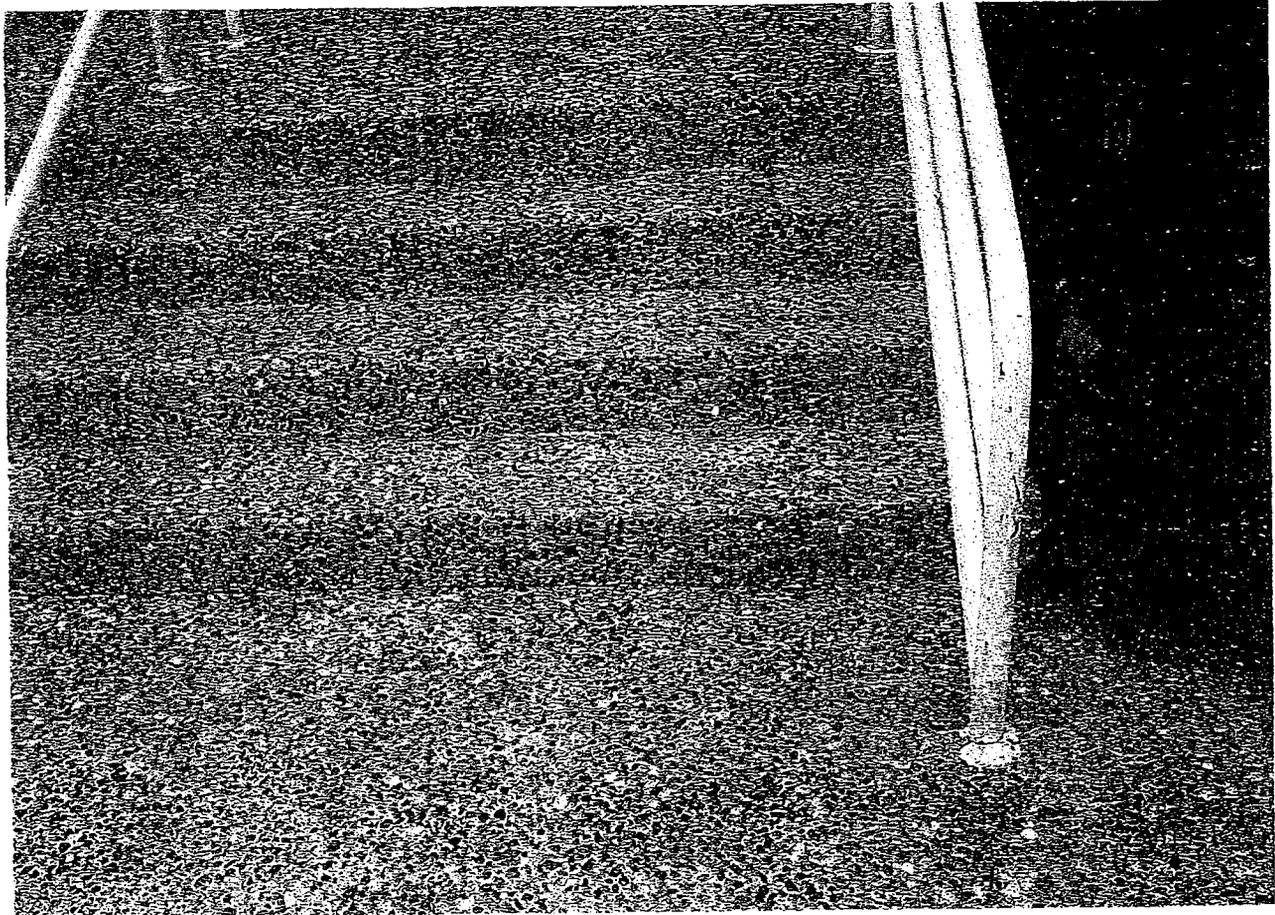
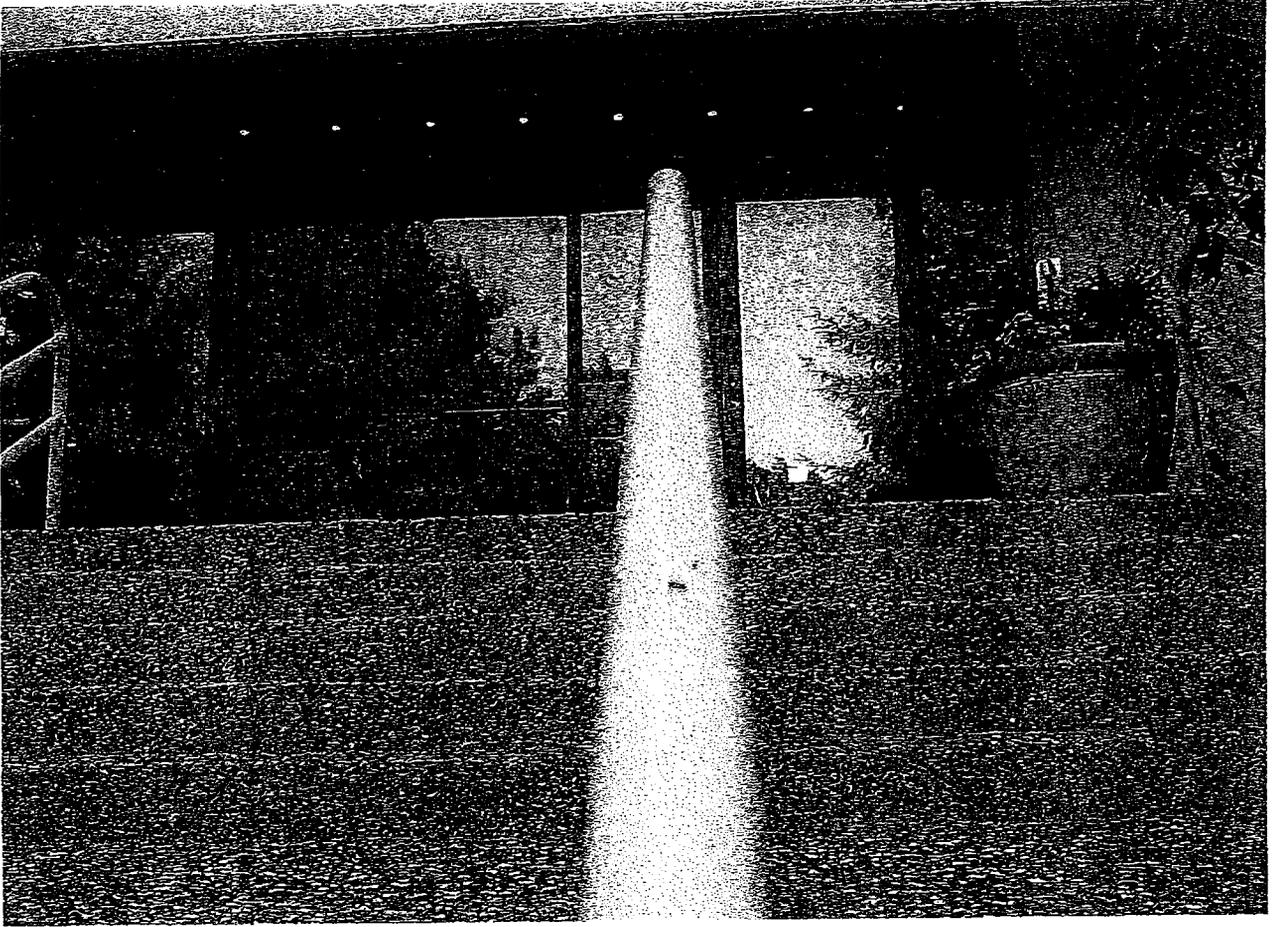
DECLARATION OF STEVE PENN - 1

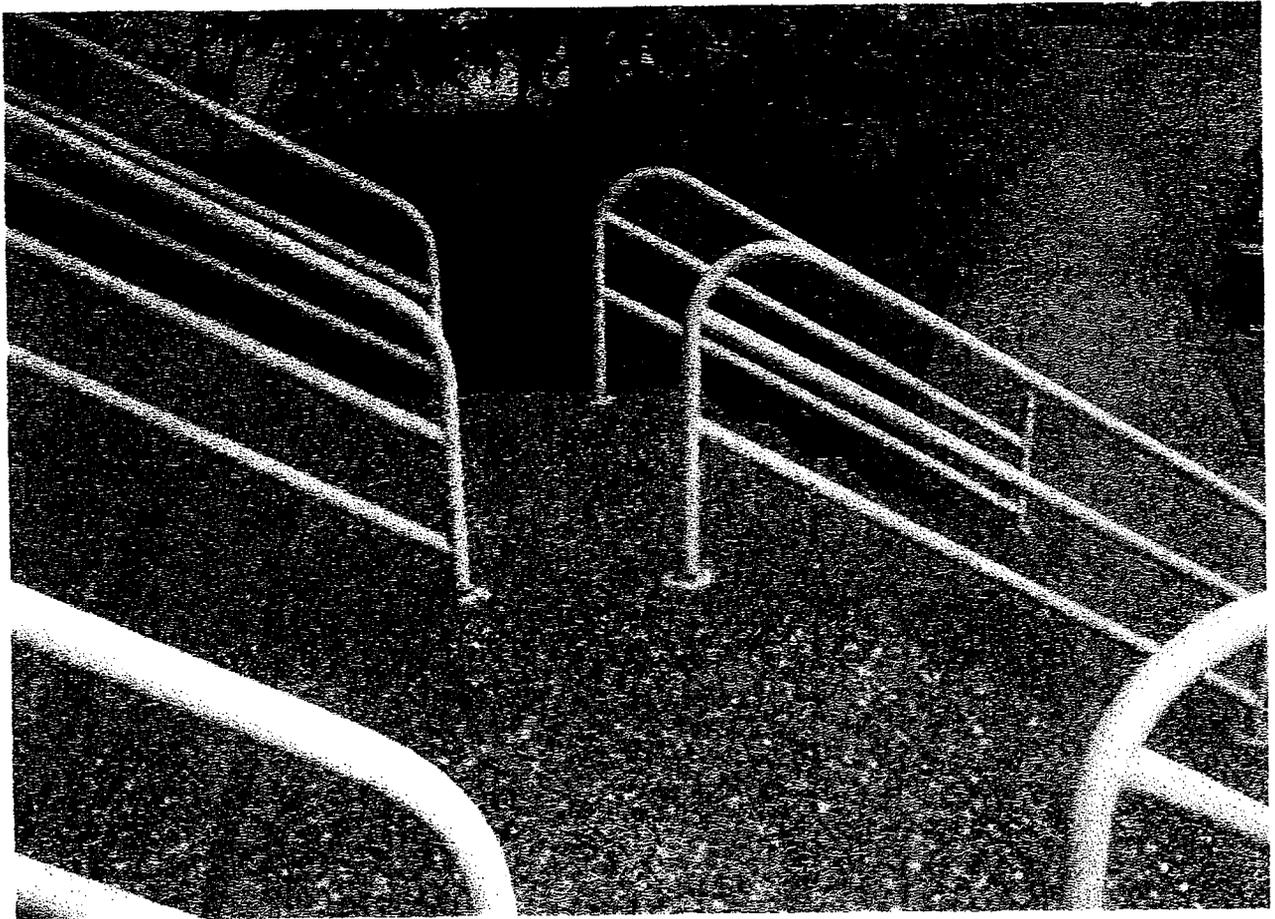
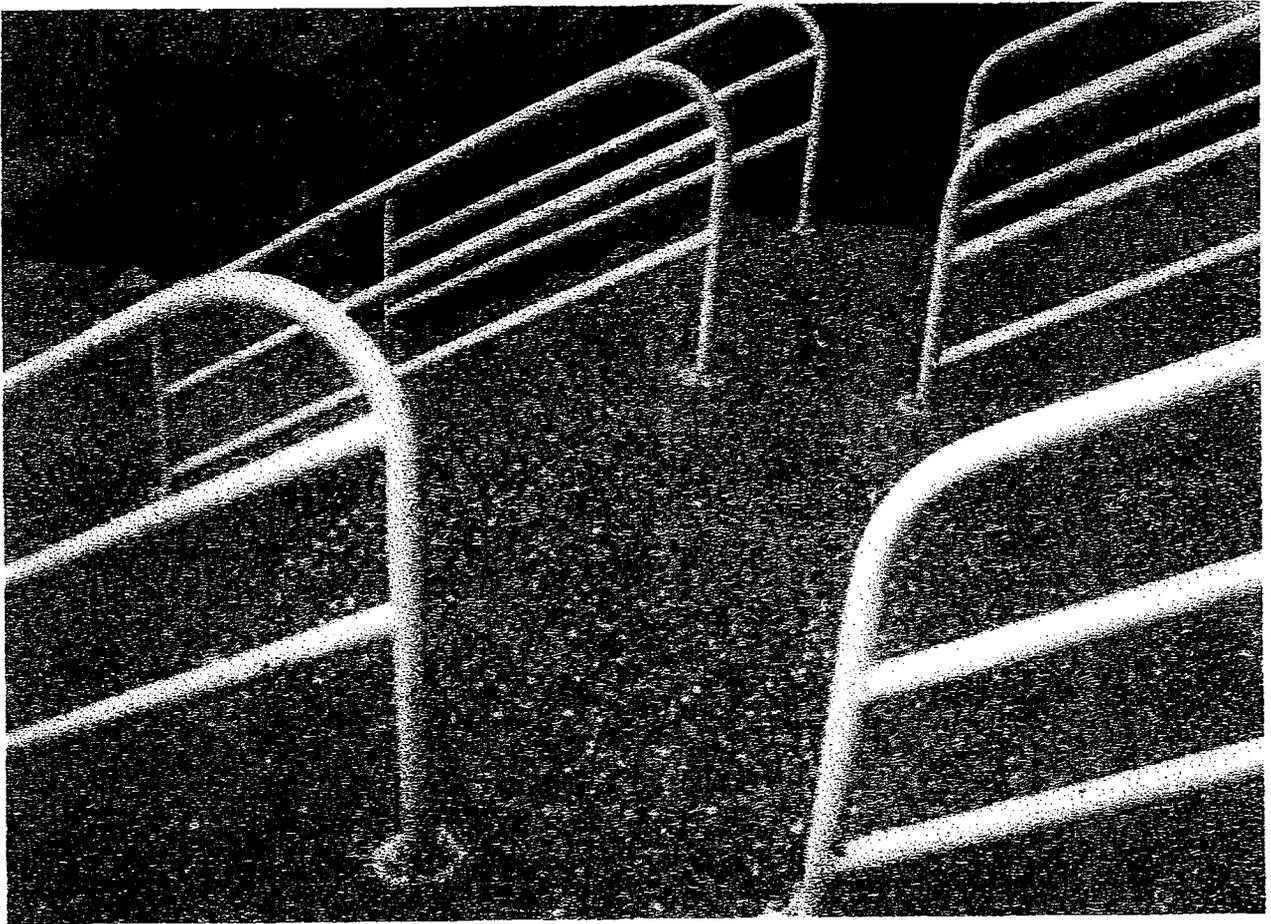
LAW OFFICE OF WILLIAM J. O'BRIEN
999 Third Avenue, Suite 805
Seattle, WA 98104
Telephone (206) 515-4800/Fax (206) 515-4848







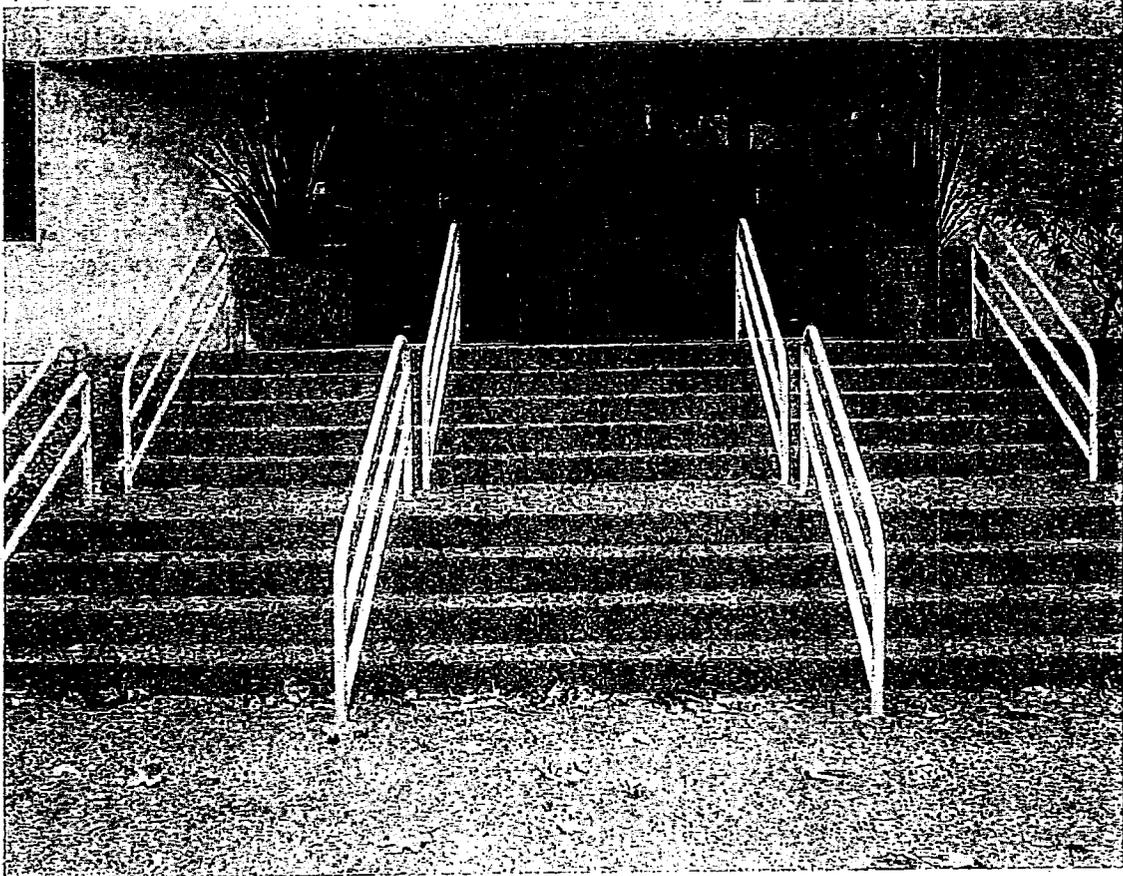




Appendix B

7/28/2009

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EXHIBIT NO. 1
Date 24 April 2012 gb
Deposition of Sandra D. Gindoff 1/1
GLORIA BELL, Court Reporter