

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO**

MARSHA ANDERSON O'BRIEN,)

Plaintiff/Appellant,)

vs.)

KB HOME TUCSON, INC. et al)

Defendant/Appellee.)

NO. 2 CA-CV 2010-0200

Pima County No. C20085032

APPENDIX TO APPELLEE'S ANSWERING BRIEF

Holly Davies, Esq. SBN #018308
Amy Wilkens, Esq. SBN #025171
Attorneys for Defendant/Appellee

TABLE OF APPENDICES

TAB	DESCRIPTION
1	Complaint filed July 21, 2008
2	Defendants' Motion to Compel Production of Preliminary Expert Opinion Affidavit Pursuant to A.R.S. § 12-2602 filed November 13, 2009
3	Plaintiff's Response to Defendant's Motion to Compel Production of Preliminary Expert Opinion Affidavit Pursuant to A.R.S § 12-2602 filed December 2, 2009
4	KB Home's Reply in Support of its Motion to Compel Production of Preliminary Expert Opinion Affidavit Pursuant to A.R.S. § 12-2602 filed December 11, 2009
5	Minute Entry Ruling filed January 6, 2010
6	Defendants' Separate Statement of Facts in Support of Their Motion for Summary Judgment filed March 10, 2010
7	Defendants' Motion for Summary Judgment filed March 10, 2010
8	Plaintiff's Separate Statement of Facts in Support of Her Opposition to Defendant's Motion for Summary Judgment filed April 14, 2010
9	Plaintiff's Response to Defendant's Motion for Summary Judgment filed April 14, 2010
10	KB Home's Rule 56(e) Supplement to its Motion for Summary Judgment filed July 12, 2010
11	Minute Entry filed July 20, 2010
12	Minute Entry Ruling filed July 23, 2010
13	KB Home's Supplement Brief in Support of its Motion for Summary Judgment filed August 2, 2010

- 14 KB Home's Supplemental Reply Brief in Support of its Motion for Summary Judgment filed August 27, 2010
- 15 Minute Entry Ruling filed September 2, 2010
- 16 Notice of Appeal filed September 29, 2010

**APPENDIX
EXHIBIT 1**

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO**

MARSHA ANDERSON O'BRIEN,)

Plaintiff/Appellant,)

vs.)

KB HOME TUCSON, INC. et al)

Defendant/Appellee.)

NO. 2 CA-CV 2010-0200

Pima County No. C20085032

APPELLEE'S OPENING APPENDIX

Holly Davies, Esq. SBN #018308
Amy Wilkens, Esq. SBN #025171
Attorneys for Defendant/Appellee

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**APPENDIX
EXHIBIT 1**

FILED
PATRICIA A. NOLAND
SUPERIOR COURT

08 JUL 21 AM 10:36

BY: J. ORR, DEPUTY

1 MICHAEL DRAKE
Attorney at Law
2 3085 W. Ina Road, Suite 111
Tucson, AZ 85741
3 (520) 624-2488
4 PCC No: 15168
5 Attorney for Plaintiff

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF PIMA

8 MARSHA ANDERSON O'BRIEN,)
9 Plaintiff,)
10 v.)
11 KB HOME TUCSON, INC.; KB HOME)
SALES - TUCSON, INC.; KB HOME, INC.;)
12 JOHN DOES 1-3 and JANE DOES 1-3;)
13 ABC CORPORATIONS 1-3,)
14 Defendants.)

NO. C20085032

COMPLAINT

STEPHEN VILLARREAL

Plaintiff alleges:

- 16 1. Plaintiff is a resident of Pima County.
- 17 2. At all pertinent times, Defendants KB Home Tucson, Inc. and KB Home Sales -
- 18 Tucson, Inc. were Arizona corporations. Defendant KB Home, Inc. is a
- 19 California corporation doing business in Arizona.
- 20 3. The incident giving rise to the action occurred in Pima County, Arizona.
- 21 4. On January 15, 2007, Plaintiff visited Defendants' residential housing develop-
- 22 ment called Pantano Overlook in Tucson with her daughter to shop for a new
- 23 home.
- 24 5. Defendant's employee and salesman "Chad" walked Plaintiff and her daughter
- 25 to a prospective home under construction. The home was on lot 54, 55, or 56,
- 26 and on the front wall had the marking 1W26 2W8.
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- 6. At all pertinent times, "Chad" was in the course and scope of his employment by Defendant.
- 7. While walking from the street pavement to the home's driveway, Chad "cut the corner" and walked across an area with yellow construction tape that was down.
- 8. Plaintiff followed Chad. She slipped on gravel or sediment covering the sloped curb and fell on a re-bar sticking up.
- 9. As a result of Defendant's negligence and breach of duty to Plaintiff, Plaintiff incurred serious injury including fractured ribs, punctured lung, hemothorax, and pneumothorax.
- 10. Plaintiff has incurred medical expense and loss of earnings, and will incur such in the future.

COUNT I

- 11. Plaintiff realleges all allegations heretofore made.
- 12. On January 15, 2007 and for some time prior, Defendant KB Home Tucson, Inc. owned, managed, maintained, and/or otherwise controlled the residential housing development called Pantano Overlook, Tucson, Arizona.
- 13. Defendant had a duty to make the subject property safe for business invitees and prospective buyers.
- 14. Defendant's duty described above was non-delegable.
- 15. Defendant breached the duty described above.

COUNT II

- 16. Plaintiff realleges all allegations heretofore made.
- 17. On January 15, 2007 and for some time prior, Defendant KB Home Sales – Tucson, Inc. owned, managed, maintained, and/or otherwise controlled the residential housing development called Pantano Overlook, Tucson, Arizona.

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- 18. Defendant had a duty to make the subject property safe for business invitees and prospective buyers.
- 19. Defendant's duty described above was non-delegable.
- 20. Defendant breached the duty described above.

COUNT III

- 21. Plaintiff realleges all allegations heretofore made.
- 22. On January 15, 2007 and for some time prior, Defendant KB Home, Inc. owned, managed, maintained, and/or otherwise controlled the residential housing development called Pantano Overlook, Tucson, Arizona.
- 23. Defendant had a duty to make the subject property safe for business invitees and prospective buyers.
- 24. Defendant's duty described above was non-delegable.
- 25. Defendant breached the duty described above.
- 26. That John Does and Jane Does are residents of Pima County or caused an event to occur in Pima County out of which this claim arises whose true names are not known to Plaintiff at present but which will be substituted when discovered. That ABC Corporations 1-3 caused an event to occur in Pima County out of which this claim arises whose true names are not known to Plaintiff at present but which will be substituted when discovered.

WHEREFORE, Plaintiff requests judgment against Defendants for the following:

- A. Compensatory damages in a reasonable amount.
- B. Costs of suit
- C. Prejudgment interest on special damages.

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D. Other appropriate relief.

Dated this 21 day of July, 2008.


Michael Drake
Attorney for Plaintiff

**APPENDIX
EXHIBIT 2**

VB

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
2009 NOV 13 PM 7:37

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2 Holly Davies, Esq. [S.B. #018308]
3 Amy Wilkens, Esq. [S.B. #025171]
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BY: J. WHITHELL, DEPUTY

9 Attorneys for Defendants KB HOME Tucson Inc., KB HOME
10 Sales-Tucson Inc., KB HOME

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12 **IN AND FOR THE COUNTY OF PIMA**

13 MARSHA ANDERSON O'BRIEN,
14 Plaintiff,

Case No. C2008 5032

15 v.

**DEFENDANTS' MOTION TO COMPEL
16 PRODUCTION OF PRELIMINARY
17 EXPERT OPINION AFFIDAVIT
18 PURSUANT TO A.R.S. § 12-2602**

19 KB HOME TUCSON INC.; KB HOME
20 SALES-TUCSON INC.; KB HOME; JOHN
21 DOES 1-3 and ABC CORPORATIONS 1-3,

(Oral Argument Requested)

22 Defendants.

(Assigned to the Honorable Stephen
23 Villarreal)

24 Defendants KB HOME Tucson Inc., KB HOME Sales-Tucson Inc., and KB HOME
25 (hereinafter collectively "KB Home"), by and through undersigned counsel, hereby move this
26 Court for an order, pursuant to A.R.S. §12-2602(D), compelling Plaintiff to provide a
27 preliminary expert opinion affidavit to comply with the requirements of A.R.S. §12-2602(B).
28 Plaintiff has asserted, in her Complaint, a negligence claim against KB Home, a licensed
professional. KB Home has certified that expert opinion is necessary to prove the standard of
care or liability under A.R.S. §12-2602. This Motion is supported by the attached Memorandum
of Points and Authorities, the exhibits attached thereto, and the Court's file.

///

///

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. BACKGROUND**

3 Plaintiff filed her Complaint on July 21, 2008, in which Plaintiff asserted, as her sole
4 cause of action, a negligence claim against KB Home. In her Complaint, Plaintiff alleged she
5 slipped and fell while visiting the Pantano Overlook Project in Tucson, Arizona (hereinafter
6 "Project"), on January 15, 2007. Plaintiff alleges she visited the Project to shop for a new home
7 and to view a prospective home that was under construction. Plaintiff alleges while visiting the
8 Project she walked across an area marked with yellow construction tape outside of the
9 prospective home. Plaintiff alleges she slipped and fell onto rebar while crossing the taped off
10 area. Plaintiff reasserted her negligence claim and her alleged factual basis for the same in her
11 Initial Rule 26.1 Disclosure Statement dated September 23, 2008. *See Plaintiff's Initial*
12 *Disclosure Statement attached hereto as Exhibit "A"*. Along with the production of her Initial
13 Disclosure Statement, Plaintiff served her "Statement Regarding Expert Opinion Testimony,"
14 wherein Plaintiff stated, pursuant to A.R.S. § 12-2603, expert opinion is not necessary to prove
15 Defendant's negligence and breach of standard of care. *See Plaintiff's Statement Regarding*
16 *Expert Opinion Testimony attached hereto as Exhibit "B"*.

17 KB Home, a licensed professional, was developer of the Project. Arizona has enacted
18 specific statutory requirements that a claimant must meet in order to bring and maintain a cause
19 of action against a licensed professional for claims arising out of the professional's rendering of
20 professional services. See A.R.S. §§ 12-2601, et seq. Specifically, a claimant who brings a
21 claim against a licensed professional is required to produce an expert opinion affidavit at the
22 time of initial disclosures, detailing the basis of the claim, the acts or omissions that violated the
23 applicable standard of care resulting in liability, and the manner in which the acts or omissions
24 caused or contributed to the alleged damages. A.R.S. § 12-2602(B)(1)-(4). KB Home served its
25 certificate regarding testimony, pursuant to A.R.S. § 12-2602(A), stating that expert opinion
26 testimony will be necessary to prove the standard of care or liability of KB Home, as a licensed
27 professional. *See KB Home's Certificate Regarding Expert Testimony attached hereto as*
28 *Exhibit "C"*. Despite KB Home's demand for a preliminary expert opinion affidavit, Plaintiff

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1 has failed and refused to disclose the expert opinion testimony necessary to maintain its claims
2 against KB Home, or the identity of any expert who is claimed to be qualified to render such
3 opinions, thus requiring KB Home to file the instant motion to compel the same. Due to
4 Plaintiff's failure to comply with the express statutory requirements to maintain its claims
5 against KB Home as a licensed professional, as well as its failure to disclose any basis upon
6 which KB Home could be liable for negligence, KB Home requests this Court order Plaintiff to
7 produce a preliminary expert opinion affidavit, or dismiss Plaintiff's Amended Complaint
8 pursuant to A.R.S. § 12-2602 (D) – (F).

9 Plaintiff failed to file a certification as to whether or not expert testimony was necessary
10 to prove the claims alleged against KB Home pursuant A.R.S. § 12-2602. Instead, Plaintiff filed
11 a certification pursuant to A.R.S. § 12-2603 stating expert testimony was not necessary.
12 However, A.R.S. § 12-2603 pertains to claims brought against healthcare professionals. KB
13 Home is not a healthcare professional. Through subsequent communication with Plaintiff's
14 counsel regarding the issue presented in this Motion, Plaintiff's counsel advised counsel of KB
15 Home, undersigned, that Plaintiff did not believe A.R.S. § 12-2602 was applicable to Plaintiff's
16 claim and thus an affidavit was not necessary. Plaintiff's counsel advised counsel of KB Home
17 to file the instant motion. The parties have met and conferred on the issue presented in this
18 Motion and Plaintiff maintains its refusal to produce a preliminary expert opinion affidavit to
19 comply with A.R.S. § 12-2602. See Affidavit of Amy M. Wilkens, Esq., counsel for KB Home,
20 dated November 13, 2009.

21 **II. ARGUMENT**

22 **A. Plaintiff's Negligence Claim Against KB Home Is Subject to the Requirements**
23 **of A.R.S. § 12-2602.**

24 The relevant legal authority clearly establishes that Plaintiff's negligence claim is subject
25 to the requirements of A.R.S. § 12-2602, which provides in subsection (A) the following:

26 If a claim against a licensed professional is asserted in a civil action,
27 the claimant or the claimant's attorney shall certify in a written
28 statement that is filed and served with the claim whether or not
expert opinion testimony is necessary to prove the licensed
professional's standard of care or liability for the claim.

1 Pursuant to A.R.S. § 12-2601(1):

2 "Claim" means a legal cause of action...or an affirmative defense to
3 which all of the following apply:

- 4 (a) The claim is asserted against a licensed
5 professional in a complaint, answer, cross-
6 claim, counterclaim or third-party complaint.
7 (b) The claim is based on the licensed
8 professional's alleged breach of contract,
9 negligence, misconduct, errors or omissions in
10 rendering professional services.
11 (c) Expert testimony is necessary to prove the
12 licensed professional's standard of care or
13 liability for the claim.

14 A.R.S. § 12-2601(3) defines a licensed professional as a person or entity that is licensed
15 by the state of Arizona to practice a profession or occupation under title 20 or 32. KB Home
16 holds an Arizona Registrar of Contractors License (ROC # 143522) and thus is a licensed
17 professional as defined by A.R.S. § 12-2601(3). See also A.R.S. § 32-1101, et. seq. Plaintiff
18 has alleged a cause of action for negligence against KB Home.

19 Plaintiff alleged, in her Complaint, that she slipped and fell, suffering injuries, while
20 shopping for a new home at the Project. Plaintiff alleged she slipped and fell onto rebar while
21 following a KB Home employee across an area under construction and marked with yellow tape
22 while walking to the prospective home also under construction. Plaintiff alleges she sustained
23 various injuries as a result of "Defendant's negligence and breach of duty to Plaintiff." See
24 Plaintiff's Complaint at ¶¶ 4-9.

25 Plaintiffs' claims against KB Home are clearly based on KB Home's alleged negligence,
26 misconduct, errors or omissions in rendering the professional services it provided as a licensed
27 contractor. In order to prove its cause of action for negligence, Plaintiff will have to offer proof
28 of four elements: (1) a duty, (2) breach, (3) causation, and (4) damage. *Ontiveros v. Borak*, 136
Ariz. 500, 505, 667 P.2d 200, 205 (1983). In order to prove each of these elements, Plaintiff
must present testimony from an expert who is qualified to express an opinion regarding the
standard of care of a licensed contractor. The expert must establish what duty KB Home, as a
licensed contractor, owed to Plaintiff, how KB Home allegedly breached that duty, how the
alleged breach caused damage to Plaintiff, and the extent of the damage proximately caused by

1 the alleged breach. The claim alleged against KB Home in Plaintiff's Complaint is a "claim" as
2 defined by A.R.S. § 12-2601, and thus the requirements of A.R.S. § 12-2602 apply to Plaintiff's
3 claim against KB Home, and expert testimony is required to prove Plaintiff's claim. Plaintiff has
4 asserted a negligence cause of action against KB Home, as developer and licensed professional,
5 based on her allegations of her slipping and falling in an area of open construction at the Project.
6 Plaintiff is required to comply with A.R.S. § 12-2602 to provide an expert opinion affidavit
7 regarding the applicable standard of care and how the same was allegedly breached.

8 **B. Plaintiff Has Failed to Produce A Preliminary Expert Opinion Affidavit in**
9 **Compliance With A.R.S. § 12-2602.**

10 When expert testimony is necessary to prove a licensed professional's standard of care
11 and liability, a party is required to provide a preliminary expert opinion affidavit at the time of
12 initial disclosures. See A.R.S. § 12-2602(B). A.R.S. § 12-2601(2) defines an expert as a person
13 who is qualified to express an opinion regarding a licensed professional's standard of care of
14 liability for the claim. The legislature has detailed the minimum requirements which must be
15 included in the preliminary expert opinion affidavit:

- 16 1. The expert's qualifications to express an opinion on the licensed
17 professional's standard of care or liability for the claim.
- 18 2. The factual basis for each claim against a licensed professional.
- 19 3. The licensed professional's acts, errors or omissions that the
20 expert considers to be a violation of the applicable standard of care
21 resulting in liability.
- 22 4. The manner in which the licensed professional's acts, errors or
23 omissions caused or contributed to the damages or other relief
24 sought by the claimant.

25 See A.R.S. § 12-2602(B)(1)-(4). In other words, when a claim is brought against a licensed
26 professional, the plaintiff **must** provide expert opinion supporting all elements of the plaintiff's
27 claims against the professional at the onset of discovery. As a licensed professional, KB Home
28 is entitled this information, and without it, cannot adequately prepare its defenses.

To date, KB Home has not been provided with disclosure of what exactly Plaintiff in this
matter is alleging that KB Home did or did not do that fell below the applicable standard of care.

1 Plaintiff's Initial Rule 26.1 Disclosure Statement included numerous physicians and medical
2 personnel who were designated to potentially offer expert testimony, however, not a single
3 "expert" disclosed by Plaintiff is claimed to be qualified to render opinions regarding the
4 standard of care of KB Home as a licensed contractor. *See Plaintiff's Initial Disclosure*
5 *Statement attached hereto as Exhibit "A"*. This disclosure has not been supplemented to
6 include additional experts. KB Home has demanded that Plaintiff produce the required affidavit
7 in compliance with the statute, but Plaintiff has refused. *See correspondence between counsel*
8 *attached to the Affidavit of Amy M. Wilkens, Esq., counsel for KB Home, dated November 13,*
9 *2009, as Exhibit "A" filed concurrently herewith.*

10 As stated, Plaintiff has only served a certification that expert testimony was not required
11 pursuant to A.R.S. § 12-2603 which, as shown above, is inapplicable to this matter as KB Home
12 is not a healthcare provider. Plaintiff has not filed or served a certified written statement as to
13 whether expert testimony is necessary pursuant to A.R.S. § 12-2602. Plaintiff's counsel has only
14 informally informed KB Home's counsel, undersigned, that Plaintiff does not believe that
15 A.R.S. § 12-2602 is applicable in response to KB Home's certification and request that Plaintiff
16 comply with the same. Thus, Plaintiff has failed and now refused to comply with the
17 requirements of A.R.S. § 12-2602.

18 **III. CONCLUSION AND REQUESTED RELIEF**

19 Plaintiff has a negligence claim against KB Home, a licensed professional. Plaintiff's
20 allegations against KB Home are clearly based on KB Home's role as a licensed contractor as
21 defined by statute, and thus, Plaintiff **must** provide a preliminary expert opinion affidavit
22 meeting the requirements set forth in A.R.S. § 12-2602(B). Thus, pursuant to A.R.S. § 12-
23 2602(E), KB Home requests this Court order Plaintiff to produce a compliant preliminary expert
24 opinion affidavit. Further, A.R.S. § 12-2602(E) requires that "the court shall stay all other
25 proceedings and applicable time periods concerning the claim pending the court's ruling on the
26 motion to compel compliance with this section." Thus, concurrent with this Motion, KB Home
27 is submitting a form of order staying this matter pursuant to A.R.S. § 12-2602(E).

1 As detailed above, expert opinion testimony is necessary to establish each and every
2 element of Plaintiff's negligence claim against KB Home. Plaintiff has failed to disclose this
3 information, and thus, has no basis upon which to maintain their negligence claim against KB
4 Home. The Legislature has mandated the Courts dismiss a claim against a licensed professional
5 if the claimant fails to provide a preliminary expert opinion affidavit when it is required.¹ Due to
6 Plaintiff's failure to comply with the express statutory requirements to maintain its claims
7 against KB Home as a licensed professional, as well as its failure to disclose any basis upon
8 which KB Home could be liable for negligence, KB Home alternatively requests dismissal of
9 Plaintiff's Amended Complaint.

10 DATED this 13th day of November, 2009.

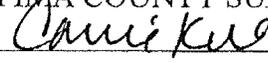
11
12 LORBER, GREENFIELD & POLITO, LLP

13
14 By: 
15 Holly Davies, Esq.
16 Amy Wilkens, Esq.
17 8222 South 48th Street
18 Attorneys for Defendants KB HOME Tucson

19 Original of the foregoing filed this
20 13th day of November, 2009, with:

21 The Clerk of Court
22 PIMA COUNTY SUPERIOR COURT
23 110 West Congress
24 Tucson, AZ 85701

25 Copy of the foregoing hand-delivered
26 this 13th day of November 2009, to:

27 The Honorable Stephen Villarreal
28 PIMA COUNTY SUPERIOR COURT


¹ "The court, on its own motion or the motion of the licensed professional, shall dismiss the claim against the licensed professional without prejudice if the claimant fails to file and serve a preliminary expert opinion affidavit after the claimant or the claimant's attorney has certified that an affidavit is necessary or the court has ordered the claimant to file and serve an affidavit." A.R.S. § 12-2602(F)(emphasis added).

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1 101 West Jefferson Street, ECB 611
Tucson, AZ

2
3 Copy of the foregoing mailed this
13th day of November, 2009, to:

4 Michael Drake, Esq.
3085 West Ina Road, Suite 111
5 Tucson, AZ 85741
Attorneys for Plaintiff

6
7 Chmi Keli

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EXHIBIT A

1 MICHAEL DRAKE
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4 PCC No: 15168

5 Attorney for Plaintiff

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

7 IN AND FOR THE COUNTY OF PIMA

8 MARSHA ANDERSON O'BRIEN,)
9 Plaintiff,)

10 v.)

NO. C20085032

11 KB HOME TUCSON, INC.; KB HOME)
12 SALES - TUCSON, INC.; KB HOME, INC.)
13 JOHN DOES 1-3 and JANE DOES 1-3;)
ABC CORPORATIONS 1-3.)

PLAINTIFF'S INITIAL
DISCLOSURE STATEMENT

14 Defendants.)

Assigned to Judge Stephen Villarreal

15 Plaintiff, through undersigned counsel, pursuant to Rule 26.1(b)(1), Arizona Rules of
16 Civil Procedure, discloses the following information:

17 1. Factual basis for each claim:

18 On Monday, January 15 2007, Plaintiff Marsha Anderson O'Brien and her
19 daughter, Robin Anderson, went to the KB Home construction site at Pantano Overlook in
20 Tucson to shop for a new home. They were led by salesman "Chad." While approaching a
21 home, Chad cut the corner from the street pavement to the home's driveway. Plaintiff
22 followed. She slipped on dirt, gravel, debris on the sloped curb and fell onto a re-bar.

23 2. The legal theory upon which each claim is based:

24 a) Negligence
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1 3. Names, addresses and telephone numbers of any witnesses whom the
2 Plaintiff expects to call at trial with designation of the subject matters about which
3 each witness might be called to testify:

4 a) Plaintiff Marsha Anderson O'Brien, c/o Law Office of Michael Drake, 3085
5 W. Ina Road, Suite 111, Tucson, Arizona 85741 will testify about the facts surrounding the
6 fall, her injuries, and damages.

7 b) Plaintiff's daughter Robin Anderson, P. P. Box 43354, Tucson, Arizona
8 85741 will testify about the facts surrounding Plaintiff's fall, her injuries, and progression of
9 recovery.

10 c) Defendant KB Home sales agent Chad _____ will testify about facts
11 and circumstances surrounding Plaintiff's fall.

12 d) Southwest Ambulance EMT driver Ryan Starbuck will testify about finding
13 Plaintiff at scene, her injuries, and transport to Tucson Medical Center.

14 e) Tucson Medical Center doctors and personnel will testify about Plaintiff's
15 injuries, diagnosis, treatment, and prognosis during her five-day hospital admission.

16 f) Debra Kroack, M.D., 1500 N. Wilmot Road, Tucson, Arizona will testify
17 about Plaintiff's injuries, diagnosis, treatment, and prognosis.

18 g) Robert Aaronson, M.D., Pulmonary Associates of Southern Arizona, 1951
19 N. Wilmot Drive, Bldg. 4, Tucson, Arizona will testify about Plaintiff's injuries, diagnosis,
20 treatment, and prognosis.

21 4. Names and addresses of all persons whom the Plaintiff believes may
22 have knowledge relevant to the events, transactions, or occurrences that give rise to
23 the action, and the nature of the knowledge or information each such individual is
24 believed to possess:

25 a) All those persons listed in No. 3 above.

26 5. Names and addresses of all persons who have given statements,
27 whether written or recorded, signed or unsigned, and the custodian of the copies of
28 the statements:

Other than what may be stated in medical records, Plaintiff is aware of no
statements.

1 6. Names and addresses of each person whom Plaintiff expects to call as
2 an expert witness at trial, the subject matter on which the expert is expected to testify,
3 the substance of the facts and opinions to which the expert is expected to testify, a
4 summary of the ground for each opinion, the qualifications of the witness, and the
5 name and address of the custodian of copies of any reports prepared by the expert:

6 See experts listed in No. 3d through 3g.

7 7. A computation and the measure of damage alleged by the Plaintiff and
8 the documents or testimony on which computation and measure are based, and the
9 names, addresses and the telephone numbers of all damage witnesses:

- 10 a) Past medical expense – approximately \$14,272.74 (incomplete)
- 11 b) Future medical expense – undetermined
- 12 c) Pain and suffering – reasonable
- 13 d) Past lost earnings – approximately \$30,000.00; will supplement
- 14 e) Future lost earnings – none

15 8. The existence, location, custodian, and general description of any
16 tangible evidence or relevant documents that the Plaintiff plans to use at trial and
17 relevant insurance agreements:

- 18 a) Documents produced by Defendant
- 19 b) Medical records from:
- 20 1. Southwest Ambulance 1/15/07 (see attached records)
- 21 2. Tucson Medical Center 1/15/06 – 1/19/07 (see attached records)
- 22 3. Debra Kroack, M.D. 1/30/08 (see attached records)
- 23 4. Robert Aaronson, M.D., Pulmonary Associates of Southern
24 Arizona 1/26/07 and 2/19/07 (see attached records)
- 25 c) Medical bills (\$14,272.74); see attached summary and bills)
- 26 d) Photos of scene and of fall (see attached photos)
- 27 e) Photos of Plaintiff in hospital (see attached photos)
- 28 f) KB Home Pantano Overlook Site Plan (see copy attached)
- g) X-rays and other diagnostic tests
- h) Pictures or models of human anatomy for demonstrative purposes
- i) Statement of witnesses and exhibits
- j) Plaintiff's tax returns
- k) Depositions and exhibits to depositions

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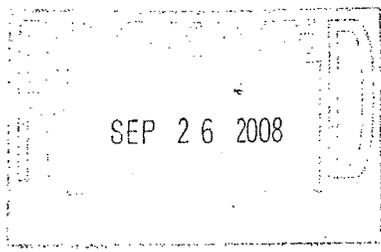
Original of the foregoing mailed this 23rd day of
September, 2008, to:

Holly Davies, Esq.
Amy Wilkens, Esq.
Lorber, Greenfield & Polito, LLP
8222 S. 48th Street, Suite 230
Phoenix, AZ 85044
Attorneys for Defendant

EXHIBIT B

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MICHAEL DRAKE
Attorney at Law
3085 W. Ina Road, Suite 111
Tucson, AZ 85741
(520) 624-2488



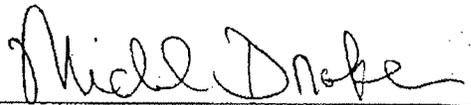
PCC No: 15168
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

MARSHA ANDERSON O'BRIEN,)	
)	
Plaintiff,)	
v.	)	NO. C20085032
)	
KB HOME TUCSON, INC.; KB HOME	)	STATEMENT REGARDING EXPERT
SALES - TUCSON, INC.; KB HOME, INC.;	)	OPINION TESTIMONY
JOHN DOES 1-3 and JANE DOES 1-3;)	
ABC CORPORATIONS 1-3,)	
)	
Defendants.	)	Assigned to Judge Stephen Villarreal

Pursuant to A.R.S. §12-2603, Plaintiff certify that expert opinion is not necessary to prove Defendant's negligence and breach of standard of care.

Dated this 23rd day of September, 2008.



Michael Drake
Attorney for Plaintiff

A copy of the foregoing was mailed this 23rd day of September, 2008, to:

Holly Davies, Esq.
Amy Wilkens, Esq.
Lorber, Greenfield & Polito, LLP
8222 S. 48th Street, Suite 230
Phoenix, AZ 85044
Attorneys for Defendants

EXHIBIT C

COPY
SEP - 2 2009
PATRICIA A. NOLANO
CLERK SUPERIOR COURT

1 LORBER, GREENFIELD & POLITO, LLP
Holly Davies, Esq. [S.B. #018308]
2 Amy Wilkens, Esq. [S.B. #025171]
8222 South 48th Street, Suite 230
3 Phoenix, Arizona 85044
TEL: (602) 437-4177 / FAX: (602) 437-4180
4 hdavies@lorberlaw.com
awilkens@lorberlaw.com

5 Attorneys for Defendants KB HOME Tucson Inc., KB HOME
6 Sales-Tucson Inc., KB HOME

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF PIMA
9

10 MARSHA ANDERSON O'BRIEN,
11 Plaintiff,

Case No. C2008 5032

12 v.

**DEFENDANT'S CERTIFICATE
REGARDING EXPERT TESTIMONY**

13 KB HOME TUCSON INC.; KB HOME
14 SALES-TUCSON INC.; KB HOME; JOHN
DOES 1-3 and ABC CORPORATIONS 1-3,
15 Defendants.

(Assigned to the Honorable Stephen
Villarreal)

16
17 Defendants, through counsel undersigned, hereby affirm, pursuant to A.R.S. § 12-
18 2602(A), that expert opinion testimony will be necessary to prove the standard of care or
19 liability for the licensed professional(s) listed as Defendants(s) in Plaintiff's Complaint.

20 DATED this 2nd day of September, 2009.

21
22 LORBER, GREENFIELD & POLITO, LLP

23
24
25 By: Amy Wilkens
Holly Davies, Esq.
Amy Wilkens, Esq.
26 8222 South 48th Street
Attorneys for Defendants
27
28

LORBER, GREENFIELD & POLITO, LLP
8222 South 48th Street, Suite 230, Phoenix, Arizona, 85044
Telephone (602) 437-4177 / Facsimile (602) 437-4180

1 Original of the foregoing filed this
2 2nd day of September 2009, with:

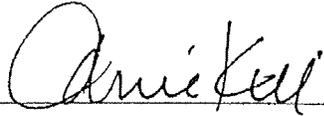
3 The Clerk of Court
4 PIMA COUNTY SUPERIOR COURT
5 110 West Congress
6 Tucson, AZ 85701

7 Copy of the foregoing hand-delivered
8 this 2nd day of September, 2009, to:

9 The Honorable Stephen Villarreal
10 PIMA COUNTY SUPERIOR COURT
11 101 West Jefferson Street, ECB 611
12 Tucson, AZ

13 Copy of the foregoing mailed this
14 2nd day of September, 2009, to:

15 Michael Drake, Esq.
16 3085 West Ina Road, Suite 111
17 Tucson, AZ 85741
18 *Attorneys for Plaintiff*

19 

LORBER, GREENFIELD & POLITO, LLP
8222 South 48th Street, Suite 230, Phoenix, Arizona 85044
Telephone (602) 437-4177 / Facsimile (602) 437-4180

**APPENDIX
EXHIBIT 3**

SLM

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

2009 DEC -2 PM 4:40

BY: J. WHITNELL, DEPUTY

MICHAEL DRAKE
Attorney at Law
3085 W. Ina Road, Suite 111
Tucson, AZ 85741
(520) 624-2488
State Bar No: 003542
Michael.Drake@azbar.org

Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

MARSHA ANDERSON O'BRIEN,)	
)	
Plaintiff,)	
v.	)	NO. C20085032
)	
KB HOME TUCSON, INC.; KB HOME	)	PLAINTIFF'S RESPONSE TO
SALES - TUCSON, INC.; KB HOME, INC.;	)	DEFENDANT'S MOTION TO COMPEL
JOHN DOES 1-3 and JANE DOES 1-3;	)	PRODUCTION OF PRELIMINARY
ABC CORPORATIONS 1-3,	)	EXPERT OPINION AFFIDAVIT
	)	PURSUANT TO A.R.S. §12-2602
Defendants.)	
	)	Assigned to Judge Stephen Villarreal

Plaintiff opposes Defendant's Motion to Compel because A.R.S. §12-2602 does not require an affidavit of an expert in this case.

Summary of Facts

This is a claim for damages for bodily injury. On January 15, 2007 Plaintiff went to Defendant's new home development Pantano Overlook in Tucson to look at new homes. She met a salesman named Chad. They walked down a paved street to look at a particular home. The salesman was leading the way.

The sidewalk at the subject home was not finished. Wood forms to lay concrete were held in place by rebars sticking up two to three feet. This area was cordoned off by yellow tape which had fallen to the ground. Upon arrival at the home, the salesman cut the corner from the paved street to the driveway of the home. He stepped over the yellow tape and walked through the area of the unfinished sidewalk. Plaintiff followed. When Plaintiff stepped

1 up on the sloped curb to follow the salesman, her foot slipped on loose gravel. She fell and
2 her chest struck a rebar. She suffered sever injury.

3
4 Legislative History of §12-2602

5 The original version of §12-2602 was enacted in 1995. In Hunter Contracting
6 Company v. Superior Court, 190 Ariz. 318, 947 P.2d 892 (Div. 1, 1997) the court held the
7 statute unconstitutional because it limited "the right of action to recover damages for injuries"
8 in violation of ARIZ. CONST. Art. XVIII, Section 6. The Hunter court held the statute
9 unconstitutional because it 1) required plaintiff to hire an expert when none would otherwise
10 be required 2) restricted plaintiff's choice of experts 3) required an affidavit be filed with the
11 complaint before any discovery was done and 4) required mandatory dismissal if no affidavit
12 was filed with the complaint without giving plaintiff opportunity to secure an affidavit once the
13 court determined one was necessary.

14 The statute was then amended to its present form in 1999. Its constitutionality has
15 been upheld. Bertleson v. Sack Tierney, PA, 204 Ariz. 124, 60 P.3d 703 (Div. 1 2003).

16
17 Discussion

18 A.R.S. §12-2602 applies only to "licensed professionals." Plaintiff concedes that
19 Defendant is a "licensed professional" within the meaning of the statute.

20 Defendant, however, argues that the affidavit is required for the sole reason that the
21 Defendant is a "licensed professional." This is not correct. Plaintiff contends the affidavit is
22 necessary only if two conditions are met:

- 23 1. Plaintiff's claim must arise from the activity for which Defendant is required to be
24 licensed in the first place. Plaintiff's Complaint does not allege faulty design or
25 construction of a home. She does not allege breach of any warranty or problem
26 arising from her purchase of a home. Were she doing so, an affidavit would be
27 required. If Plaintiff had been injured when she sat in a faulty chair in the Defendant's
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sales office, could Defendant seriously contend an affidavit is required? The claim must relate to the activity for which the license is issued.

2. An affidavit is not required if the claim would not otherwise require expert opinion.

This is a "slip and fall" case. While expert opinion is permitted in such cases, it is not required. The fact that Plaintiff was required to hire an expert even when none would otherwise be required was one of the bases upon which the Hunter court found the original version of the statute unconstitutional. The court held that the assumption that expert testimony is an essential, indisputable component of any professional negligence claim is mistaken. It said:

Expert testimony is necessary to prove professional negligence when "the question to be determined is strictly within the special and technical knowledge of the profession and not within knowledge of the average layman." (Citations omitted) But expert testimony is unnecessary to prove professional negligence "when the act or omission comes with the realm of common knowledge." (Citations omitted)

While expert opinion is permitted in slip and fall cases, it is not required. That being the case, an affidavit is not required simply because Defendant is a "licensed professional."

The facts in Hunter are similar to this case. In Hunter the plaintiff motorist struck a barricade lying on its side in the traveled roadway near a construction zone. The plaintiff filed a negligence claim against the contractor for failure to maintain a safe construction site. The defendant Hunter filed a motion to dismiss because there was no accompanying expert affidavit as required by the version of §12-2602 in effect at that time. As noted earlier, one of the bases on which the court found the statute unconstitutional was that it required an expert affidavit in circumstances where none would otherwise be required. In other words, the court concluded an expert would not have been necessary in the Hunter case, even though the Defendant was a "licensed professional."

For the foregoing reasons Plaintiff requests the Court deny Defendant's Motion to Compel.

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Dated this 1st day of December, 2009.


Michael Drake
Attorney for Plaintiff

A copy of the foregoing was hand-delivered this
2 day of December, 2009, to:

Honorable Stephen C. Villarreal
Judge, Division 4
Pima County Superior Court
110 W. Congress Street
Tucson, AZ 85701

A copy of the foregoing was mailed this
2 day of December, 2009, to:

Holly Davies, Esq.
Amy Wilkens, Esq.
Lorber, Greenfield & Polito, LLP
8222 S. 48th Street, Suite 230
Phoenix, AZ 85044
Attorneys for Defendants

**APPENDIX
EXHIBIT 4**

22

FILED

09 DEC 11 PM 8:41

PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

BY: Michael Muske
DEPUTY
Michael Muske

1 LORBER, GREENFIELD & POLITO, LLP
Holly Davies, Esq. [S.B. #018308]
2 Amy Wilkens, Esq. [S.B. #025171]
8222 South 48th Street, Suite 230
3 Phoenix, Arizona 85044
TEL: (602) 437-4177 / FAX: (602) 437-4180
4 hdavies@lorberlaw.com
awilkens@lorberlaw.com

5 Attorneys for Defendants KB HOME Tucson Inc., KB HOME
6 Sales-Tucson Inc., KB HOME

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF PIMA

10 MARSHA ANDERSON O'BRIEN,
11 Plaintiff,

Case No. C2008 5032

12 v.

**KB HOME'S REPLY IN SUPPORT OF
ITS MOTION TO COMPEL
PRODUCTION OF PRELIMINARY
EXPERT OPINION AFFIDAVIT
PURSUANT TO A.R.S. § 12-2602**

13 KB HOME TUCSON INC.; KB HOME
14 SALES-TUCSON INC.; KB HOME; JOHN
DOES 1-3 and ABC CORPORATIONS 1-3,
15 Defendants.

(Assigned to the Honorable Stephen
Villarreal)

17 Defendants KB HOME Tucson Inc., KB HOME Sales-Tucson Inc., and KB HOME
18 (hereinafter collectively "KB Home"), by and through undersigned counsel, hereby reply to
19 Plaintiff Marsha Anderson O'Brien's (hereinafter "Plaintiff") Response to KB Home's Motion
20 to Compel Production of Preliminary Affidavit Pursuant to A.R.S. § 12-2602. This Reply is
21 supported by the attached Memorandum of Points and Authorities, KB Home's Motion to
22 Compel Production of Preliminary Affidavit (hereinafter "Motion"), exhibits thereto, and the
23 Court's file.

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 The purpose of the requirements set forth in A.R.S. § 12-2602 is to protect licensed
26 professionals from frivolous lawsuits and to encourage plaintiffs, when filing claims against
27 such professionals, to make individualized and informed determinations when naming
28 defendants. *Bertleson v. Sacks Tierney, P.A.*, 204 Ariz. 124, 389 Ariz. Adv. Rep. 12, 60 P.3d

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1 703, (Ct. App. 2002). This is achieved by requiring a Plaintiff suing a licensed professional to
2 set forth with specificity and by expert affidavit, (1) the factual basis of each claim against the
3 licensed professional, (2) the licensed professional's acts, errors, or omissions that the expert
4 considered to be in violation of the applicable standard of care resulting in liability, and (3) the
5 manner in which the licensed professional's acts errors or omissions caused or contributed to the
6 damages or other relief sought by the claimant. A.R.S. § 12-2602(B).

7 In her Response, Plaintiff argues the requirements set forth in A.R.S. § 12-2602, above,
8 do not apply to her negligence claim, which Plaintiff characterizes simply as a "slip and fall"
9 case. In making this argument, Plaintiff relies primarily on *Hunter Contracting Co. v. Superior*
10 *Ct.*, 190 Ariz. 318, 947 P.2d 892 (App. 1997), which interpreted the previous version of the
11 statute. Plaintiff argues expert opinion is permitted in slip and fall cases, but not required. This
12 is incorrect and not supported by the relevant legal authority. Whether expert opinion is
13 required depends on the facts of the case, not mere characterization as "slip and fall" for
14 instance. The current version of A.R.S. § 12-2602(E), provides when a dispute arises as to
15 whether expert testimony is required, the court will make the determination. See also *Bertleson*,
16 *supra*, holding the current version of the statute as constitutional.

17 The facts in *Hunter* are distinguishable from those set forth by Plaintiff in the instant
18 matter. In *Hunter*, an unlit barricade from a nearby construction site ended up on its side amid a
19 well traveled public roadway. While traveling on the roadway a motorist struck the barricade
20 and was injured as a result. The motorist sued the construction company responsible for the
21 barricade under a negligence theory. The *Hunter* court found expert testimony is unnecessary to
22 prove professional negligence when the act or omission comes within the realm of common
23 knowledge. The *Hunter* court cited other authority providing, when the facts speak for
24 themselves, a plaintiff may forego expert testimony and prove medical negligence by *res ipsa*
25 *loquitur*. Citing to *Fair v. Doctros Hosp.*, 18 Ariz.App. 264, 267-68, 501 P.2d 440, 443-44
26 (1972). The reasoning here is that, as in *Hunter*, it is easy for a lay person to consider that an
27 unlit barricade misplaced amid a public roadway would present a negligent act/omission.
28 However, this reasoning cannot be extended to the instant matter.

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1 Plaintiff has not alleged any facts that “speak for themselves”, that would infer
2 negligence. Plaintiff has merely alleged she slipped and fell at an area of open construction on
3 the Pantano Overlook Development. Plaintiff does not go any further. Plaintiff does not even
4 detail in any way its negligence claim in her Initial Disclosure Statement. *See Plaintiff’s Initial*
5 *Disclosure Statement attached to hereto as Exhibit “A”*. Instead, Plaintiff alleges the same
6 basic facts set forth in her Complaint and alleges generically a negligence claim, but fails to
7 state what the applicable duty or standard of care was allegedly owed. Plaintiff has produced
8 nothing in this matter to expand or support in any way its claim of negligence or the duty or
9 standard of care allegedly owed, and the same cannot be inferred. These are the very
10 circumstances A.R.S. § 12-2602 was designed to avoid. If Plaintiff had complied with A.R.S. §
11 12-2602 requirements, KB Home would be on notice of the claims against it, including what
12 duty Plaintiff alleges KB Home owed, and thus could proceed with defending against the same.
13 However, as it stands Plaintiff’s “negligence” claim is too vague and potentially frivolous for
14 KB Home to be able to substantively respond to.

15 Plaintiff, in her Response, misstates KB Home’s position, claiming KB Home argues an
16 affidavit is required solely because KB Home is a licensed professional. However, this is
17 incorrect. By Plaintiff’s own argument, an affidavit is required where Plaintiff’s claims arise
18 from the activity for which Defendant is required to be licensed. Based on the limited
19 information Plaintiff has produced to date it appears Plaintiff is calling into question the
20 condition of the area of construction where she allegedly slipped and fell. Any purported
21 construction or construction safety issues raised by Plaintiff would fall under the purview of KB
22 Home’s status as a licensed professional and thus require Plaintiff to establish its claims per
23 A.R.S. § 12-2602. Plaintiff previously submitted requests for production to KB Home
24 requesting any instructions, guidelines, policy manuals or other material covering the
25 maintenance of the subject area and regarding promoting and maintenance safety of the subject
26 premises and regarding how, when, and in what manner homes under construction would be
27 shown to prospective buyers. *See Plaintiff’s Requests for Production attached hereto as Exhibit*
28 *“B”*. Plaintiff also submitted non-uniform interrogatories to KB Home requesting the identity

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Telephone (602) 437-4177 / Facsimile (602) 437-4180

1 of what employee was responsible for maintaining the grounds at the scene of the incident on
2 the date of the incident and the identity of any people who supervised or performed repairs or
3 alterations to the subject curb, walkway area after the incident. *See Plaintiff's Interrogatories*
4 *attached hereto as Exhibit "C"*. Any information or documents regarding maintenance, safety
5 and general condition of an area under construction, as Plaintiff clearly sought with her
6 discovery requests, deal directly with the "activity" for which KB Home is licensed, namely
7 construction activities. Again, if Plaintiff is putting at issue any construction or construction
8 safety standards or intends to in any way rely on the same, as may be inferred from Plaintiff's
9 basic factual assertions and by Plaintiff's discovery requests, Plaintiff must comply with A.R.S.
10 § 12-2602. Plaintiff has failed to do so.

11 **I. CONCLUSION**

12 Plaintiff is suing a licensed professional, a point which she concedes. Plaintiff has failed
13 to substantiate her claim in any way. Plaintiff cannot show that her negligence claim "speaks
14 for itself" or that the same is "within the realm of common knowledge". Plaintiff seeks to rely
15 on construction standards and construction safety standards. Expert opinion testimony is
16 necessary to establish each and every element of Plaintiff's negligence claim against KB Home.
17 Plaintiff has failed to disclose this information, and thus, has no basis upon which to maintain
18 their negligence claim against KB Home. For the reasons set forth herein and in KB Home's
19 Motion, KB Home respectfully requests this Court order Plaintiff to produce a compliant
20 preliminary expert opinion affidavit and otherwise comply with the requirements of A.R.S. § 12-
21 2602 or alternatively requests dismissal of Plaintiff's Amended Complaint, due to Plaintiff's
22 failure to comply with the express statutory requirements to maintain its claims against KB

23 ///

25 ///

27 ///

1 Home as a licensed professional, as well as its failure to disclose any basis upon which KB
2 Home could be liable for negligence.

3 DATED this 11th day of December, 2009.

4 LORBER, GREENFIELD & POLITO, LLP

5
6 By: 
7 Holly Davies, Esq.
8 Amy Wilkens, Esq.
9 8222 South 48th Street
10 Attorneys for Defendants KB HOME Tucson

11 Original of the foregoing filed this
12 11th day of December, 2009, with:

13 The Clerk of Court
14 PIMA COUNTY SUPERIOR COURT
15 110 West Congress
16 Tucson, AZ 85701

17 Copy of the foregoing hand-delivered
18 this 11th day of December, 2009, to:

19 The Honorable Stephen Villarreal
20 PIMA COUNTY SUPERIOR COURT
21 101 West Jefferson Street, ECB 611
22 Tucson, AZ

23 Copy of the foregoing mailed this
24 11th day of December, 2009, to:

25 Michael Drake, Esq.
26 3085 West Ina Road, Suite 111
27 Tucson, AZ 85741
28 *Attorneys for Plaintiff*



LORBER, GREENFIELD & POLITO, LLP
8222 South 48th Street, Suite 230, Phoenix, Arizona 85044
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Exhibit A

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MICHAEL DRAKE
Attorney at Law
3085 W. Ina Road, Suite 111
Tucson, AZ 85741
(520) 624-2488

JAN 26 2007

PCC No: 15168
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

MARSHA ANDERSON O'BRIEN,)	
)	
Plaintiff,)	
)	
v.	)	NO. C20085032
)	
KB HOME TUCSON, INC.; KB HOME	)	PLAINTIFF'S INITIAL
SALES - TUCSON, INC.; KB HOME, INC.	)	DISCLOSURE STATEMENT
JOHN DOES 1-3 and JANE DOES 1-3;)	
ABC CORPORATIONS 1-3.)	
	)	Assigned to Judge Stephen Villarreal
Defendants.)	

Plaintiff, through undersigned counsel, pursuant to Rule 26.1(b)(1), Arizona Rules of Civil Procedure, discloses the following information:

1. Factual basis for each claim:

On Monday, January 15 2007, Plaintiff Marsha Anderson O'Brien and her daughter, Robin Anderson, went to the KB Home construction site at Pantano Overlook in Tucson to shop for a new home. They were led by salesman "Chad." While approaching a home, Chad cut the corner from the street pavement to the home's driveway. Plaintiff followed. She slipped on dirt, gravel, debris on the sloped curb and fell onto a re-bar.

2. The legal theory upon which each claim is based:

a) Negligence

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3. Names, addresses and telephone numbers of any witnesses whom the Plaintiff expects to call at trial with designation of the subject matters about which each witness might be called to testify:

a) Plaintiff Marsha Anderson O'Brien, c/o Law Office of Michael Drake, 3085 W. Ina Road, Suite 111, Tucson, Arizona 85741 will testify about the facts surrounding the fall, her injuries, and damages.

b) Plaintiff's daughter Robin Anderson, P. P. Box 43354, Tucson, Arizona 85741 will testify about the facts surrounding Plaintiff's fall, her injuries, and progression of recovery.

c) Defendant KB Home sales agent Chad _____ will testify about facts and circumstances surrounding Plaintiff's fall.

d) Southwest Ambulance EMT driver Ryan Starbuck will testify about finding Plaintiff at scene, her injuries, and transport to Tucson Medical Center.

e) Tucson Medical Center doctors and personnel will testify about Plaintiff's injuries, diagnosis, treatment, and prognosis during her five-day hospital admission.

f) Debra Kroack, M.D., 1500 N. Wilmot Road, Tucson, Arizona will testify about Plaintiff's injuries, diagnosis, treatment, and prognosis.

g) Robert Aaronson, M.D., Pulmonary Associates of Southern Arizona, 1951 N. Wilmot Drive, Bldg. 4, Tucson, Arizona will testify about Plaintiff's injuries, diagnosis, treatment, and prognosis.

4. Names and addresses of all persons whom the Plaintiff believes may have knowledge relevant to the events, transactions, or occurrences that give rise to the action, and the nature of the knowledge or information each such individual is believed to possess:

a) All those persons listed in No. 3 above.

5. Names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of the statements:

Other than what may be stated in medical records, Plaintiff is aware of no statements.

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6. Names and addresses of each person whom Plaintiff expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the ground for each opinion, the qualifications of the witness, and the name and address of the custodian of copies of any reports prepared by the expert:

See experts listed in No. 3d through 3g.

7. A computation and the measure of damage alleged by the Plaintiff and the documents or testimony on which computation and measure are based, and the names, addresses and the telephone numbers of all damage witnesses:

- a) Past medical expense – approximately \$14,272.74 (incomplete)
- b) Future medical expense – undetermined
- c) Pain and suffering – reasonable
- d) Past lost earnings – approximately \$30,000.00; will supplement
- e) Future lost earnings – none

8. The existence, location, custodian, and general description of any tangible evidence or relevant documents that the Plaintiff plans to use at trial and relevant insurance agreements:

- a) Documents produced by Defendant
- b) Medical records from:
 - 1. Southwest Ambulance 1/15/07 (see attached records)
 - 2. Tucson Medical Center 1/15/06 – 1/19/07 (see attached records)
 - 3. Debra Kroack, M.D. 1/30/08 (see attached records)
 - 4. Robert Aaronson, M.D., Pulmonary Associates of Southern Arizona 1/26/07 and 2/19/07 (see attached records)
- c) Medical bills (\$14,272.74); see attached summary and bills)
- d) Photos of scene and of fall (see attached photos)
- e) Photos of Plaintiff in hospital (see attached photos)
- f) KB Home Pantano Overlook Site Plan (see copy attached)
- g) X-rays and other diagnostic tests
- h) Pictures or models of human anatomy for demonstrative purposes
- i) Statement of witnesses and exhibits
- j) Plaintiff's tax returns
- k) Depositions and exhibits to depositions

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Original of the foregoing mailed this 23rd day of
September, 2008, to:

Holly Davies, Esq.
Amy Wilkens, Esq.
Lorber, Greenfield & Polito, LLP
8222 S. 48th Street, Suite 230
Phoenix, AZ 85044
Attorneys for Defendant

Exhibit B

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MICHAEL DRAKE
Attorney at Law
3085 W. Ina Road, Suite 111
Tucson, AZ 85741
(520) 624-2488

SEP - 4 2008

PCC No: 15168
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

MARSHA ANDERSON O'BRIEN,)	
)	
Plaintiff,)	
v.	)	NO. C20085032
)	
KB HOME TUCSON, INC.; KB HOME	)	REQUESTS FOR PRODUCTION
SALES - TUCSON, INC.; KB HOME, INC.;	)	TO DEFENDANTS
JOHN DOES 1-3 and JANE DOES 1-3;)	
ABC CORPORATIONS 1-3,)	
)	
Defendants.	)	Assigned to Judge Stephen Villarreal

TO: Defendants and counsel of record

Pursuant to Rule 34, Arizona Rules of Civil Procedure, you are requested to produce for the inspection and copying at the office of Michael Drake, 3085 W. Ina Road, Suite 111, Tucson, Arizona 85701 within forty days, the following:

1. Any investigative or incident report prepared regarding this incident.
2. Any written or recorded statements of anyone regarding this incident.
3. Any instructions, guidelines, policy manuals, or other material covering maintenance of the subject area.
4. Any instructions, guidelines, policy manuals, or other material regarding promoting and maintaining safety of the subject premises.
5. Any instructions, guidelines, policy manuals, or other material regarding how, when, and in what manner homes under construction would be shown to prospective buyers.

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Dated this 3 day of September, 2008.



Michael Drake
Attorney for Plaintiff
3085 W. Ina Road, Suite 111
Tucson, AZ 85741

An original and one copy of the foregoing was mailed this 3 day of September, 2008, to:

Holly Davies, Esq.
Amy Wilkens, Esq.
Lorber, Greenfield & Polito, LLP
8222 S. 48th Street, Suite 230
Phoenix, AZ 85044
Attorneys for Defendants

Exhibit C

1 MICHAEL DRAKE
2 Attorney at Law
3 3085 W. Ina Road, Suite 111
4 Tucson, AZ 85741
5 (520) 624-2488

SEP - 4 2008

6 PCC No: 15168
7 Attorney for Plaintiff

8 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

9 IN AND FOR THE COUNTY OF PIMA

10 MARSHA ANDERSON O'BRIEN,)

11 Plaintiff,)

12 v.)

NO. C20085032

13 KB HOME TUCSON, INC.; KB HOME)
14 SALES - TUCSON, INC.; KB HOME, INC.;)
15 JOHN DOES 1-3 and JANE DOES 1-3;)
16 ABC CORPORATIONS 1-3,)

UNIFORM AND NON-UNIFORM
INTERROGATORIES TO DEFENDANTS

17 Defendants.)

Assigned to Judge Stephen Villarreal

18 TO: Defendant and counsel of record

19 Pursuant to Rule 33, Arizona Rules of Civil Procedure, Plain-tiff requests each of the
20 Defendants above named to answer separately and fully in writing, under oath, the following
21 interrogatories within forty days (40) from the date of service hereof.

22 INSTRUCTIONS

23 A. All information is to be divulged which is in the possession of each individual or
24 corporate party, his or her attorneys, investigators, agents, employees, insurers, insurance
25 adjusters, or other representatives of each named party.

26 B. A "medical practitioner" as used in these interrogatories is meant to include any
27 person who practices any form of healing arts.

28 C. Where an individual interrogatory calls for an answer which involves more than
one party, each part of the answer should be clearly set out so that it is understandable.

D. Where the terms "you", "Plaintiff" or "Defendant" are used, they are meant to
include every individual, and separate answers should be given for each person named as a
party, if requested.

E. Where the terms "accident" or "the accident" are used, they are meant to mean
the incident which is the basis of this lawsuit, unless otherwise specified.

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Please answer the following Personal Injury Uniform Interrogatories:

4. State exactly and in detail Defendant's version of how this accident occurred.

5. State specifically and in detail the facts upon which Defendant's contention is based that the accident or Plaintiff's injuries were caused by any negligent conduct on the part of the Plaintiff.

6. Was an investigation conducted concerning the accident in question? _____ If so, state:
a. The name, address and occupation of the person or organization conducting the investigation.

b. The date or dates on which the investigation was conducted.

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c. Whether Defendant or anyone acting on Defendant's behalf has interviewed or spoken with Plaintiff about the event in question. _____ If so, please identify the individual spoken with and the substance of the conversation.

d. The name and address of the person now having custody of any written report made concerning the investigation.

7. Do you know of any person who is skilled in any particular field or science, including the field of medicine, whom you may call as a witness upon the trial of this action and who has expressed an opinion upon any issue of this action? _____ If so, state:

a. The name and address of each person.

b. The field or science in which each such person is sufficiently skilled to enable him to express opinion evidence in this action.

c. Whether such potential witness will base his or her opinion:

- (1) In whole or in part upon facts acquired personally by him or her in the course of an investigation or examination of any of the issues of this case, or
- (2) Solely upon information as to facts provided him or her by others.

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d. If your answer to 7(c) discloses that any such witness has made a personal investigation or examination relating to any of the issues of this case, state the nature and dates of such investigation or examination.

e. Each and every fact, and each and every document, item, photograph or other tangible object supplied or made available to such person.

f. The general subject upon which each such person may express an opinion.

g. Whether such persons have rendered written reports. _____ If so:

(1) Give the dates of each report.

(2) State the name and address of the custodian of such reports.

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16. Provide the identity, location, and state the facts that support the liability, of any nonparty who you claim, pursuant to A.R.S. 12-2506(B) (as amended), was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in this action.

17. Do you have liability insurance or are you aware of any other form of indemnity which you claim is applicable to this accident? _____ If the answer is yes, state:

a. The name of the company or companies, including any excess or umbrella carriers, which you claim provide coverage.

b. The policy number or numbers of any applicable policy.

c. The limit or limits of liability of each policy.

d. The named insured on each policy.

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e. Whether the insurance carrier has accepted or denied coverage.

f. Whether you are being defended by the insurance carrier under a reservation of rights.

Please answer the following Non-Uniform Interrogatories:

1. State the name, address and occupation of Defendant's employee responsible for maintaining the grounds at the scene of the incident on the date of the incident.

2. State the name, address and occupation of any person who inspected the scene of the incident after it occurred.

3. State the name, address and occupation of any people who supervised or performed repairs or alterations to the subject curb, walkway area after the incident.

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4. Identify by date, location, name, and address any other falls suffered by individuals on the subject premises, parking lots, walkways, or sidewalks during the construction of this subdivision.

5. Identify by name, address and occupation any witnesses to the subject incident and anyone else with information about it.

6. Identify by date made, author, subject matter any investigation reports made regarding this incident.

7. Regarding any statements made regarding this incident, identify each such statement by date given, who made it, to whom it was given, and by what medium it was recorded or preserved.

Dated this 3 day of September, 2008.



Michael Drake
Attorney for Plaintiff

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Orig plus 1
A copy of the foregoing was mailed
this 3 day of September, 2008, to:

Holly Davies, Esq.
Amy Wilkens, Esq.
Lorber, Greenfield & Polito, LLP
8222 S. 48th Street, Suite 230
Phoenix, AZ 85044
Attorneys for Defendants

Waterproofing repairs, which are not addressed in this report, are critical for the success of the structural concrete repairs. Damages will continue to reoccur if the waterproofing is not properly repaired and water is permitted to penetrate the structure.

4. We have consulted with a concrete repair contractor who is experienced in this type of structural repairs. They have estimated the cost to repair the observed damages of the structural concrete to be approximately \$471,000. This does not include the cost of work necessary to expose the Plaza slab from above (e.g. removing paving, excavating earth, removing the existing waterproof membrane, if any). Nor does it include the cost of any work to restore these items. Furthermore, for any repairs to be successful it is necessary to design and construct an effective waterproof barrier which prevents any water from penetrating to the structural concrete. This report does not include any evaluation or analysis for waterproofing design nor construction. Failure to provide a proper waterproof barrier will likely result in the reoccurrence of water penetration to the Garage and the structural concrete damages.

Furthermore, we estimate the cost to develop:

- Structural Drawings (plans, details and technical specifications) for the repair of the Garage structural concrete to be approximately \$48,800; and
- Architectural Drawings (plans, details and technical specifications) for the repair of the Garage/Plaza waterproofing to be approximately \$74,000.

INVESTIGATION

During the course of our investigation we performed the following tasks:

1. Jack Gordon, P.E. of Gervasio & Assoc., Inc. (G&A) performed site visits on February 23 and 24, 2010. During these visits Mr. Gordon:
 - Made a preliminary/cursory walk-through of Garage Levels 1 & 2;
 - Provided technical assistance in identifying and removing areas of spalled and loose concrete which posed a falling debris hazard;
 - Sketched and photographed the areas of spalled/loose concrete; and
 - Recovered samples of material during the removal of the loose/spalled concrete. Samples are currently stored in our office.

Mr. Gordon's Field notes are included in Appendix A.2.

2. Mr. Gordon and George Sheller, R.A. of G&A performed site visits on March 23 through 25 (after a rainstorm on March 22, 2010) and April on 14, 2010. During these site visits they:
 - Observed the visible concrete structural slabs in all Garage levels, noting places where the concrete:
 - ▶ Had signs of deterioration and structural distress such as cracking, spalling, and/or corrosion of the reinforcing steel;
 - ▶ Was wet because water was currently leaking;
 - ▶ Was stained (water and or rust stains) from leaks; and
 - ▶ Had mineral deposits (efflorescence and/or calcification).

**APPENDIX
EXHIBIT 5**

JAN 06 2010

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

10 JAN -6 AM 8:39

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. STEPHEN C. VILLARREAL

BY: R. ST. GERMAIN, DEPUTY CASE NO. C20085032

DATE: January 5, 2010

MARSHA ANDERSON O'BRIEN,

Plaintiff,

VS.

KB HOME TUCSON INC.; KB HOME SALES-
TUCSON INC.; KB HOME; JOHN DOES 1-3
and ABC CORPORATIONS 1-3,

Defendants.

RULING

IN CHAMBERS RULING RE: DEFENDANT'S MOTION TO COMPEL PRODUCTION OF PRELIMINARY EXPERT OPINION AFFIDAVIT PURSUANT TO A.R.S. § 12-2602.

Defendants seek an order from this Court compelling plaintiff to provide a preliminary expert opinion affidavit pursuant to A.R.S. § 12-2602. While plaintiff's complaint asserts a negligence claim against defendant KB Home—a licensed professional—plaintiff has certified that expert opinion testimony is not necessary to prove defendant's negligence and breach of standard of care.¹ Defendants, however, disagree, and contend that expert opinion testimony will be necessary to prove the standard of care or liability of KB Home. The Court has read and reviewed defendants' motion, plaintiff's response, and defendants' reply and heard oral argument on the matter on December 14, 2009.

Analysis

A.R.S. § 12-2602, subsection (A) provides:

If a claim against a licensed professional is asserted in a civil action, the claimant or the claimant's attorney shall certify in a written statement that is filed and served with the claim

¹ Plaintiff's certification references A.R.S. § 12-2603 which pertains to claims brought against healthcare professionals. As defendants point out and plaintiff concedes, however, § 12-2602 is the applicable statute at issue here.

Jeff Kautenburger
Judicial Law Clerk

RULING

Page: 2

Date: January 5, 2010

Case No: C20085032

whether or not expert opinion testimony is necessary to prove the licensed professional's standard of care or liability for the claim.

A clear implication arising from the plain language of the statute, and one supported by legislative history and case law, is that there may indeed be claims asserted against licensed professionals that do not require expert testimony in order to prove negligence. *See Hunter Contracting Co. v. Superior Court*, 190 Ariz. 318, 320-21, 947 P.2d 892, 894-95 (App. Div. 1, 1997) (Assumption that expert testimony is an essential, indispensable component of any professional negligence complaint is mistaken.)

In *Hunter*, the plaintiff motorist struck a barricade lying on its side in the traveled roadway near a construction zone. The plaintiff filed a negligence claim against the contractor for failure to maintain a safe construction site. The defendant Hunter filed a motion to dismiss because there was no accompanying expert affidavit as required by the version of §12-2602 in effect at that time. In holding that version of § 12-2602 unconstitutional because it limited "the right of action to recover damages for injuries" in violation of the Arizona Constitution, the *Hunter* court specifically cited as a basis for its holding the fact that the former statute required plaintiff to hire an expert when none would otherwise be required. *Id.* As the *Hunter* court stated:

Expert testimony is necessary to prove professional negligence when "the question to be determined is strictly within the special and technical knowledge of the profession and not within knowledge of the average layman." But expert testimony is unnecessary to prove professional negligence "when the act or omission comes within the realm of common knowledge."

Id. (citations omitted). In other words, the court concluded an expert would not have been necessary in the *Hunter* case, even though the defendant was a licensed professional.

Here, plaintiff has asserted a negligence claim against defendants seeking damages for bodily injury. Plaintiff's initial disclosure statement sets forth the following factual basis for the claim:

On Monday, January 15, 2007, Plaintiff Marsha Anderson O'Brien and her daughter, Robin Anderson, went to the KB Home construction site at Pantano Overlook in Tucson to shop for

Jeff Kautenburger
Judicial Law Clerk

RULING

Page: 3

Date: January 5, 2010

Case No: C20085032

a new home. They were led by salesman "Chad." While approaching a home, Chad cut the corner from the street pavement to the home's driveway. Plaintiff followed. She slipped on dirt, gravel, debris on the sloped curb and fell onto a re-bar.

The Court finds that these facts, although minimal, viewed in light of a negligence theory, are such that a relevant standard of care and any act or omission constituting a breach of that standard of care could come within the realm of common knowledge of a lay jury.

Conclusion

Accordingly, defendants' motion to compel production of a preliminary expert affidavit pursuant to A.R.S § 12-2602 is hereby DENIED.


HON. STEPHEN C. VILLARREAL

cc: Under Advisement Clerk - Civil
Michael Drake, Esq.
Holly Davies, Esq. / Amy Wilkens, Esq. – LORBER, GREENFIELD & POLITO, LLP.
8222 South 48th Street, Suite 230, Phoenix, AZ 85044

Jeff Kautenburger
Judicial Law Clerk

**APPENDIX
EXHIBIT 6**

AM

1 LORBER, GREENFIELD & POLITO, LLP
Holly Davies, Esq. [S.B. #018308]
2 Amy Wilkens, Esq. [S.B. #025171]
230 West Fifth Street
3 Tempe, Arizona 85281
TEL: (602) 437-4177 / FAX: (602) 437-4180
4 hdavies@lorberlaw.com
awilkens@lorberlaw.com

FILED
10 MAR 10 PM 5:32
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
BY 
DEPUTY

5 Attorneys for Defendants KB HOME Tucson Inc., KB HOME
6 Sales-Tucson Inc., KB HOME

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF PIMA**

9 MARSHA ANDERSON O'BRIEN,
10 Plaintiff,
11 v.
12 KB HOME TUCSON INC.; KB HOME
SALES-TUCSON INC.; KB HOME; JOHN
13 DOES 1-3 and ABC CORPORATIONS 1-3,
14 Defendants.

Case No. C2008 5032
**DEFENDANTS' SEPARATE
STATEMENT OF FACTS IN SUPPORT
OF THEIR MOTION FOR SUMMARY
JUDGMENT**

(Assigned to the Honorable Stephen
Villarreal)

15
16 Defendants KB HOME Tucson Inc., KB HOME Sales-Tucson Inc., and KB HOME
17 (collectively "KB Home"), by and through undersigned counsel, submits their Separate
18 Statement of Facts in Support of their Motion for Summary Judgment filed concurrently
19 herewith.

20 **KB HOME'S SEPARATE STATEMENT OF FACTS**

- 21 1. KB Home was the owner and developer of the residential development known as
22 Pantano Overlook located in Tucson, Arizona (hereinafter "Development"). *See relevant*
23 *portions of KB Home's Initial Disclosure Statement attached hereto as Exhibit "A".*
24 2. Plaintiff alleges she visited the Development on January 15, 2007, to shop for a
25 new home and view a spec home present at the Development. *See Plaintiff's Complaint at ¶ 4*
26 *and 5.*
27 3. Plaintiff alleges she was injured while walking from the street to the driveway of a
28 spec home she intended to view at the Development. *See Plaintiff's Complaint at ¶ 7 - 9.*

1 4. While approaching the home, Plaintiff alleges she cut across a corner where there
2 existed ongoing construction consisting of concrete forms for a sidewalk that was being placed,
3 capped concrete form stakes, and yellow caution tape. *See Plaintiff's Complaint at ¶ 4 and 5.*
4 *See also photographs produced by Plaintiff in this matter and said to be taken of the site of the*
5 *incident on the two days following the incident, attached hereto as Exhibit "B".*

6 5. While crossing this area, Plaintiff alleges she slipped on debris and gravel on a
7 sloped curb and fell, landing on a concrete form stake. *See Plaintiff's Complaint at ¶ 7 - 9.*

8 6. The area where Plaintiff alleges her injuries occurred is depicted in photographs
9 produced by Plaintiff which were said to be taken on the two days following the incident. *See*
10 *said photographs produced by Plaintiff in this matter attached hereto as Exhibit "B".*

11 7. The photographs exhibit the area where Plaintiff cut across a corner of open
12 construction was clearly marked by yellow caution tape. *See photographs produced by Plaintiff*
13 *in this matter attached hereto as Exhibit "B".*

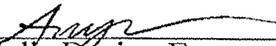
14 8. Further, the concrete forms and concrete form stakes capped with bright orange
15 caps were clearly visible at any range. *See said photographs produced by Plaintiff in this matter*
16 *attached hereto as Exhibit "B".*

17 9. Plaintiff has never alleged the areas where construction was occurring were not
18 apparent or obvious to her. *See Plaintiff's Complaint.*

19 10. Also, the photographs clearly depict the pathway to the house, from the street, to
20 the driveway, and to the walkway to the front door was clear and free from obstruction. *See said*
21 *photographs produced by Plaintiff in this matter attached hereto as Exhibit "B".*

22 DATED this 10th day of March, 2010.

23 LORBER, GREENFIELD & POLITO, LLP

24
25 By: 
26 Holly Davies, Esq.
27 Amy Wilkens, Esq.
28 230 West Fifth Street
Tempe, AZ 85281
Attorneys for Defendants KB HOME Tucson

1 Original of the foregoing filed this
2 10th day of March, 2010, with:

3 The Clerk of Court
4 PIMA COUNTY SUPERIOR COURT
5 110 West Congress
6 Tucson, AZ 85701

7 Copy of the foregoing hand-delivered
8 This 10th day of March, 2010, to:

9 The Honorable Stephen Villarreal
10 PIMA COUNTY SUPERIOR COURT
11 101 West Jefferson Street, ECB 611
12 Tucson, AZ

13 Copy of the foregoing mailed this
14 10th day of March, 2010, to:

15 Michael Drake, Esq.
16 3085 West Ina Road, Suite 111
17 Tucson, AZ 85741
18 *Attorneys for Plaintiff*

19 Carrie Kell

EXHIBIT A

LORBER, GREENFIELD & POLITO, LLP
8222 South 48th Street, Suite 230
Phoenix, Arizona 85044
(602) 437-4177
Fax (602) 437-4180

1 LORBER, GREENFIELD & POLITO, LLP
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3 Amy Wilkens, Esq. [S.B. #025171]
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7 FAX: (602) 437-4180
8 *hdavies@lorberlaw.com*
9 *awilkens@lorberlaw.com*

10 Attorneys for Defendants KB HOME Tucson Inc., KB HOME Sales - Tucson Inc., and KB HOME

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12 **IN AND FOR THE COUNTY OF PIMA**

13 MARSHA ANDERSON O'BRIEN,
14
15 Plaintiff,
16
17 v.

CASE NO. C2008 5032
**DEFENDANT KB HOME'S
INITIAL DISCLOSURE
STATEMENT**

18 KB HOME TUCSON INC.; KB HOME
19 SALES-TUCSON INC.; KB HOME INC.;
20 JOHN DOES 1-3 and JANE DOES 1-3,
21 ABC CORPORATIONS 1-3,
22
23 Defendants.

(Assigned to the Honorable Stephen Villarreal)

24 Defendants KB HOME Tucson Inc., KB HOME Sales-Tucson Inc., and KB HOME
25 (hereinafter collectively referred to as "KB Home"), by and through undersigned counsel,
26 hereby provide their Initial Disclosure Statement, pursuant to Rule 26. 1, *Ariz.R.Civ.P.* As
27 formal discovery has not commenced and a scheduling order is not in place, KB Home expressly
28 reserves the right to amend and/or supplement this disclosure as additional information is
developed through the course of discovery and/or continuing investigation.

PRELIMINARY STATEMENT

The contents of this Disclosure Statement are provisional and subject to supplementation,
amendment, explanation, and/or change and amplification. The reason for the provisional nature
of the statement is that the case is in the preliminary stages of discovery and KB Home is not
fully aware of the allegations against it and others at this time. The claimant is in possession
of important knowledge, information, and history of events giving rise to this action. Therefore,

1 if any part of this disclosure statement is ever read to a jury, fairness would require that the jury
2 have this preliminary statement or be told that this case was in the preliminary stages of
3 discovery, and that KB Home had limited access to information at the time this Disclosure
4 Statement was exchanged.

5 **I. FACTUAL BASIS.**

6 This litigation arises from Plaintiff's allegations of negligence as a result of the injuries
7 she sustained when, on January 15, 2007, while visiting a residential development owned by KB
8 Home, Plaintiff allegedly crossed through an area marked with construction tape, slipped on a
9 sloped curb therein, and fell on a piece of capped rebar. Plaintiff alleges that KB Home failed
10 to make the subject property safe for business invitees and prospective buyers, to wit: Plaintiff
11 slipped and fell while walking towards a prospective home that was under construction located
12 at Pantano Overlook (referred to herein as "subject property"), a residential development in
13 Tucson, Pima County, Arizona. Plaintiff knew she was entering a construction site, and could
14 see the caution tape and the capped rebar. The dirt and sediment was an open and obvious
15 condition.

16 KB Home Sales-Tucson Inc. is the seller of the properties located at Pantano Overlook
17 development and KB Home Tucson Inc. is the general contractor for the development.

18 **II. LEGAL THEORIES.**

19 **A. Negligence**

20 Plaintiff alleges KB Home breached its duty to make the subject property safe for
21 business invitees and prospective buyers. Under Arizona law, a business owner is under a duty
22 to make the premises reasonably safe for use by invitees. *Preuss v. Sambo's of Arizona, Inc.*,
23 130 Ariz. 288, 635 P.2d 1210 (1981). Notably, the business owner is not the insurer of the
24 invitees, and is not required to keep the premises absolutely safe. *Id.* Moreover, a business
25 owner is not liable to invitees for injuries resulting from open and obvious conditions. *Moore*
26 *v. Southwest Sash & Door Co.*, 71 Ariz. 418, 228 P.2d 993 (1951); *Sherman v. Arno*, 94 Ariz.
27 284, 383 P.2d 741 (1963).

28 Plaintiff has failed to assert how KB Home breached its duty to make the premises

1 reasonably safe for use by invitees. Further, since KB Home is a licensed professional, Plaintiff
2 will need expert testimony to establish KB Home's acts, errors or omissions that Plaintiff
3 considers to be a violation of the applicable standard of care resulting in liability. In addition,
4 expert testimony will be needed to establish the manner in which KB Home's acts, errors or
5 omissions caused or contributed to the damages or other relief sought by the claimant.

6 In this case, Plaintiff acknowledges that the site was marked with yellow construction
7 tape. KB Home took precautionary measures by surrounding the area with yellow construction
8 tape and placing red caps on the ends of the rebar. The purpose of placing red caps on rebar is
9 to make the rebar more visible and to prevent injury. Despite these open and obvious conditions,
10 Plaintiff alleges that KB Home is responsible for her injuries. KB Home satisfied any duty owed
11 to Plaintiff by taking any and all safety precautions, including marking off areas under
12 construction with caution tape and by capping any exposed rebar, thereby making the premises
13 reasonably safe.

14 **B. Affirmative Defenses**

15 KB Home asserts all defenses applicable to Plaintiff's claims, either as presently
16 available or which may become available as discovery progresses, as set forth in its Answer,
17 including but not limited to, failure to state a claim for which relief can be granted, failure to
18 mitigate damages, estoppel, acts or omissions of other persons or entities, contributory
19 negligence, comparative negligence, and open and obvious condition.

20 **III. NAMES AND ADDRESSES OF WITNESSES WHOM DEFENDANTS EXPECT**
21 **TO CALL AT TRIAL.**

22 3.1 Henry "Chad" Taylor
23 Former Sales Representative, KB Home Sales- Tucson Inc.
24 c/o Lorber, Greenfield & Polito, LLP

25 Mr. Taylor is a former sales representative for KB Home Sales- Tucson Inc. Mr.
26 Taylor is expected to testify consistent with his knowledge regarding the issues presented by
27 Plaintiff's claims.

28 ///

///

1 3.2 Penelope Brown
2 Project Superintendent, KB Home Tucson Inc.
3 c/o Lorber, Greenfield & Polito, LLP

4 Ms. Brown was the Project Superintendent for KB Home Tucson Inc. Ms. Brown is
5 expected to testify consistent with her knowledge regarding the issues presented by
6 Plaintiff's claims.

7 3.3 Greg Mohl
8 Director of Construction, KB Home Tucson Inc.
9 c/o Lorber, Greenfield & Polito, LLP

10 Mr. Mohl is the Director of Construction for KB Home Tucson Inc. Mr. Mohl is
11 expected to testify consistent with his knowledge regarding the issues presented by
12 Plaintiff's claims.

13 3.4 Additional representatives and/or employees, past or present, of KB Home
14 Tucson Inc. and KB Home Sales -Tucson.

15 3.5 Plaintiff is expected to testify regarding the facts and circumstances of the
16 alleged incident.

17 3.6 Plaintiff's daughter is expected to testify regarding the facts and circumstances
18 of the alleged incident.

19 3.7 Any and all healthcare providers and personnel and ambulance service personnel
20 with knowledge of the facts and circumstances surrounding Plaintiff's alleged injuries.

21 3.8 Any and all witnesses, percipient, expert, or otherwise, listed by any other party.

22 3.9 Any and all witnesses whose identity or testimony is revealed during the course
23 of discovery.

24 3.10 Any and all custodians of record for any exhibits.

25 3.11 Any other witnesses required to lay foundation for any and all exhibits.

26 KB Home expressly reserves the right to supplement and/or amend this section as
27 necessary.

28 ///

///

///

1 IV. NAMES AND ADDRESSES OF ALL PERSONS WHOM KB HOME BELIEVES
2 MAY HAVE KNOWLEDGE OR INFORMATION RELEVANT TO THE
3 EVENTS, TRANSACTIONS, OR OCCURRENCES THAT GIVE RISE TO
4 THE ACTION, AND THE NATURE OF THE KNOWLEDGE OR
5 INFORMATION EACH SUCH INDIVIDUAL IS BELIEVED TO POSSESS.

6 4.1 The persons listed in Section 3 above.

7 4.2 Any and all representatives of any subcontractor or other entity, which performed
8 work and/or supplied services on the subject property.

9 4.3 Any and all persons who have investigated and/or inspected the subject property
10 at any time.

11 4.4 Any and all persons who have investigated the alleged incident.

12 KB Home reserves the right to supplement this section in accordance with the applicable
13 rules.

14 V. NAMES AND ADDRESSES OF ALL PERSONS WHO HAVE GIVEN
15 STATEMENTS, WHETHER WRITTEN OR RECORDED, SIGNED OR
16 UNSIGNED, AND THE CUSTODIAN OF THE COPIES OF THE
17 STATEMENTS.

18 5.1 See Plaintiff's Initial Disclosure Statement.

19 5.2 KB Home does not have any written or recorded statements to submit at this
20 time.

21 KB Home reserves the right to supplement this section in accordance with the applicable
22 rules.

23 VI. NAMES AND ADDRESSES OF EACH PERSON WHOM DEFENDANTS
24 EXPECT TO CALL AS AN EXPERT WITNESS AT TRIAL, THE SUBJECT
25 MATTER OF WHICH THE EXPERT IS EXPECTED TO TESTIFY, THE
26 SUBSTANCE OF THE FACTS AND OPINIONS TO WHICH THE EXPERT IS
27 EXPECTED TO TESTIFY, A SUMMARY OF THE GROUNDS FOR EACH
28 OPINION, THE QUALIFICATIONS OF THE WITNESS, AND THE NAME AND
ADDRESS OF THE CUSTODIAN OF COPIES OF ANY REPORTS PREPARED
BY THE EXPERT.

6.1 Given that this case is in its preliminary stages of discovery and investigation,
experts have not yet been consulted. KB Home will supplement this disclosure once experts
have been retained.

///

///

1 VII. COMPUTATION AND MEASURE OF DAMAGE ALLEGED BY DEFENDANTS
2 AND THE DOCUMENTS OR TESTIMONY ON WHICH THE COMPUTATION
3 AND MEASURE ARE BASED AND THE NAMES, ADDRESSES, AND PHONE
4 NUMBERS OF ALL DAMAGE WITNESSES.

5 7.1 KB Home will seek its costs of suit incurred if it is the prevailing party in this
6 litigation.

7 VIII. THE EXISTENCE, LOCATION, CUSTODIAN, AND GENERAL DESCRIPTION
8 OF ANY TANGIBLE EVIDENCE OR RELEVANT DOCUMENTATION THAT
9 DEFENDANTS PLAN TO USE AT TRIAL AND RELEVANT INSURANCE
10 AGREEMENTS.

11 8.1 All documents listed on the Exhibit List attached as Exhibit "A" to this disclosure,
12 previously disclosed with KB Home's discovery responses.

13 Given that this case is in its preliminary stages of discovery and investigation, KB
14 Home is still in the process of locating additional project documents. KB Home will
15 supplement this disclosure once the relevant information and documents are obtained.

16 IX. LIST OF THE DOCUMENTS KNOWN BY DEFENDANT TO EXIST WHICH
17 DEFENDANT BELIEVES MAY BE RELEVANT TO THE SUBJECT MATTER
18 OF THE ACTION, AND THOSE WHICH APPEAR REASONABLY
19 CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE
20 EVIDENCE.

21 9.1 Given that this case is in its preliminary stages of discovery and investigation,
22 KB Home is still in the process of locating additional project documents. KB Home will
23 supplement this disclosure once the relevant information and documents are obtained.

24 DATED this 27th day of January, 2009.

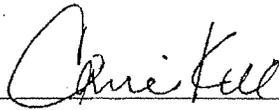
25 LORBER, GREENFIELD & POLITO, LLP

26 By: Amy Wilkens
27 Holly Davies, Esq.
28 Amy Wilkens, Esq.
8222 South 48th Street, Suite 230
Phoenix, Arizona 85044
Attorneys for Defendants KB Home Tucson Inc., KB
Home Sales - Tucson Inc., and KB HOME

29 ///

1 ORIGINAL of the foregoing mailed this
2 27th day of January 2009, to:

3 Michael Drake, Esq.
4 3085 West Ina Road, Suite 111
5 Tucson, AZ 85741
6 *Attorney for Plaintiff*

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LORBER, GREENFIELD & POLITO, LLP

8222 South 48th Street, Suite 230

Phoenix, Arizona 85044

(602) 437-4177

Fax (602) 437-4180

Exhibit A

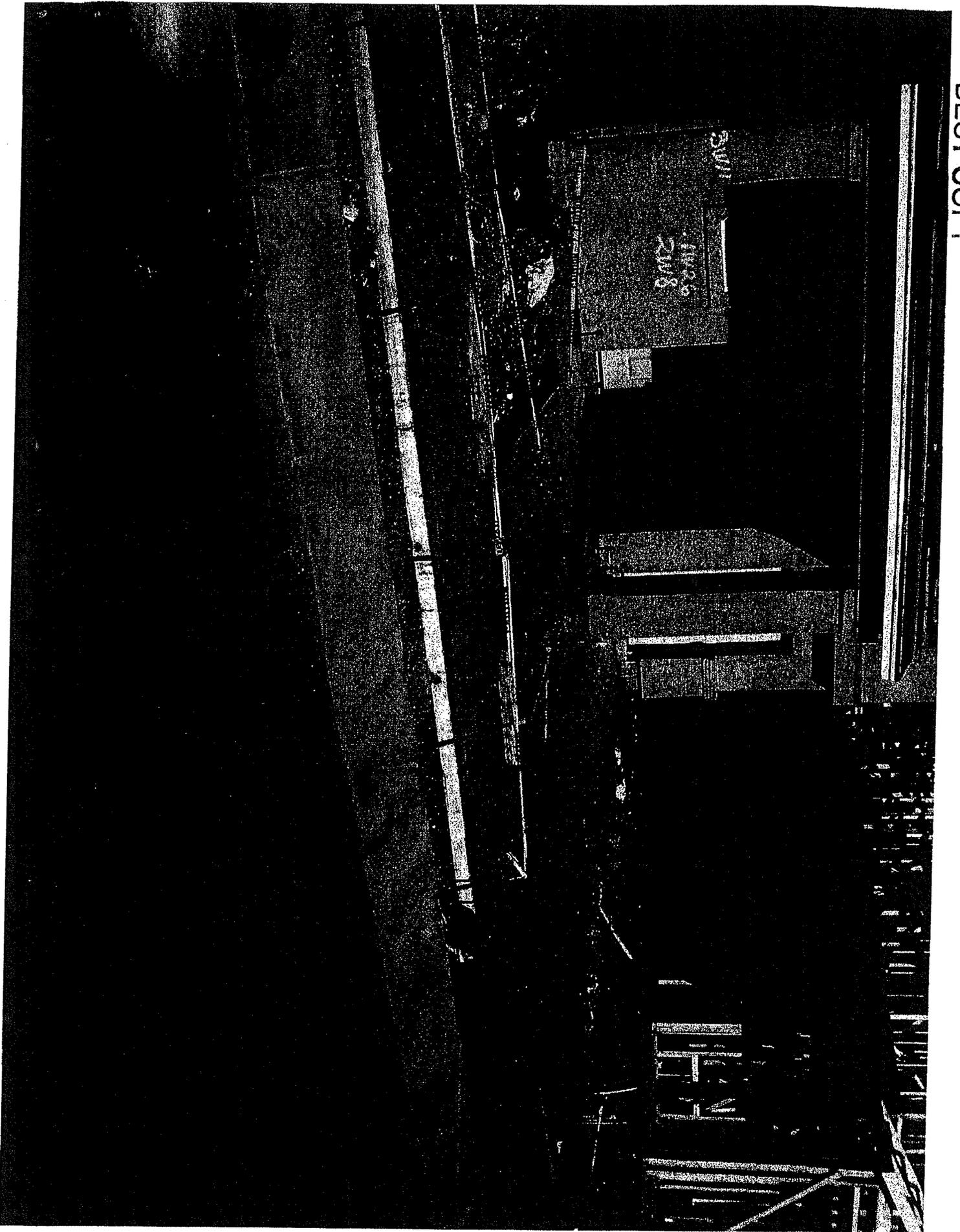
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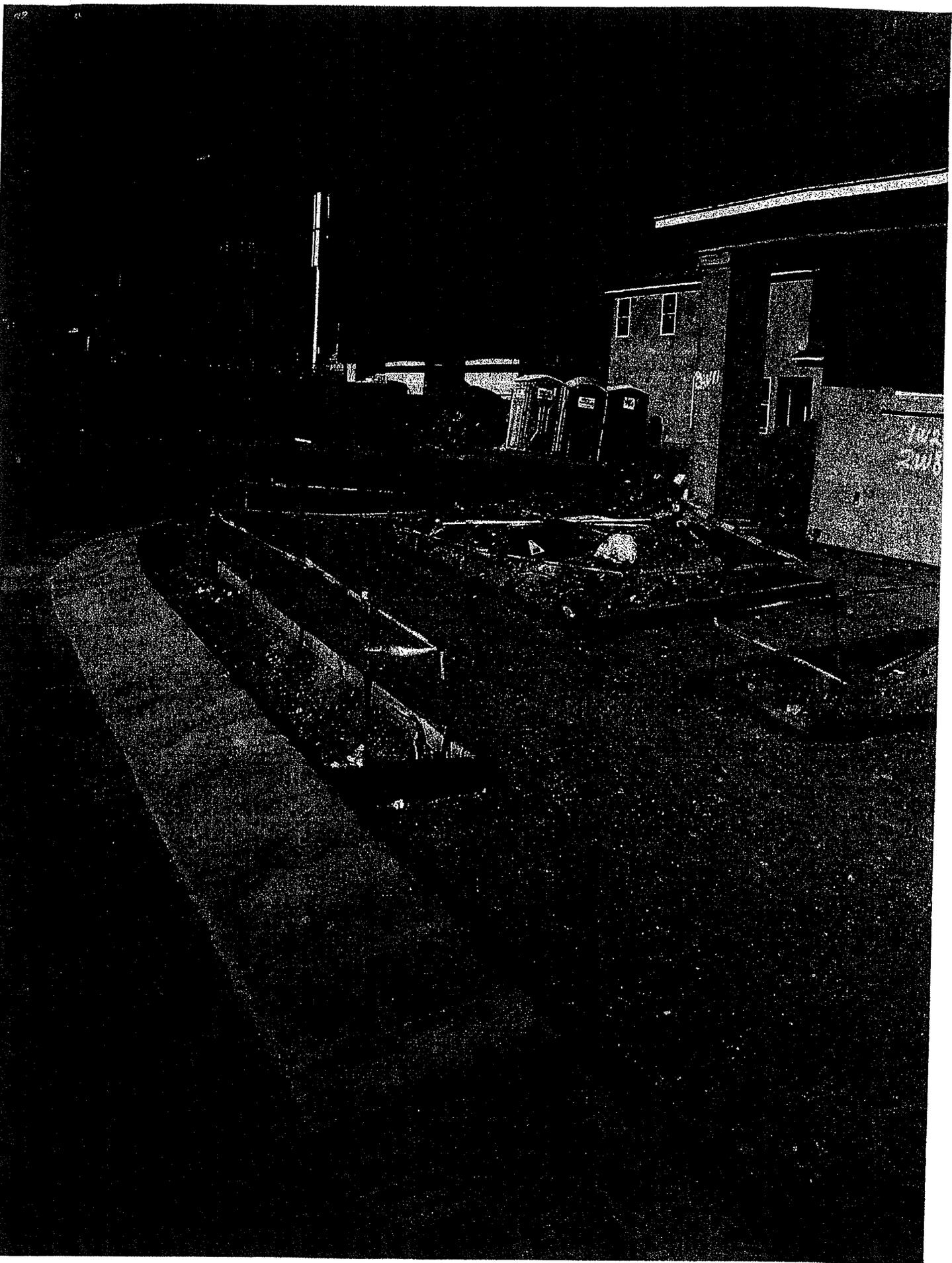
Document Description	Bates Numbers
KB Home Field Safety Manual	KB-OBRIEN000001 to KB-OBRIEN000127

LORBER, GREENFIELD & POLITO, LLP
8222 South 48th Street, Suite 230
Phoenix, Arizona 85044
(602) 437-4177
Fax (602) 437-4180

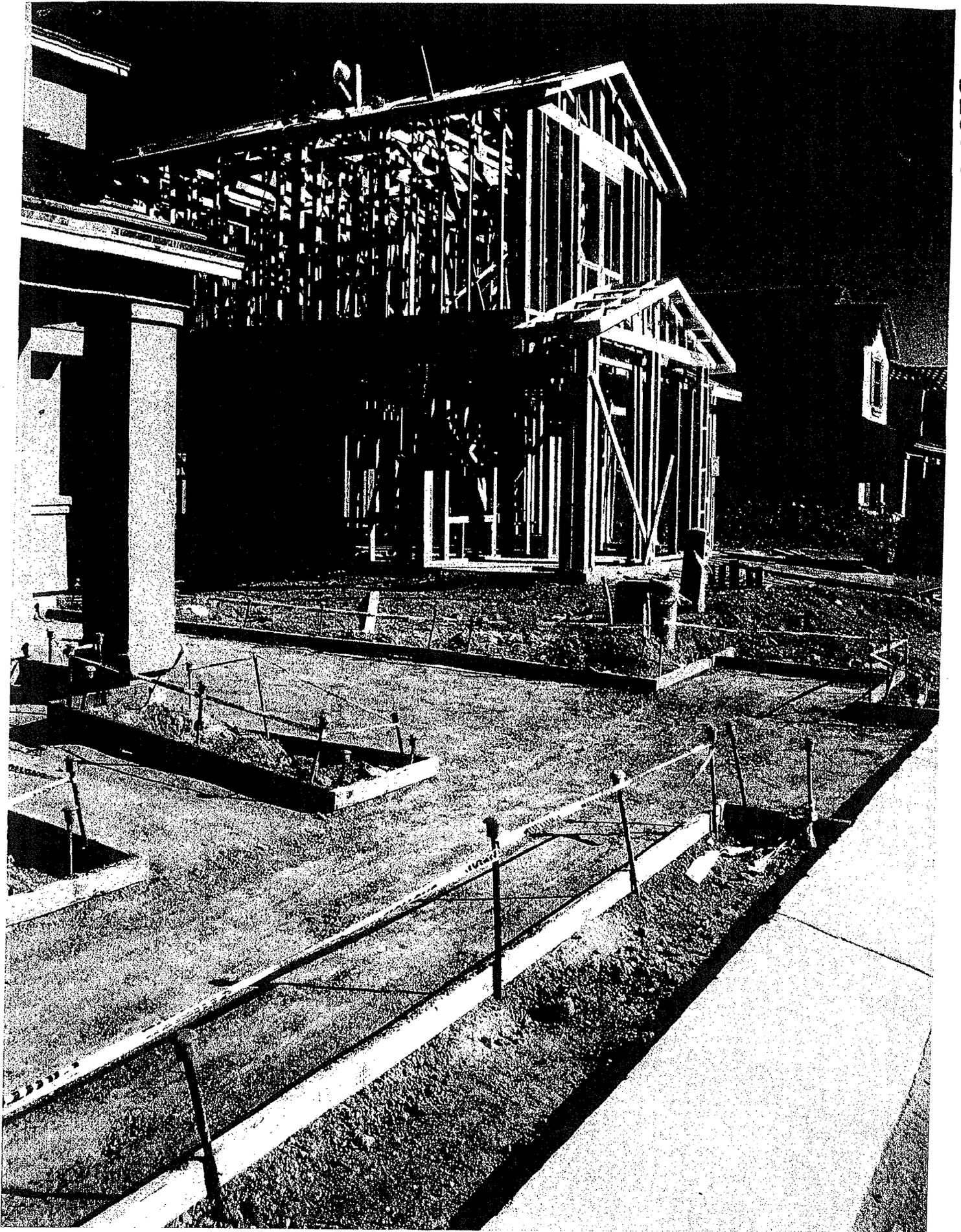
EXHIBIT B

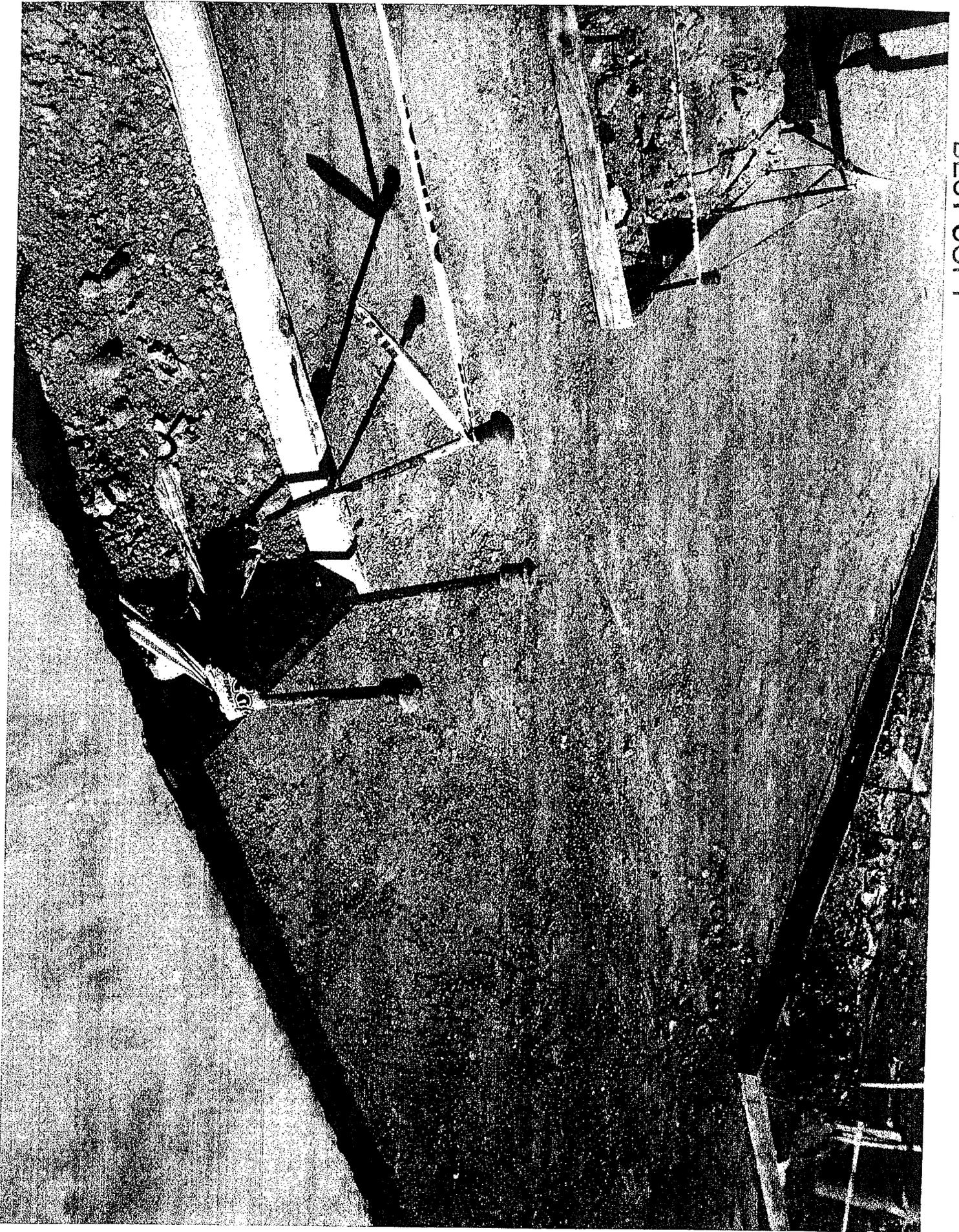
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**APPENDIX
EXHIBIT 7**

pm

MATTHEW MCCLENDON
FILED

10 MAR 10 PM 5:32

PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
BY ~~_____~~
DEPUTY

1 LORBER, GREENFIELD & POLITO, LLP
Holly Davies, Esq. [S.B. #018308]
2 Amy Wilkens, Esq. [S.B. #025171]
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hdavies@lorberlaw.com
awilkens@lorberlaw.com

5 Attorneys for Defendants KB HOME Tucson Inc., KB HOME
6 Sales-Tucson Inc., KB HOME

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF PIMA**

9 MARSHA ANDERSON O'BRIEN,
10 Plaintiff,

Case No. C2008 5032

11 v.

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

12 KB HOME TUCSON INC.; KB HOME
13 SALES-TUCSON INC.; KB HOME; JOHN
DOES 1-3 and ABC CORPORATIONS 1-3,

(Assigned to the Honorable Stephen
Villarreal)

14 Defendants.

15
16 Defendants KB HOME Tucson Inc., KB HOME Sales-Tucson Inc., and KB HOME
17 (collectively "KB Home"), by and through undersigned counsel, hereby move the Court,
18 pursuant to the provisions of Rule 56, *Ariz.R.Civ.P.*, for summary judgment against Plaintiff
19 Marsha Anderson O'Brien (hereinafter "Plaintiff"), on the grounds that there is no genuine issue
20 as to any material fact and KB Home is entitled to judgment as a matter of law. This Motion is
21 supported by KB Home's Separate Statement of Facts, the accompanying Memorandum of
22 Points and Authorities, and the entire record before this Court.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. FACTUAL BACKGROUND**

25 Plaintiff asserted her claims in this matter under a premises liability theory. KB Home
26 was the owner and developer of the residential development known as Pantano Overlook located
27 in Tucson, Arizona (hereinafter "Development"). (KB Home's Separate Statement of Facts

1 "SSOF" 1) Plaintiff alleges she visited the Development on January 15, 2007, to shop for a
2 new home and view a spec home present at the Development. (SSOF 2) Plaintiff alleges she
3 was injured while walking from the street to the driveway of a spec home she intended to view
4 at the Development. (SSOF 3) While approaching the home, Plaintiff alleges she cut across a
5 corner where there existed ongoing construction consisting of concrete forms for a sidewalk that
6 was being placed, capped concrete form stakes, and yellow caution tape. (SSOF 4) While
7 crossing this area, Plaintiff alleges she slipped on debris and gravel on a sloped curb and fell
8 landing on a concrete form stake. (SSOF 5) The area where Plaintiff alleges her injuries
9 occurred is depicted in photographs produced by Plaintiff which were said to be taken on the
10 two days following the incident. (SSOF 6) The photographs exhibit the area where Plaintiff cut
11 across a corner of open construction was clearly marked by yellow caution tape. (SSOF 7)
12 Further, the concrete forms and concrete form stakes capped with bright orange caps were
13 clearly visible at any range. (SSOF 8) Plaintiff has never alleged the areas where construction
14 was occurring were not apparent or obvious to her. (SSOF 9) Also, the photographs clearly
15 depict the pathway to the house, from the street, to the driveway, and to the walkway to the front
16 door was clear and free from obstruction. (SSOF 10) As a clear pathway to the house existed,
17 there was no need to cut across the area of obvious construction as Plaintiff admits she did. It is
18 clear KB Home kept the area of the spec home and the access areas free from any unreasonable
19 danger. The areas around the home where construction was occurring were clearly marked,
20 visible, and taped off with yellow caution tape and Plaintiff was not justified in crossing over the
21 same. Plaintiff's claims fail accordingly.

22 II. SUMMARY JUDGMENT STANDARD

23 Rule 56 (c), *Arizona Rules of Civil Procedure*, provides that a party may obtain relief in
24 the form of summary judgment where there is no genuine issue as to any material fact and the
25 moving party is entitled to judgment as a matter of law. Summary judgment is appropriate if the
26 facts produced by the party opposing the motion have so little probative value, given the
27 quantum of evidence required, that reasonable people could not agree with the claim advanced

1 in opposition to the motion for summary judgment. *Orme School v. Reeves*, 166 Ariz. 301, 802
2 P.2d 1000 (1990); *Andrew v. Blake*, 205 Ariz. 236, 69 P.3d 7 (2003). A motion for summary
3 judgment should not be denied simply on the speculation that some slight doubt, some scintilla
4 of evidence, or some dispute over irrelevant or immaterial facts might blossom into a
5 controversy. *Id.* Whether a defendant owes a duty to a plaintiff generally presents an issue of
6 law for the trial court and is therefore appropriate for summary judgment. *Bellezzo v. State of*
7 *Arizona and Arizona Board of Regents*, 174 Ariz. 548, 550, 851 P.2d 847, 849 (1992).

8 **III. ARGUMENT**

9 **A. The condition of the premises where Plaintiff alleges she suffered injury was**
10 **open and obvious, and KB Home is not liable to Plaintiff accordingly.**

11 Plaintiff has alleged she suffered injuries due to alleged negligence of KB Home under a
12 premises liability theory. The standard of care an owner of land owes to persons thereon
13 depends on the status of the persons on the land. Plaintiff has alleged she was a business invitee
14 when she entered the Project. Even if we assume, for the sake of this Motion, Plaintiff was a
15 business invitee when she entered the Project and allegedly suffered the injuries as set forth in
16 her Complaint, Plaintiff's claims fail as the conditions present at the Project where Plaintiff
17 alleges her injuries occurred were open and obvious.

18 The general standard of care owed by the possessor of land to an invitee is set forth in the
19 Restatement (Second) of Torts § 343 which provides:

20 "A possessor of land is subject to liability for physical harm caused to this invitees
21 by a condition on the land if, but only if, he

- 22 (a) Knows or by the exercise of reasonable care would discover the condition,
23 and should realize that it involves an unreasonable risk of harm to such
24 invitees, and
- 25 (b) Should expect that they will not discover or realize the danger, or will fail
26 to protect themselves against it, and
- 27 (c) Fails to exercise reasonable care to protect them against the danger."

28 A land possessor is not ordinarily found negligent for injuries to invitees from conditions
which are open and obvious, nor for those which are known to the invitee. *Bellezzo v. State of*

1 *Arizona and Arizona Board of Regents*, 174 Ariz. 548, 552, 851 P.2d 847, 851 (1992). The
2 basis of this general principle is when a danger is open and obvious, the risk of harm generally is
3 slight because the condition is easily perceived and therefore does not pose an unreasonable risk
4 against which the landowner must protect invitees. *Id.* Regarding open and obvious dangers, the
5 Restatement (Second) of Torts § 343A provides:

6 “(1) A possessor of land is not liable to his invitees for physical harm caused to
7 them by any activities or condition on the land whose danger is known or obvious
8 to them, unless the possessor should anticipate the harm despite such knowledge
9 or obviousness.

10 (2) In determining whether the possessor should anticipate harm from a known or
11 obvious danger, the fact that the invitee is entitled to make use of the public land,
12 or of the facilities of a public utility is a factor of importance indicating the harm
13 should be anticipated.”

14 Plaintiff alleges she was injured while walking from the street to the driveway of a spec
15 home she intended to view. While approaching the home, Plaintiff alleges she cut across a
16 corner where there existed ongoing construction consisting of concrete forms, concrete form
17 stakes, and yellow caution tape. While crossing this area, Plaintiff alleges she slipped on debris
18 and gravel on a sloped curb and fell landing on a concrete form stake. The area where Plaintiff
19 alleges her injuries occurred is depicted in photographs produced by Plaintiff which were said to
20 be taken on the two days following the incident. The photographs clearly depict that the
21 pathway to the house, from the street, to the driveway, and to the walkway to the front door
22 were clear and did not present a danger. It was unreasonable for Plaintiff to walk across an area,
23 clearly marked with yellow caution tape, with concrete form stakes clearly visible and capped
24 with bright orange caps. It is clear KB Home kept the area of the spec home and the access
25 areas free from any unreasonable danger. The areas around the home where construction was
26 occurring were clearly marked, visible, and taped off with yellow caution tape. Plaintiff has
27 never alleged the areas where construction was occurring were not apparent or obvious to her.
28 Rather, Plaintiff ignored the same and walked across those areas at her own risk.

29 Courts have long recognized the principle that the possessor of a premises has no duty to
30 protect or warn an invitee of peril or dangerous condition that the injured person was aware of or

1 because it was open and obvious the invitee should have observed in the exercise of due care.
2 As noted in 62 Am Jur 2d Premises Liability §174, this principle has been applied in an wide
3 variety of situations including those similar to the instant, where individuals slipped and fell in
4 broad daylight from a curb which was visible, slipped and fell on mud on a sidewalk, slipped
5 and fell on wet leaves after rain, fell after stepping off a sidewalk leading to a restaurant into an
6 irregularity in the parking lot pavement, and slipped and fell on a graveled incline covered with
7 wet leaves and mud at a construction site. In the last matter cited, the injured party was an
8 invitee entering the defendant's property to purchase a camper. *Newson v. Byrnes*, 443 S. E. 2d
9 365, (N.C. App. 1994). The plaintiff slipped and fell while walking up a gravel driveway that
10 was wet. The Court in the *Newson* matter found the driveway the plaintiff walked up was
11 ordinarily used by hauling construction trucks to access defendant's property without getting
12 stuck and was in a reasonably safe condition and fit for such a purpose. Further, the Court
13 found, even if the condition of the driveway had been rendered unsafe under the circumstances,
14 plaintiffs knew of the unsafe condition or it should have been obvious to any ordinary person
15 under the circumstances at the time of the injury that the wet and muddy incline partially
16 covered with leaves would be slippery and potentially dangerous. *Id.* In the instant matter,
17 Plaintiff has alleged she slipped on gravel on an incline while cutting a corner at the Project.
18 The existence of gravel on an incline is not considered an unreasonably dangerous condition. In
19 fact, this is quite common in Arizona. Such gravel is commonly used in landscaping across the
20 state. The desert around the Project and throughout Arizona is covered by such gravel and the
21 average person is familiar with the danger presented by gravel on any surface. Again, as in the
22 other matters cited, this condition can be observed and avoided by a person acting with
23 reasonable care. In each of these matters cited to in said section of American Jurisprudence, the
24 respective Courts found the conditions were open and obvious, and the invitees should have
25 exercised due care and were barred from recovering from the land possessor accordingly.

26 Additionally in the *Bellezzo* matter, plaintiff, a spectator at a baseball game, was struck
27 and injured by a foul ball. While the stadium had screens to protect spectators in areas where

1 foul balls most commonly could be hit into the stands, plaintiff chose to sit in an unscreened
2 area to better view her son who was playing baseball. The plaintiff had been attending baseball
3 games for thirteen years. The Court found, while there is a risk involved in attending a baseball
4 game that one may be struck by a ball, this is a risk that most persons are familiar with and
5 plaintiff was certainly familiar with. The *Bellezzo* Court cited to the example used previously by
6 Arizona Courts,

7 “one may say as a matter of law that the government would not be negligent in
8 failing to post a sign warning visitors to the Grand Canyon that it is a long way to
9 the bottom and those who stand too close to the edge may lose their balance, fall
and get hurt.” *Id* at 553, 852.

10 The *Bellezzos* could have sat in an area behind the screen to protect them from the risk of
11 foul balls. However they chose not to. Similarly, Plaintiff in this matter chose not to walk on
12 the clearly marked path to the house but instead to cut a corner across an area with obvious
13 ongoing construction - yellow tape, concrete forms, and bright orange capped concrete form
14 stakes. As the *Bellezzo* Court recognized, a person faced with an open and obvious danger is
15 free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify
16 the risk. *Id* at 554, 853. The law requires the possessors of land to protect invitees from
17 unreasonable risks of harm, but it does not require possessors of land to protect from or insure
18 against all risks, no matter how remote or obvious. *Id*. The condition of the area where Plaintiff
19 fell was open and obvious. A reasonably prudent person would have observed the area of
20 construction and properly avoided the same by walking within the walkway which was free
21 from obstructions and any danger. Plaintiff’s claims fail as a matter of law and KB Home
22 requests summary judgment accordingly.

23 **B. Plaintiff’s alleged injuries resulted from Plaintiff’s own negligence.**

24 As shown above, KB Home exercised reasonable care in protecting against foreseeable
25 danger to persons coming onto the Project. Any danger presented by the condition of the area
26 where Plaintiff slipped and fell was open and obvious. In addition to this, Plaintiff was under a
27 duty herself. A business invitee is required to use, in the interest of his or her own safety, that

1 degree of care and prudence which a person of ordinary intelligence would exercise under the
2 same or similar circumstances. 62A Am Jur 2d Premises Liability § 705. A customer exercises
3 ordinary care when he or she uses all senses to discover and avoid hurtful things, that is, taking
4 everything into account, the act is one which the common sense of mankind pronounces want of
5 such prudence as the ordinarily careful person would use in a like situation. Id. Where an
6 invitee voluntarily exposes herself to a hazard, the owner of the premises is not the insurer of the
7 invitee's safety, since an invitee is required to exercise some degree of care for his or her own
8 safety. If invitees were not under a duty to look out for themselves to a reasonable degree,
9 owners of property would be unjustifiably exposed to unlimited liability. It cannot be said that
10 Plaintiff was using all of her senses to discover and avoid hurtful things. A reasonable person
11 would have observed the yellow caution tape and bright orange capped concrete form stake in
12 the area of construction and easily avoided the same by taking the outlined pathway to the house
13 Plaintiff intended to view. Instead, Plaintiff cut a corner and crossed this area, breaching her
14 duty.

15 Plaintiff's breach of her duty is further evidenced by the fact that Plaintiff chose the path
16 to the house that she did. While it is clear that there was an outlined path to the house, free from
17 any threat of danger, from the photographs produced by Plaintiff herself in this matter, Plaintiff
18 chose an alternate route to the house. Plaintiff crossed over the area of construction where she
19 ultimately fell. This was unnecessary and unreasonable. Where more than one means of
20 entrance and exit is provided, a landowner may be relieved from liability for a person injured
21 while using a way with an obvious defect when another adequate and safer way is available.
22 62A Am Jur 2d Premises Liability § 609. While a landowner has a duty to provide reasonably
23 safe means of ingress and egress to business invitees, he/she does not have to provide a specific
24 route or the shortest route to any destination. Id. Plaintiff, by virtue of her Complaint, is
25 alleging she was entitled to walk across the clearly marked and obvious area of open
26 construction. The law does not support her claim. To the contrary, the law places a duty on

1 Plaintiff to discover and avoid potential danger. Thus, Plaintiff choosing the path she chose
2 breached her duty to exercise reasonable care and avoid injury.

3 In fact, an invitee who deviates from the premises within the scope of her invitation, such
4 as by walking across a lawn instead of using a road or path on the premises, **becomes a licensee**
5 to whom the owner of the premises owes only a duty to refrain from willful or wanton acts of
6 negligence. 62A Am Jur Premises Liability § 615. A landowner who maintains a suitable
7 approach to his or her premises owes no duty to licensees and trespassers to eliminate
8 obstructions and fill depressions in a lawn or front yard that is not normally used as an approach
9 to the premises. Id. As evidenced by the photographs and not contested by Plaintiff otherwise,
10 there was a clear path from the street to the house. By walking across the area of construction
11 instead of the clear pathway from the street to the house, Plaintiff deviated from the scope of her
12 invitation. Plaintiff's actions in deviating from the scope of her invitation render her a licensee.
13 As a licensee, Plaintiff is owed only a duty by KB Home to refrain from willful or wanton acts
14 of negligence. Plaintiff has never alleged that KB Home's acts were willfully or wantonly
15 negligent and, in fact, KB Home's actions were not. Thus, Plaintiff's claims fail in this matter,
16 as Plaintiff chose to deviate from the scope of her invitation by choosing an alternate route to the
17 house when an obvious and safe pathway was provided.

18 **IV. CONCLUSION**

19 KB Home is not liable to Plaintiff for any injuries to Plaintiff from conditions which are
20 open and obvious, nor for those which are known to the Plaintiff. Further, KB Home is not
21 liable to Plaintiff for Plaintiff's failure to exercise reasonable care to avoid injury, particularly
22 where a specific, safe pathway was available and obvious. For the foregoing reasons, Plaintiff's
23 claims fail and KB Home is entitled to judgment as a matter of law.

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1 DATED this 10th day of March, 2010.

2
3 LORBER, GREENFIELD & POLITO, LLP

4
5 By: Amy
6 Holly Davies, Esq.
7 Amy Wilkens, Esq.
8 230 West Fifth Street
9 Tempe, AZ 85281
10 Attorneys for Defendants KB HOME Tucson

11 Original of the foregoing filed this
12 10th day of March, 2010, with:

13 The Clerk of Court
14 PIMA COUNTY SUPERIOR COURT
15 110 West Congress
16 Tucson, AZ 85701

17 Copy of the foregoing hand-delivered
18 this 10th day of March, 2010, to:

19 The Honorable Stephen Villarreal
20 PIMA COUNTY SUPERIOR COURT
21 101 West Jefferson Street, ECB 611
22 Tucson, AZ

23 Copy of the foregoing mailed this
24 10th day of March, 2010, to:

25 Michael Drake, Esq.
26 3085 West Ina Road, Suite 111
27 Tucson, AZ 85741
28 Attorneys for Plaintiff

29 Carmel

**APPENDIX
EXHIBIT 8**

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MICHAEL DRAKE
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State Bar No: 003542
Michael.Drake@azbar.org

Attorney for Plaintiff

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

2010 APR 14 PM 4:41

J. WHITNELL, DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

MARSHA ANDERSON O'BRIEN,)	
)	
Plaintiff,)	
v.	)	NO. C20085032
)	
KB HOME TUCSON, INC.; KB HOME	)	PLAINTIFF'S SEPARATE STATEMENT
SALES - TUCSON, INC.; KB HOME, INC.;	)	OF FACTS IN SUPPORT OF HER
JOHN DOES 1-3 and JANE DOES 1-3;	)	OPPOSITION TO DEFENDANT'S
ABC CORPORATIONS 1-3,	)	MOTION FOR SUMMARY JUDGMENT
)	
Defendants.	)	Assigned to Judge Stephen Villarreal

Plaintiff submits her Separate Statement of Facts pursuant to Rule 56(c)(2), Arizona Rules of Civil Procedure.

1. KB Home was the owner and developer of the residential development known as Pantano Overlook in Tucson. (See Defendant's Initial Disclosure Statement attached to its Separate Statement of Facts.)
2. On January 15, 2007 Plaintiff and her daughter visited the development to shop for a new home. (See Plaintiff's Complaint, paragraph 4 and 5.)
3. Upon arriving at the site, Plaintiff met KB Home sales agent Chad. (See Affidavit of Plaintiff Marsha Anderson O'Brien, attached as Exhibit A. Chad offered to show Plaintiff homes that were under construction.
4. As they walked down the street toward the home, Plaintiff followed behind Chad. When they arrived at the home, Chad stepped up over the sloped curb to cut across the front yard. Plaintiff followed him. (See Affidavit, paragraph 4.)

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When she stepped on the curb she slipped on gravel debris and fell forward.
(See Affidavit, paragraph 5.)

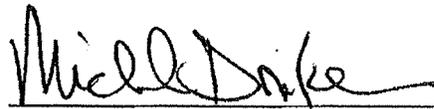
5. When Plaintiff fell she struck her chest directly on a steel reinforcing bar sticking up alongside wooded forms for a concrete sidewalk. Plaintiff fractured four ribs, sustained a pneumothorax, and incurred other injuries. (See Affidavit, paragraph 7.)

6. Plaintiff did not see the debris on the curb and appreciate the danger of the curb and the rebar because she was following closely behind Chad. (See Affidavit, paragraph 8.)

7. The yellow construction tape in that area was laying on the ground. There were cardboard boxes, hoses, pipes, cans, and other construction materials laying in the front yard, along the yet-to-be-poured sidewalks, and in the driveway. (See Affidavit, paragraph 9.)

8. The four photos attached as Exhibit B portray the condition of the area where Plaintiff fell before it was cleaned up by Defendant.

Dated this 14 day of April, 2010.



Michael Drake
Attorney for Plaintiff

A copy of the foregoing delivered
this 14 day of April, 2010, to:

Honorable Stephen C. Villarreal
Judge, Division 4
Pima County Superior Court
110 W. Congress Street
Tucson, AZ 85701

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A copy of the foregoing was mailed
this 14 day of April, 2010, to:

Holly Davies, Esq.
Amy Wilkens, Esq.
Lorber, Greenfield & Polito, LLP
230 W. Fifth Street
Tempe, AZ 85281
Attorneys for Defendants

EXHIBIT A

AFFIDAVIT OF MARSHA ANDERSON O'BRIEN

STATE OF ARIZONA)
)
COUNTY OF PIMA)

Marsha Anderson O'Brien, being first duly sworn, deposes and says:

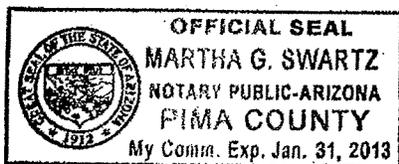
1. I am Plaintiff in this case and make this affidavit in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment.
2. On January 15, 2007 my daughter Robin and I visited the KB Homes residential development in Tucson called Pantano Overlook.
3. We parked at the Visitor Center and met sales agent Chad. He offered to show us a home. He said it looked like it was going to fall out of escrow and Plaintiff might get a good deal. We walked down the street for a block or so. I followed him.
4. When we arrived at a particular home, he turned left to cut across the front yard toward the home. I followed.
5. I stepped on the sloped curb and slipped on debris and fell forward, striking my chest on a rebar sticking up from the ground.
6. I fractured four ribs, sustained a pneumothorax, and other injuries.
7. Because I was following closely behind Chad, I did not see the debris on the curb nor the rebar sticking up.
8. After I fell, I saw the yellow barrier construction tape was laying on the ground. In that area there was other debris including cans, hoses, pipes, and cardboard boxes. The driveway was blocked with larger cans.
9. Prior to my fall, I did not see nor appreciate that the condition of the area over which Chad led me was dangerous.

10. The four photos attached as Exhibit B to Plaintiff's Separate Statement of Facts accurately portray the condition of the area where I fell before the area was cleaned up by Defendant.

Dated this 14 day of April, 2010.


Marsha Anderson O'Brien

SUBSCRIBED AND SWORN to before me this 14 day of April, 2010, by
Marsha Anderson O'Brien.



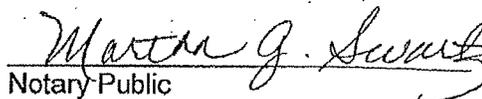
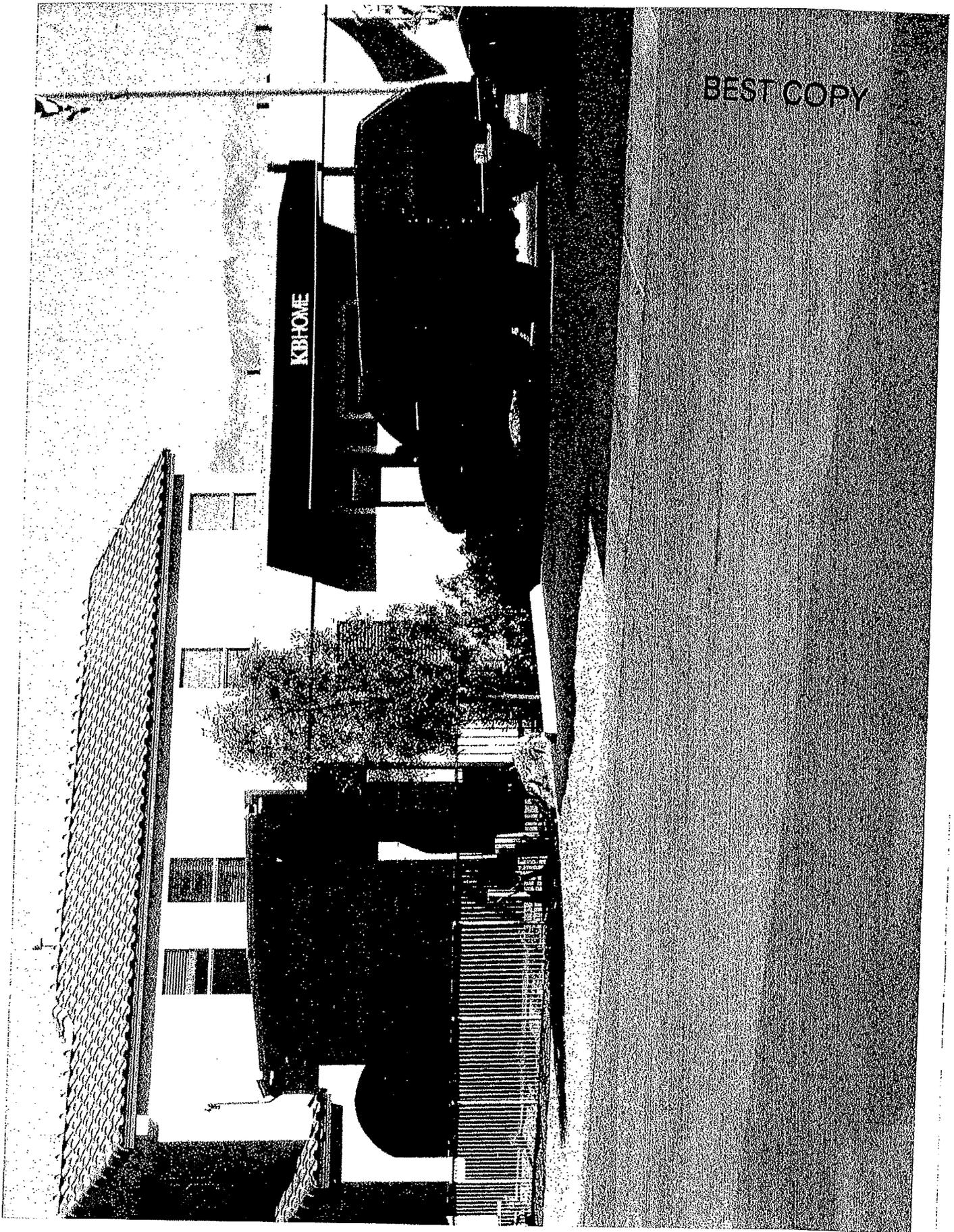

Notary Public

EXHIBIT B

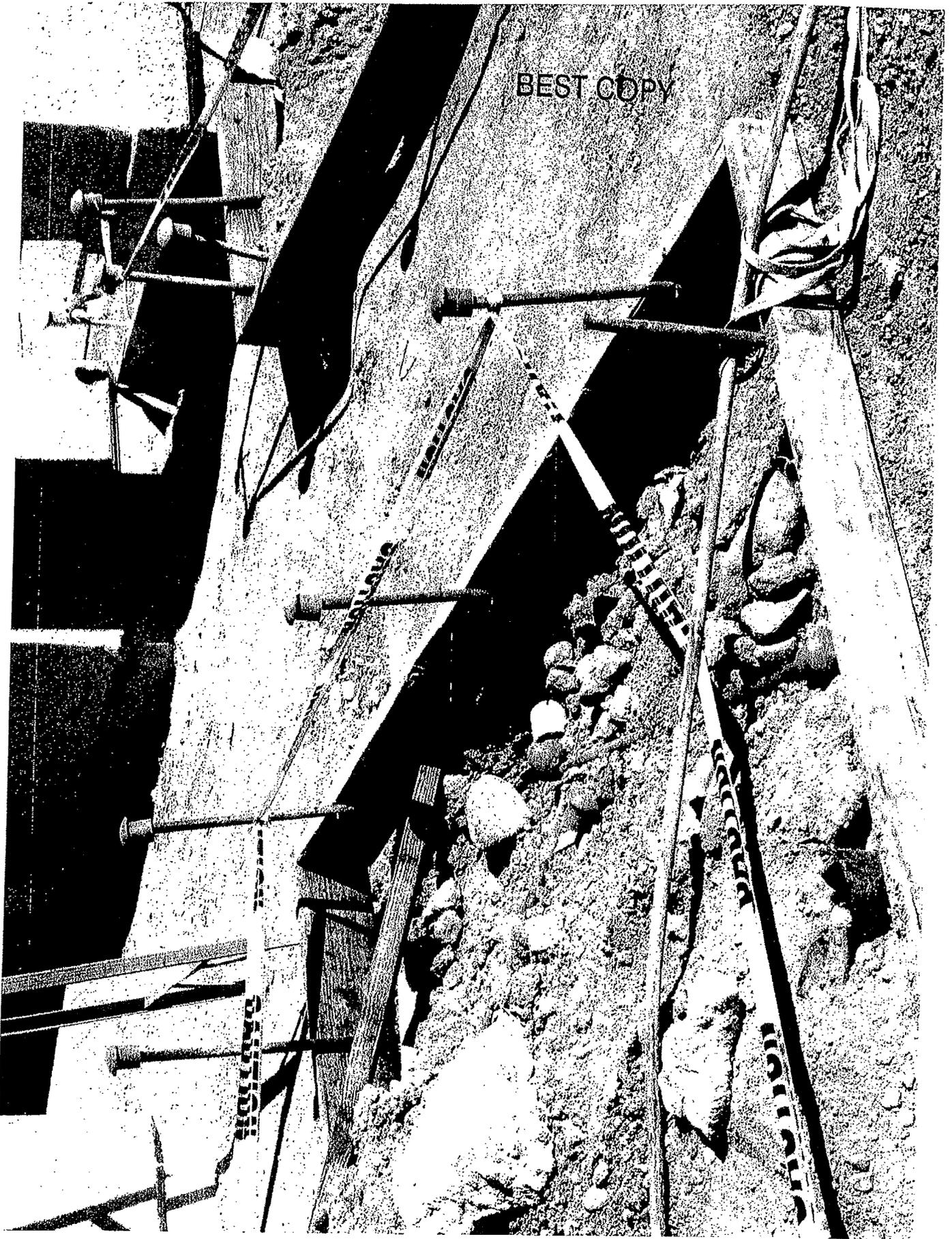
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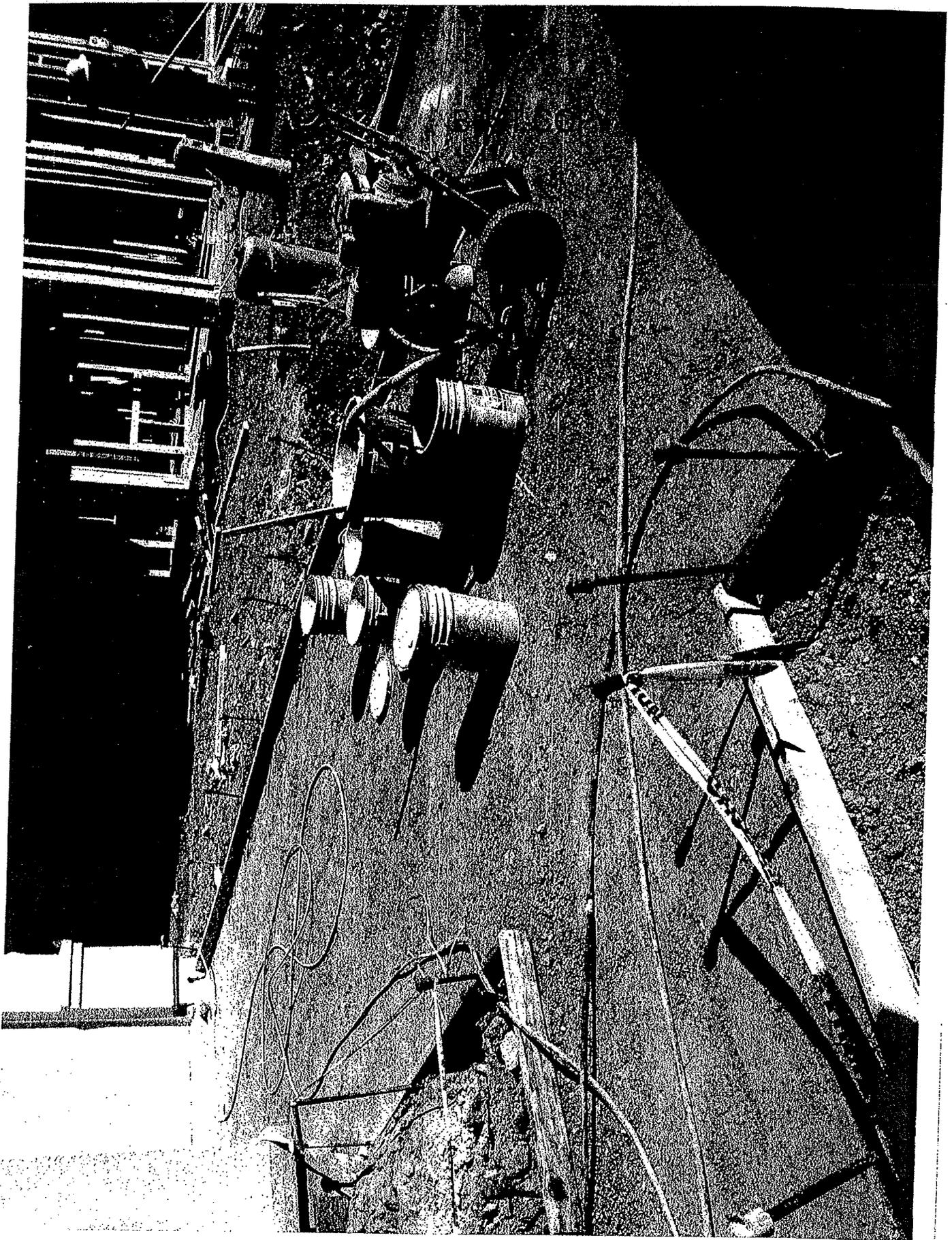


EXHIBIT C



SM

FIELD
SAFETY

REQUIREMENTS & INFORMATION

KB-OBRIEN000001



SECTION TAB #11

HOUSEKEEPING

Housekeeping is important from a safety and/or liability viewpoint and needs to be addressed in the following manner:

1. Keep all streets as clear as possible. Store construction materials off the street when possible.
2. When materials must be stored in the street, insure they are properly marked to identify the potential hazard they create.
3. Remove used saw blades, shot strips, and broken glass from the job site on a daily basis.
4. Review safety and liability concerns with our subcontractors, both verbally and in writing, if needed. This is in their best interest, as well as ours.
5. Seek help in addressing issues with subcontractors when you are unable to get their cooperation in the field. Contact the General Superintendent, the Director of Construction, or the Division Manager as needed.

The Occupational Safety and Health Agency (OSHA) specifically identifies housekeeping requirements from a safety standpoint. These requirements are as follows:

1. Trenches must be flagged, or marked in some manner to warn employees of the potential safety hazard. In addition, if over four feet deep, a stairway, ladder, ramp, or other safe means of egress must be located in the trench, within 25 feet of any point in the trench.
2. Metal stakes standing for use in foundations, walls, and for pouring concrete must be capped to prevent impalement.
3. Material with nails protruding through it, broken glass, and other tripping hazards should be removed from the job site on a regular basis.

However, in addition to being a safety concern, housekeeping has the potential of creating an even larger problem - **LIABILITY**. Construction sites are viewed as an "Attractive Nuisance" by the legal system and the courts.

No effort to post signs, barricades, or other forms of warning markers to identify safety hazards will certainly put us in a bad position when there is a liability issue (the subcontractor that created the hazard will be in the same position).

Discarded saw blades, live loads left on shot strips, and any other construction material can become dangerous weapons in the hands of children. I can just about guarantee you that any injuries created by such materials, found on the job site, will be a liability issue for someone.

→ Even though streets in construction areas are commonly owned by us and should only be used by construction personnel, we all know others also use them.

The ideal situation would be to eliminate the storage of any construction materials in the street, but that is not always feasible.

However, when construction materials are stored in the street, they must be properly marked, lighted, barricaded, or posted to identify a potential hazard to anyone using the street. The party responsible for locating material in the street should be responsible for properly identifying the potential hazard.

If the subcontractor places material in the street, they should insure they properly mark the material to identify the hazard.

If you need to store materials in the street, contact the designated purchasing agent for the tract to obtain any equipment or materials that you may need to properly identify any potential hazards.

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CONFIDENTIAL DOCUMENT - ATTORNEY-CLIENT PRIVILEGE AND
ATTORNEY-WORK PRODUCT

PUBLIC/MODEL COMPLEX SAFETY INSPECTION
(20 Pts minus 2 per concern)

POTENTIAL PUBLIC SAFETY CONCERNS:

- Dead-end streets with no barriers/warning devices:
- Open trenches not marked/identified:
- Lack of safety rails above and in stairwells:
- Const. Mat. in streets w/no barriers/warning devices:
- Dirt/trash piles with no warning devices/markings/signs:
- Offsite work w/no devices to block or prevent traffic from entering area:
- No warning sign(s) posted at entrance to construction areas/ on the jobsite:
- Other potential safety concerns identified:

POTENTIAL MODEL HOME COMPLEX CONCERNS:

- Lack of signage regarding walkways being slippery when wet or icy:
- Steps going up or down in model areas w/no warning devices:
- Tension self-closing doors too strong, which could injure fingers:
- Garage/ basement doors not locked and no sign to warn that steps are ahead:
- Large/heavy items that are not stable and could be tipped over easily:
- Rugs not secured to prevent tripping:
- Light bulbs at levels that can be reached by a small child:
- Low level electrical outlets not plugged:
- Other potential safety hazards:

KB-OBRIEN000093

KBHOME

SECTION TAB # 18

SAFETY ISSUES

MUSHROOM STYLE PLASTIC COVERS USED ON REBAR:

- < These are not acceptable as protection from an impalement hazard. Vertical rebar poses an impalement hazard. If employees are working above an area where vertical rebar is present, then appropriate fall protection **MUST** be used to prevent them from falling on the rebar, or steel reinforced covers or wooden troughs must be used to protect employees from an impalement hazard.
- < A reasonable alternative is to insure that the rebar is bent over flat against the surface, thereby eliminating the impalement hazard.
- < Keep in mind that horizontal rebar should be marked or capped with mushroom covers to warn employees of a tripping hazard. Caps should be used on any horizontal rebar, more than a few inches off the ground, to prevent tripping hazard, scrapes, and cuts that could be received from the jagged ends of the rebar.

USE OF FULL BODY HARNESES:



Body Belt



Full Body Harness

- < **Effective January 1, 1998, body belts are no long allowed for fall protection. A full body harness is required.**
- < Any subcontractor using a fall arrest system (probably the roofers) must use a full body harness and cannot use the body belt. The majority of roofing subcontractors have already switched to the use of body harnesses.
- < Alternate fall protection is still acceptable, and the use of slide guards on roofs is an acceptable alternate.

C20085032



SAFETY UPDATE

Recently a non-employee (also known as a potential customer) was seriously injured at one of our job sites. Although the Occupational Safety and Health Agency regulations do not cover injuries to non-employees, these injuries can raise a number of other concerns.

Many of the potential problems that are present at our subdivisions would seem easy to spot and correct, but they also remind me of the saying that "you can't see the forest for the trees". Things can become so familiar that they are not viewed as a concern.

Most of the following concerns can create a safety issue, for employees while they are working, as well as others before or after normal work hours. As a reminder, I ask that you take a look at the following areas to see if you may have a problem that needs to be addressed:

- Have you reviewed the American with Disability Act (ADA) requirements for the sales offices? **Insure we are in compliance with specific requirements**, such as "handicapped parking", width of sidewalks, access to office, availability of services, proper slopes on inclines, etc.
- **Are steps, or raised areas in sidewalks, or paths marked with tape, flags, or paint to identify them to customers?** Do we have procedures set up for **ice and snow removal** when needed?
- Are rugs secured on floors that could be slippery?
- Sales agents need to use good judgment **when taking clients into work areas**. Sales agents should **avoid areas where work is currently in progress**.
- When the end of a **street is not completed**, are there signs to warn, and/or barricades to block access to these areas?
- **Are the streets cleaned** as needed? Are **materials left in the street** barricaded, flagged, or marked to warn of potential hazard?
- **Is rebar capped, flagged, marked, or bent over?**
- Are open **trenches or basement excavations blocked off, barricaded, or flagged** to warn people of the potential danger?
- Do homes under production have **floor openings covered** (such as crawl space covers and vent openings)?
- **Review housekeeping procedures** to limit debris and clutter at the job site.
- Are **hand rails and stair rails in place?**
- Are **second floor window openings blocked** (if less than 32" from floor) and are second floor wall openings, less than 18" wide, blocked to prevent falls?

Injuries can be prevented if we can eliminate the hazards that can cause the injury. Our employees, customers, and neighbors are all important to us. See if we can do something that could resolve a potential hazard in our work area.

**APPENDIX
EXHIBIT 9**

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MICHAEL DRAKE
Attorney at Law
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Tucson, AZ 85741
(520) 624-2488
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Michael.Drake@azbar.org

Attorney for Plaintiff

FILED
PATRICIA A. NOLAN
CLERK, SUPERIOR COURT

2010 APR 14 PM 4:41

J. WHITNELL, DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

MARSHA ANDERSON O'BRIEN,)	
)	
Plaintiff,)	
v.	)	NO. C20085032
)	
KB HOME TUCSON, INC.; KB HOME	)	PLAINTIFF'S RESPONSE TO
SALES - TUCSON, INC.; KB HOME, INC.;	)	DEFENDANT'S MOTION FOR
JOHN DOES 1-3 and JANE DOES 1-3;	)	SUMMARY JUDGMENT
ABC CORPORATIONS 1-3,)	
)	
Defendants.	)	Assigned to Judge Stephen Villarreal

Plaintiff opposes Defendant's Motion for Summary Judgment. This opposition is supported by Plaintiff's Memorandum of Points and Authorities, Separate Statement of Facts, Affidavit of Plaintiff Marsha Anderson O'Brien, and the record in the case.

Memorandum of Points and Authorities

I. Factual Background

On January 15, 2007 Plaintiff and her daughter visited Defendant's residential housing development called Pantano Overlook in Tucson to shop for a new home. Defendant concedes it was the owner and developer of this property.

The development had a sales office, several adjoining, completed model homes, and many homes in various stages of construction.

Defendant's salesman "Chad" led Plaintiff and her daughter to a particular home under construction. After reaching the home, Chad walked from the paved street across the

1 front yard of the home. He stepped over the curb, over yellow tape laying on the ground, over
2 forms laid to pour a concrete sidewalk, and into the front yard. Plaintiff followed Chad. When
3 she stepped on the sloped curb from the street, she slipped on gravel debris on it and fell
4 forward. She struck her chest on a rebar sticking approximately three feet up from the
5 ground. She broke four ribs, sustained a pneumothorax, and other injuries.
6

7 II. Summary Judgment Standards

8 A Motion for Summary Judgment should be denied if there is a genuine issue as to
9 any material fact. Rule 56(c).

10
11 III. Argument

12 Defendant states two bases for its Motion: (A) The condition was open and obvious,
13 and (B) Plaintiff's comparative negligence precludes her recovery.

14 A. Open and Obvious. Defendant contends that there was no dangerous
15 condition on its property but, if there was one, it was open and obvious.

16 Plaintiff cites that Restatement (Second) of Torts §343 applies. It states:

17 A possessor of land is subject to liability for physical harm
18 caused to this invitees by a condition on the land if, but
only if, he

19 (a) Knows or by the exercise of reasonable care would
20 discover the condition, and should realize that it involves
an unreasonable risk of harm to such invitees, and

21 (b) Should expect that they will not discover or realize the
22 danger, or will fail to protect themselves against it, and

23 (c) Fails to exercise reasonable care to protect them
24 against the danger.

25 Plaintiff makes the following points with respect to the provisions of §343:

26 Here, Plaintiff was an invitee. She was a customer. Defendant solicits people to come
27 to the property so it can sell them homes. Defendant's employee Chad invited and led
28 Plaintiff onto the active construction site. Defendant knew about the condition of the property

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where Plaintiff fell. Indeed, Defendant created the hazards, which included debris on the curb, yellow tape laying on the ground, construction debris scattered about, and rebar sticking straight up. A rebar sticking up out of the ground is a hazard. Defendant should expect that Plaintiff would not discover or realize the danger. Chad told Plaintiff he would lead her to the home. She followed him. She followed directly behind him and did not see nor appreciate the hazard of the debris on the curb, or the upright rebar. Chad exercised no care to protect Plaintiff from the hazard. Indeed, he led her into it.

Arizona law is stated in Arizona Recommended Jury Instruction, Premises Liability 1. Defendant is required to use "reasonable care" to warn of, or remedy a dangerous condition of which Defendant has notice. Defendant has notice if it has created the condition, employees knew of the condition, or it existed for a sufficient length of time. The comment to Premises Liability 1 addresses the issue of whether an instruction on "open and obvious" should be given. Generally speaking, such an instruction should not be given because RAJI (Civil) 3d Fault Instructions and Premises Liability 1 Instruction cover the law on this point. If an open and obvious instruction is given, however, it should read substantially as follows:

Normally, a person need not safeguard or warn of a condition which is sufficiently open and obvious that it may reasonably be expected that person will see and avoid it. Nevertheless, if under all the circumstances it should reasonably have been anticipated that the condition could cause harm, then a person must use reasonable care to correct or safeguard or warn of the condition, even if the condition is open and obvious.

In other words, even if the condition is open and obvious, Chad had a duty to safeguard or warn of the condition. He did not.

The following are important points of fact:

1. No where in its Motion does Defendant mention that its salesman Chad actually led Plaintiff to the subject home and led her over the curb where she fell. Defendant gives the impression Plaintiff was out wandering around on her own. Defendant makes statements like "Plaintiff alleges she cut across the corner where

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there existed ongoing construction . . ."; and "Plaintiff chose not to walk on the clearly marked path . . ."; and "Plaintiff chose the path to the house that she did." In fact, Plaintiff was following Defendant's employee, a fact Defendant conveniently disregards.

2. Defendant alleges Plaintiff fell on a "concrete form stake." Actually, she fell on a one-half inch steel reinforcing bar.

3. As she was following Chad, Plaintiff was not able to see around him and see where he was going. She did not see and appreciate the hazard of the debris on the curb.

4. The photographs attached to Defendant's Motion were taken days after Plaintiff's fall. In the meantime, Defendant had cleaned up the site, put back up the yellow tape, swept the curb, removed debris from the sidewalk and driveway areas. This was not the state of the site at the time Plaintiff fell. Attached as Exhibit B to Plaintiff's Separate Statement of Facts are four photos taken before the site was sanitized.

5. Defendant says there was a "clearly marked path" to the house and that the "walkway was free from obstruction and any danger". It is not clear to which path or walkway Defendant is referring. As shown in the attached photos taken before Defendant cleaned up the site, there was debris everywhere, the yellow tape was down, the driveway was littered with cans, and the sidewalk had debris scattered about.

6. Defendant violated its own field safety manual in several respects. See Exhibit C attached to Plaintiff's Separate Statement of Facts with Bates-stamp numbers.

a) This was an active construction site. The streets on the site "should only be used by construction personnel." (Bates No. 71)

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b) Dirt, trash piles shall have warning devices/markings/signs. (Bates No. 98)

c) "Mushroom-style plastic cones on rebar are not acceptable as protection from an impalement hazard. The rebar should be bent over flat against the surface." (Bates No. 99) Here, mushroom caps were used and the rebar were not bent over.

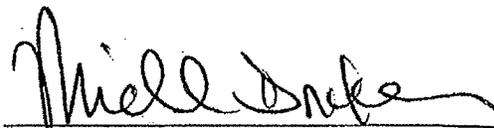
d) "Sales agents should avoid areas where work is currently in progress." (Bates No. 109) This was clearly an active construction site and Plaintiff should not have been taken on the site at all.

B. Defendant contends Plaintiff's comparative negligence precludes her recovery. Based on all the foregoing, it is clear there are genuine issues of fact as to both Defendant's negligence and any comparative negligence on the part of Plaintiff. These issues, of course, should be resolved by a jury.

Conclusion

Plaintiff therefore requests the Court deny Defendant's Motion for Summary Judgment.

Dated this 14 day of April, 2010.



Michael Drake
Attorney for Plaintiff

A copy of the foregoing delivered this 14 day of April, 2010, to:

Honorable Stephen C. Villarreal
Judge, Division 4
Pima County Superior Court
110 W. Congress Street
Tucson, AZ 85701

020085032

1 A copy of the foregoing was mailed this
2 14 day of April, 2010, to:

3 Holly Davies, Esq.
4 Amy Wilkens, Esq.
5 Lorber, Greenfield & Polito, LLP
6 230 W. Fifth Street
7 Tempe, AZ 85281
8 Attorneys for Defendants
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**APPENDIX
EXHIBIT 10**

FILED
PATRICIA A. NOLANO
CLERK, SUPERIOR COURT
2010 JUL 12 PM 4:22
7-12-10
J. WHITNELL, DEPUTY

1 LORBER, GREENFIELD & POLITO, LLP
Holly Davies, Esq. [S.B. #018308]
2 Amy Wilkens, Esq. [S.B. #025171]
230 West Fifth Street
3 Tempe, Arizona 85281
TEL: (602) 437-4177 / FAX: (602) 437-4180
4 hdavies@lorberlaw.com
awilkens@lorberlaw.com

5 Attorneys for Defendants KB HOME Tucson Inc., KB HOME
6 Sales-Tucson Inc., KB HOME

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF PIMA**

9 MARSHA ANDERSON O'BRIEN,
10 Plaintiff,
11 v.
12 KB HOME TUCSON INC.; KB HOME
13 SALES-TUCSON INC.; KB HOME; JOHN
DOES 1-3 and ABC CORPORATIONS 1-3,
14 Defendants.

Case No. C2008 5032
**KB HOME'S RULE 56(e) SUPPLEMENT
TO ITS MOTION FOR SUMMARY
JUDGMENT**
(Assigned to the Honorable Stephen
Villarreal)

15
16 Defendants KB HOME Tucson Inc., KB HOME Sales-Tucson Inc., and KB HOME
17 (collectively "KB Home"), by and through undersigned counsel, hereby submit the following
18 supplement to its Motion for Summary Judgment filed on March 10, 2010 (hereinafter
19 "Motion"), pursuant to Rule 56(e), *Ariz.R.Civ.P.*, based on recent deposition testimony given by
20 Plaintiff after the briefing of KB Home's Motion which directly contradicts Plaintiff's Affidavit
21 submitted with and relied upon in her Response to KB Home's Motion. This Supplement is
22 supported by the accompanying Memorandum of Points and Authorities, KB Home's Motion,
23 Separate Statement of Facts, Reply, and the entire record before this Court.

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 Plaintiff submitted its Separate Statement of Facts in support of its Response to KB
26 Home's Motion (hereinafter "Response"). Plaintiff submitted her Affidavit in support of the
27 same. Plaintiff was deposed in this matter on June 10, 2010. At her deposition, Plaintiff gave
28 several statements which directly contradicted her Affidavit and her Response and Statement of

1 Facts relying upon the same. Rule 56(e), *Ariz.R.Civ.P.*, provides a court may permit affidavits to
2 be supplemented or opposed by depositions. Supplementation is proper, here, as Plaintiff's
3 recent deposition testimony contradicts her Affidavit on points Plaintiff is relying on as being
4 dispositive in regards to KB Home's Motion. The contradictory statements are as follows:

5 **Plaintiff's Statement of Fact No. 6:** "Plaintiff did not see the debris on the curb and
6 appreciate the danger of the curb and the rebar because she was following closely behind Chad."
7 In making this statement, Plaintiff was relying on her Affidavit, nos. 7 and 8, in which she stated
8 she did not see the debris on the curb, the "rebar" sticking up, nor the yellow construction tape
9 in and around the area she fell until after she fell.

10 At her deposition, Plaintiff testified she did actually see the concrete forms, concrete
11 form stakes (what Plaintiff referred to as "rebar"), and orange caps on stakes **before** she fell. *See*
12 *relevant portions of Plaintiff's Deposition Transcript¹, Lines 17-22 and 1-6, Page 22, attached*
13 *hereto as Exhibit "A"*. Also, during her deposition Plaintiff stated she did see the "debris",
14 gravel and dirt, on the curb **before** falling. *See relevant portions of Plaintiff's Deposition*
15 *Transcript, Lines 10-11, Page 29, attached hereto as Exhibit "A"*. Plaintiff also admitted she
16 saw the yellow construction tape at and around the area where she alleges she fell **before** she
17 fell. *See relevant portions of Plaintiff's Deposition Transcript, Lines 10-25, Page 63; and Lines*
18 *1-4, Page 64, attached hereto as Exhibit "A"*.

19 As to the portion of Plaintiff's Statement of Fact No. 6 claiming Plaintiff did not
20 "appreciate the danger," Plaintiff's deposition testimony contradicts the same, as she testified
21 she not only observed the "debris," curb, and "rebar"/stakes, prior to choosing to walk across the
22 same, but she also admitted that orange caps and yellow tape signify "caution." *See relevant*
23 *portions of Plaintiff's Deposition Transcript, Lines 20-25, Page 68; and Lines 2-8, Page 69,*
24 *attached hereto as Exhibit "A"*. Further, Plaintiff admits she noticed the bright orange caps
25 prior to falling because "bright orange stands out". *See relevant portions of Plaintiff's*
26

27
28 ¹ Counsel for Defendant has not yet been provided the final draft of the transcript of Plaintiff's deposition. The attached transcript is the reporter's rough draft of the same. Counsel for Defendant will provide the final draft upon receipt of the same.

1 Deposition Transcript, Lines 4-18, Page 41; and Line 19, Page 42, attached hereto as *Exhibit*
2 "A".

3 Thus, it is clear from Plaintiff's recent deposition testimony that Plaintiff did see the
4 debris, curb, rebar/stakes with orange caps, and yellow caution tape. Further, Plaintiff
5 appreciated the significance of the same.

6 **Plaintiff's Statement of Fact No. 7:** "The yellow construction tape in that area was
7 laying on the ground. There were cardboard boxes, hoses pipes, cans and other construction
8 materials laying in the front yard, along the yet-to-be-poured sidewalks, and in the driveway."
9 Plaintiff supported this statement with her Affidavit in which she states there was debris
10 including cans, hoses, pipes, and cardboard boxes in the front yard, and the driveway was
11 blocked with larger cans.

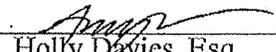
12 At her deposition, Plaintiff admitted she did not actually know whether the driveway was
13 blocked and could not say that there was not a clear path to the home. *See relevant portions of*
14 *Plaintiff's Deposition Transcript, Lines 4-15, Page 66, attached hereto as Exhibit "A"*. Further,
15 Plaintiff could not recall with any specificity the locations of the alleged "debris" in the front
16 yard or what it consisted of. By claiming the "driveway was blocked" in her Response, Plaintiff
17 was attempting to justify her choice to walk across an area which was clearly marked and the
18 condition of the same was open and obvious, as she admits. However, she admitted at her
19 deposition she could not say there was not a clear pathway to the house. Rather, she just chose
20 the path that she chose.

21 Plaintiff submitted her Response and Affidavit attempting to create issues of fact.
22 However, it is clear from Plaintiff's direct contradictory statements made in her deposition and
23 from those other issues raised by KB Home in its Motion and Reply brief that there is no
24 genuine issue as to any material fact and KB Home is entitled to summary judgment. Further,
25 parties cannot thwart the purposes of Rule 56 by creating issues of fact through affidavits that
26 contradict their own deposition testimony, and any affidavit which does contradict deposition
27 testimony should be disregarded for the purposes of summary judgment. *MacLean v. State Dept.*
28 *of Educ.*, 195 Ariz. 235, 986 P.2d 903 (1999). For the foregoing reasons and for those set forth

1 in KB Home's Motion and Reply Brief, KB Home respectfully requests this Court grant its
2 Motion.

3 DATED this 12th day of July, 2010.

4 LORBER, GREENFIELD & POLITO, LLP

5
6 By: 
7 Holly Davies, Esq.
8 Amy Wilkens, Esq.
9 230 West Fifth Street
10 Tempe, Arizona 85281
11 Attorneys for Defendants

11 Original of the foregoing filed this
12 12th day of July, 2010, with:

13 The Clerk of Court
14 PIMA COUNTY SUPERIOR COURT
15 110 West Congress
16 Tucson, AZ 85701

17 Copy of the foregoing hand-delivered
18 this 12th day of July, 2010, to:

19 The Honorable Stephen Villarreal
20 PIMA COUNTY SUPERIOR COURT
21 101 West Jefferson Street, ECB 611
22 Tucson, AZ

23 Copy of the foregoing mailed this
24 12th day of July, 2010, to:

25 Michael Drake, Esq.
26 3085 West Ina Road, Suite 111
27 Tucson, AZ 85741
28 *Attorneys for Plaintiff*



EXHIBIT A

1 BY MS. WILKENS:

2 Q. Hi, my name is Holly Davies. Do you mind stating
3 and spelling your name for record?

4 A. Marsha Anderson O'Brien, Marsha M-A-R-S-H-A,
5 Anderson A-N-D-E-R-S-O-N, O'Brien capital O apostrophe
6 capital B-R-I-E-N.

7 Q. Thank you. Have you had your deposition taken
8 before?

9 A. Yes.

10 Q. How many times?

11 A. Just once.

12 Q. What was that matter regarding?

13 A. Regarding a foot.

14 Q. What was the law -- was it over a lawsuit I
15 assume?

16 A. Yes.

17 Q. What was the lawsuit about?

18 A. Foot injury.

19 Q. Your foot injury?

20 A. Yes.

21 Q. So were you the plaintiff in that lawsuit?

22 A. Yes.

23 Q. How long ago was that?

24 A. Over 20 years ago.

25 Q. What state was it in?

MARSHA O'BRIEN.txt
MR. DRAKE: Okay.

9

10 BY MS. WILKENS:

11 Q. Did you see any stakes next to the forms in the
12 front of the lot?

13 A. I didn't look. I didn't look at the stake. I
14 didn't see -- difficult to explain. I did not realize
15 that was the house we were going to. Coming around the
16 corner I wasn't -- I was busy talking to Chad.

17 Q. Okay. Prior to your fall, did you see the forms
18 in front of the house?

19 A. Yes.

20 Q. Prior to your fall did you see the middle stakes
21 in front of the house?

22 A. Yes.

23 Q. Prior to your fall did you see the yellow
24 construction tape in front of the house?

25 A. No.

23

1 Q. Prior to the fall did you see original caps on
2 the metal stakes?

3 A. On some -- on some metal stakes, yes.

4 Q. Which metal stakes?

5 A. Some of the metal stakes right in front of the
6 house had original caps.

7 Q. Which ones did not have original caps?

8 A. I don't know.

9 Q. You just recall that some of them did not?

MARSHA O'BRIEN.TXT

13 A. No. I don't know. I don't recall. I don't
14 recall.

15 Q. Okay. I'm going to ask this question again just
16 because I'm still not clear on the answer. So how did
17 you know there was gravel or dirt on the curb if you
18 can't see the curb before you fell?

19 A. Street was paved, and there was curbing as we
20 were coming around on the other streets.

21 Q. Okay. I'm sorry. Still doesn't answer my
22 question.

23 A. Well, I don't know.

24 Q. Did you assume there was gravel or dirt on the
25 curb and that's why you fell?

30

1 A. No, I didn't assume it. There are. There was.

2 Q. But you did not see the curb before you fell?

3 A. I didn't -- I didn't realize -- I didn't see the
4 curb. I followed after Chad and I slipped on the dirt
5 and gravel.

6 Q. That you didn't see?

7 A. I did see the dirt, yes. Dirt was there.

8 Q. When did you see the dirt and the gravel?

9 A. As I was following behind Chad.

10 Q. You saw the dirt and the gravel on the curb?

11 A. Yes.

12 Q. In your complaint it states that the home where

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19 looks the same or that looks different from when you
20 were walking up to the house prior to you falling? If
21 so, will you describe whatever is the same or whatever
22 is different?

23 A. Yes. It appears the sidewalk has been swept off.
24 This is the sidewalk from here to here.

25 Q. You're pointing to the concrete area. Is that

42

1 the sidewalk or the curb?

2 A. I'm sorry. Wrong -- wrong word.

3 Q. I want to make sure.

4 A. Curb that's the curbing. It's a sloped curb.

5 That's swept clean or blown clean. There is caution
6 tape that's in place. The wood forms were there. Rebar
7 was there. However there is orange caps on the rebar
8 and it appears that some of the other construction stuff
9 has been moved away.

10 Q. And before you fell when you were walking, you go
11 up to the house. Which one of the metal stakes did not
12 have an orange cap on them?

13 A. Several.

14 Q. Which several?

15 A. I can't tell you exactly which ones now. But not
16 all of them will were covered.

17 Q. Why were you noticing that as you walked up to
18 the house?

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19 A. Orange, bright orange, stands out.

20 Q. And then you said some of the caution tape was
21 not there. Which caution tape was not there when you --
22 before you fell? If you want to mark it, here, you can
23 the caution tape.

24 A. That would be in our path of walking. This
25 caution tape was not here.

43

1 Q. So why don't you put little purple dashes through
2 the caution tape that you feel was not there at the time
3 you fell.

4 A. All the way across here. It was not strung up.

5 A. Okay. You can do slash marks following from the
6 start to end of where it was not.

7 Q. Make sure we see it okay. Can you just do it a
8 little bit darker? sorry.

9 A. Certainly.

10 Q. And then I'm sorry, third thing you said was that
11 the curb was swept, is that correct or?

12 A. This is -- this is -- this is clean. This has
13 been cleaned.

14 Q. So you remember there being dirt on this curb as
15 you approached the house?

16 A. That's correct. Dirt, gravel, correct.

17 Q. Okay. And when you fell, where was Chad? was he
18 still right next to you slightly in front of you?

19 A. He is in front of me.

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64

1 house?

2 MR. DRAKE: That was not the question. You
3 mischaracterized the testimony earlier.

4

5 Read read.

6

7 THE WITNESS: The construction tape was
8 down.

9 MR. DRAKE: Yes.

10 THE WITNESS: What you asked me -- maybe I
11 got the question wrong earlier, you were wanting to know
12 if there was construction tape as a barrier across as
13 this is. There wasn't construction tape across here as
14 a barrier. It was down and earlier I think I tried to
15 state that around the corner there was some construction
16 tape but didn't continue all the way down because it was
17 on the ground.

18 MR. DRAKE: Okay. That's the answer to that
19 question. I'm taking a break, please.

20

21 Off off.

22

23 BY MS. WILKENS:

24 Q. So prior to your fall you saw the construction
25 tape on the ground?

- 1 A. Yes.
- 2 Q. And you saw Chad step over the construction tape
3 on the ground?
- 4 A. Yes.
- 5 Q. And then on number 8 of affidavit it says after I
6 fell I saw the yellow barrier construction tape was
7 laying on the ground. So it's both before you fell and
8 after you fell that you saw the construction tape on the
9 ground?
- 10 A. As I fell forward, yes. The answer is yes.
- 11 Q. And then going on and number 8 it says in that
12 area there was other debris including cans, hoses,
13 pipes, and cardboard boxes. The cans, is that referring
14 to the paint cans we discussed or some other type of can
15 you're referring to?
- 16 A. There were different cans there.
- 17 Q. What other types of cans?
- 18 A. The answer is yes. I don't know.
- 19 Q. Same size? Smaller?
- 20 A. There was different sizes.
- 21 Q. Where were the cans?
- 22 A. Where the driveway would be. There was some
23 other -- there was debris on the --
- 24 Q. So the other cans were on the driveway?
- 25 A. Correct.

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1 a circle and that's where the pipes and the cardboard
2 boxes are, correct?

3 A. Correct.

4 Q. And then it says the driveway was blocked with
5 larger cans. Can you not walk up the driveway because
6 it was blocked with larger cans?

7 A. I followed Chad.

8 Q. That wasn't my question.

9 A. Right.

10 Q. Could you have walked up the driveway or was it
11 blocked by the larger cans?

12 A. I don't know. I don't know.

13 Q. Do you know if the driveway was blocked by large
14 cans?

15 A. I don't know.

16 Q. So in regard to you following closely behind
17 Chad, the only thing you could not see according to your
18 affidavit was the debris on the curb and the rebar, the
19 actual bar sticking up as you fell upon it, is that
20 correct?

21 A. State it again please.

22 Q. Sure. In your affidavit you refer to because I
23 was following closely behind Chad so I'm asking because
24 you were following closely behind is it your testimony
25 that the only thing you could than see were the debris

- 1 Q. Did you percieve it as you should proceed with
2 caution?
3 A. Yes.
4 Q. Why did you think you needed to proceed with
5 caution?
6 A. I didn't percieve it as dangerous. We were
7 following Chad, walked right in his foot steps, he made
8 it across just fine.
9 Q. How tall is Chad?
10 A. I have no idea.
11 Q. What -- how tall do you think Chad is?
12 A. Six foot.
13 Q. How young do you think Chad is?
14 A. 30ish.
15 Q. How often do you think Chad works on a
16 construction site?
17 A. I have no idea.
18 Q. How often do you walk around construction sites?
19 A. Never.
20 Q. Did you know what the original caps on the metal
21 stake was for?
22 A. I know what they're there for, caution.
23 Q. What did you assume the caution tape that you saw
24 in other areas of the project and laying on the ground
25 was for?

- 1 A. To pour concrete.

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2 Q. The caution tape was there to pour concrete?

3 A. The forms are there there to pour concrete.

4 Q. What was the caution tape there for?

5 A. I don't know.

6 Q. When you see yellow construction tape or caution
7 tape what do you assume it to mean?

8 A. Caution.

9 Q. There is the four photos attached to your
10 affidavit, your statement in number 10 says the four
11 photos attached as Exhibit B to plaintiff separate
12 statement of fact accurately portrays the condition of
13 the area where I fell before the area was cleaned up by
14 defendant.

15 I'd like to ask that you look at those
16 photographs and affirm that's still your testimony
17 today.

18 A. Yes.

19 Q. Second photograph which shows the curb that
20 accurately reflects the curb that you stepped on and
21 fell?

22 A. Yes.

23 Q. And the third photograph that accurately reflect
24 the metal stake that you fell upon?

25 MR. DRAKE: Objection. Question is vague.

71

1 There is number of stakes there.

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23 later in the day?

24 A. Yes.

25 MS. DAVIES: That is all my questions.

113

1 MR. DRAKE: No questions. Read and sign, please.

2 Same order, full and condensed.

3

4 (At 4:35 p.m. the deposition was concluded.)

5

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REPORTER'S CERTIFICATION

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I, ^ Reporter, a Certified Shorthand Reporter in
and for the State of Arizona, do hereby certify:

That the foregoing witness was by me duly sworn;
that the deposition was then taken before me at the time
and place herein set forth; that the testimony and
proceedings were reported stenographically by me and
later transcribed into typewriting under my direction;
that the foregoing is a true record of the testimony and
proceedings taken at that time.

IN WITNESS WHEREOF, I have subscribed my name this
^ day of ^ , ^ .

^ Reporter, CSR No. ^

**APPENDIX
EXHIBIT 11**

FILED
PATRICIA NOLAND
CLERK, SUPERIOR COURT
07/20/10 7:49:35 AM
By: Vicki Thompson

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. STEPHEN C. VILLARREAL
JUDGE

CASE NO. C20085032

COURT REPORTER: Bob Sipos
Courtroom - 380

DATE: July 19, 2010

MARSHA ANDERSON O'BRIEN
Plaintiff

Michael Drake, Esq. counsel for Plaintiff

VS.

KB HOME TUCSON INC,
KB HOME SALES-TUCSON INC, and
KB HOME INC
Defendants

Holly P Davies, Esq.
counsel for Defendants

MINUTE ENTRY

DEFENDANTS' KB HOME'S RULE 56(e) MOTION FOR SUMMARY JUDGMENT:

No parties present.

THE COURT NOTES it read the Motion for Summary Judgment, Defendants' Statement of Facts, Plaintiff's response, Plaintiff's Statement of Facts, Defendants' reply, and Defendants' Supplement to their Motion for Summary Judgment.

Ms. Davies argues the motion to the Court.

Mr. Drakes argues the motion to the Court in response.

The Court takes the matter under advisement.

IT IS ORDERED affirming the Status Conference set on September 27, 2010 at 9:00 a.m., and the jury trial set on November 16, 2010 at 9:00, both in this Division.

cc: Hon. Stephen C. Villarreal
Holly P Davies, Esq.
Michael Drake, Esq.
Clerk of Court - Under Advisement Clerk

Vicki Thompson
Deputy Clerk

**APPENDIX
EXHIBIT 12**

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

JUL 23 2010

ARIZONA SUPERIOR COURT, PIMA COUNTY JUL 23 AM 8:36

HON. STEPHEN C. VILLARREAL
JUDGE

CASE NO. C20085032

BY: R. ST. GERMAINE, DEPUTY

DATE: July 21, 2010

MARSHA ANDERSON O'BRIEN,
Plaintiff,

VS.

KB HOME TUCSON INC,
KB HOME SALES-TUCSON INC, and
KB HOME INC,
Defendants.

RULING

IN CHAMBERS UNDER ADVISEMENT RULING RE: MOTION FOR SUMMARY JUDGMENT:

Defendants have filed a motion for summary judgment alleging that there is no basis for liability here where plaintiff, an invitee, walked onto a sloped curb which contained sand and gravel and slipped and fell, causing injury. Defendant alleges this condition was open and obvious pursuant to §343(A) of the Restatement (Second) of Torts. Plaintiff denies the condition was open and obvious and stated in an April 2010 affidavit submitted in opposition to the motion for summary judgment that she did not see the condition on the curb. However, in a June 2010 deposition she appears to contradict her affidavit by stating that she saw the condition and appreciated it prior to stepping onto the curb.

The Court, upon consideration of the pleadings and argument, finds that the "sham affidavit rule" may or may not apply to the circumstances and may or may not be dispositive of the motion for summary judgment (See *Allstate v. Ridgely*, 214 Ariz. 440, 153 P.3d 1069 (App. 2007); *Wright v. Hills*, 161 Ariz. 583, 588, 780 P.2d 416, 421 (App. 1989). In the interest of allowing the parties a full opportunity to be heard on this issue the Court is requiring additional briefing. Defendants must submit their supplemental brief no later than August 3, 2010. Plaintiff's responsive supplemental brief shall be filed no later than August 17, 2010. Defendants' supplemental reply brief is due August 31, 2010.

Marti Ackermann
Judicial Administrative Assistant

RULING

Page 2

Date: July 21, 2010

Case No.: C20085032

The Court vacates its previous order placing this matter under advisement until such time that the briefing is completed on this issue and the Court determines the need, if any, for additional oral argument.



HON. STEPHEN C. VILLARREAL

Cc: Amy Wilkens, Esq.
Holly P. Davies, Esq.
Michael Drake, Esq.
Clerk of Court - Under Advisement Clerk

Marti Ackermann
Judicial Administrative Assistant

**APPENDIX
EXHIBIT 13**

8/22

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

2010 AUG -2 PM 4:45

J. WHITNELL, DEPUTY

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9 Attorneys for Defendants KB HOME Tucson Inc., KB HOME
10 Sales-Tucson Inc., KB HOME

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12 **IN AND FOR THE COUNTY OF PIMA**

13 MARSHA ANDERSON O'BRIEN,
14 Plaintiff,

15 v.

16 KB HOME TUCSON INC.; KB HOME
17 SALES-TUCSON INC.; KB HOME; JOHN
18 DOES 1-3 and ABC CORPORATIONS 1-3,
19 Defendants.

Case No. C2008 5032

**KB HOME'S SUPPLEMENTAL BRIEF
IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

(Assigned to the Honorable Stephen
Villarreal)

20 Defendants KB HOME Tucson Inc., KB HOME Sales-Tucson Inc., and KB HOME
21 (collectively "KB Home"), by and through undersigned counsel, hereby submit the following
22 Supplemental Brief in Support of its Motion for Summary Judgment, per this Court's Ruling
23 dated July 21, 2010. The "sham affidavit" rule applies to the circumstances underlying this
24 matter, as Plaintiff's affidavit submitted in support of her Response to KB Home's Motion
25 clearly and directly conflicts with her deposition testimony, and summary judgment should be
26 granted accordingly. This Supplemental Brief is supported by the accompanying Memorandum
27 of Points and Authorities, KB Home's Motion, Separate Statement of Facts, Reply, Supplement,
28 and the entire record before this Court.

MEMORANDUM OF POINTS AND AUTHORITIES

Where a moving party makes a prima facie showing of the absence of any genuine issue
of fact, the adverse party may not simply rest on the pleadings, but must show by competent
evidence specific facts that create a genuine issue for trial. *MacConnel v. Mitten*, 131 Ariz. 22,

1 683 P.2d 689 (1981). Here, Plaintiff submitted an affidavit to support her Response in an
2 attempt to meet her afore-referenced burden. Where affidavits are employed in this manner,
3 Rule 56 (e) requires that the affidavit set forth such facts as would be admissible in evidence,
4 and show affirmatively that the affiant is competent to testify to the matters stated therein. Per
5 the “sham affidavit” rule, parties cannot thwart the purposes of Rule 56 by creating issues of fact
6 through affidavits that contradict their own deposition testimony, and any affidavit which does
7 contradict their deposition testimony should be disregarded for purposes of summary judgment.
8 *Wright v. Hills*, 161 Ariz. 583, 780 P.2d 416 (Ct. App. Div. 2 1989). This is precisely what
9 Plaintiff has done in the instant matter.

10 The *Wright* Court set forth the “sham affidavit” rule citing to a long line of precedence
11 for the same and to the underlying policy that allowing a party to submit an affidavit which
12 contradicts its deposition testimony would greatly diminish the utility of summary judgment as a
13 procedure for screening out genuine issues of fact. *Id* at 420. As set forth with specific citations¹
14 in KB Home’s Supplement to its Motion for Summary Judgment filed on July 12, 2010,
15 Plaintiff’s recent deposition testimony directly and clearly contradicts her Affidavit. Plaintiff
16 claims in her Affidavit that she did not see the debris on the curb upon which she claims she fell,
17 the yellow caution tape in and around the area in question, and the stakes/rebar with bright
18 orange caps, prior to falling. At her deposition, Plaintiff was specifically asked about her
19 Affidavit and admitted that she did actually see the debris on the curb, the yellow caution tape,
20 and the brightly orange capped stakes/rebar, **prior** to falling. In her Affidavit, Plaintiff claimed
21 she did not see or appreciate the potential danger in the area where she fell. However, at her
22 deposition, Plaintiff admitted that she understood that yellow caution tape and bright orange
23 caps on stakes/rebar signified “caution,” and she saw the yellow caution tape and capped
24 stakes/rebar in the area where she fell prior to her fall. Further, Plaintiff claimed in her Affidavit
25 she did not see or appreciate the condition of the area in question as she was walking so closely
26

27 ¹ To avoid redundancy with KB Home’s previous Supplement, KB Home has attached as Exhibit “1” its previous
28 Supplement with specific citations to Plaintiff’s Affidavit and Plaintiff’s deposition. The previous Supplement has been
revised to include citations to the final draft of Plaintiff’s deposition transcript, which was received after KB Home submitted
its previous Supplement.

1 behind the KB Home sales representative. This is contradicted by Plaintiff's deposition
2 testimony, referred to above, where she states she did actually see and appreciate the condition
3 of the area where she fell. Plaintiff's Affidavit statement about "following too closely" is also
4 contradicted by her daughter's recent deposition testimony, where her daughter estimates her
5 mother was approximately six feet behind Chad, and by the time Plaintiff fell, near the street,
6 Chad was closer to the front door of the home. *See Relevant Portions of the Deposition of Robin*
7 *Anderson attached hereto as Exhibit "2"*. Thus, Plaintiff's deposition testimony clearly
8 contradicts Plaintiff's Affidavit on each point where Plaintiff was attempting to make an issue of
9 material fact regarding KB Home's Motion.

10 Plaintiff's Affidavit was offered to defeat KB Home's Motion for Summary Judgment.
11 As Plaintiff's deposition revealed, Plaintiff's Affidavit was a "sham" as it was not accurate. In
12 *Allstate Indem. Co. v. Ridgely*, 153 P.3d 1069, 214 Ariz. 440 (2007), the court recognized that
13 federal courts applying the sham affidavit rule have given greater weight to deposition testimony
14 that affidavits, as deposition testimony is subject to cross-examination and thus inherently more
15 reliable than an affidavit. That is clear in this case, as when being asked at her deposition
16 about her Affidavit, Plaintiff admitted she did actually see and appreciate the condition of the
17 area where she fell prior to falling. *Allstate* further provides the standards for what constitutes a
18 "sham," whether the deposition and affidavit are clearly in conflict and whether the affidavit
19 was directed at thwarting the purposes of Rule 56. Here, there can be no doubt that both
20 elements are met. Plaintiff's deposition testimony directly contradicted her Affidavit, as set
21 forth above. Further, Plaintiff's sole purpose for making her Affidavit was to attempt to
22 substantiate her Response to KB Home's Motion and to avoid summary judgment. Thus,
23 Plaintiff's Affidavit is clearly a sham affidavit by definition.

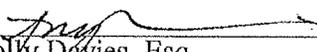
24 CONCLUSION

25 Plaintiff's Affidavit is clearly contradicted by her deposition testimony and that of her
26 daughter. Plaintiff's sole motive for offering her Affidavit was to defeat KB Home's Motion for
27 Summary Judgment. At her deposition, Plaintiff was asked specifically about those statements
28 made in her Affidavit and directly contradicted the same. Thus, the purpose of Plaintiff's

1 Affidavit was clearly to thwart Rule 56 by attempting to create issues of fact through an affidavit
2 which clearly contradicts Plaintiff's deposition testimony. For the foregoing reasons, Plaintiff's
3 Affidavit should be disregarded for the purposes of KB Home's Motion for Summary Judgment
4 per the sham affidavit rule.

5 DATED this 2nd day of August, 2010.

7 LORBER, GREENFIELD & POLITO, LLP

9 By: 
10 Holly Davies, Esq.
11 Amy Wilkens, Esq.
12 230 West Fifth Street
13 Tempe, Arizona 85281
14 Attorneys for Defendant KB HOME

14 Original of the foregoing filed this
15 2nd day of August, 2010, with:

16 The Clerk of Court
17 PIMA COUNTY SUPERIOR COURT
18 110 West Congress
19 Tucson, AZ 85701

18 Copy of the foregoing hand-delivered
19 this 2nd day of August, 2010, to:

20 The Honorable Stephen Villarreal
21 PIMA COUNTY SUPERIOR COURT
22 110 West Congress
23 Tucson, Arizona 85701

22 Copy of the foregoing mailed this
23 2nd day of August, 2010, to:

24 Michael Drake, Esq.
25 3085 West Ina Road, Suite 111
26 Tucson, AZ 85741
27 Attorneys for Plaintiff

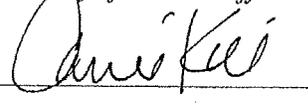
26 

EXHIBIT 1

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6 Sales-Tucson Inc., KB HOME

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

8 **IN AND FOR THE COUNTY OF PIMA**

9 MARSHA ANDERSON O'BRIEN,

10 Plaintiff,

11 v.

12 KB HOME TUCSON INC.; KB HOME
SALES-TUCSON INC.; KB HOME; JOHN
13 DOES 1-3 and ABC CORPORATIONS 1-3,

14 Defendants.

Case No. C2008 5032

**KB HOME'S RULE 56(e) SUPPLEMENT
TO ITS MOTION FOR SUMMARY
JUDGMENT**

(Assigned to the Honorable Stephen
Villarreal)

15
16 Defendants KB HOME Tucson Inc., KB HOME Sales-Tucson Inc., and KB HOME
17 (collectively "KB Home"), by and through undersigned counsel, hereby submit the following
18 supplement to its Motion for Summary Judgment filed on March 10, 2010 (hereinafter
19 "Motion"), pursuant to Rule 56(e), *Ariz.R.Civ.P.*, based on recent deposition testimony given by
20 Plaintiff after the briefing of KB Home's Motion which directly contradicts Plaintiff's Affidavit
21 submitted with and relied upon in her Response to KB Home's Motion. This Supplement is
22 supported by the accompanying Memorandum of Points and Authorities, KB Home's Motion,
23 Separate Statement of Facts, Reply, and the entire record before this Court.

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 Plaintiff submitted its Separate Statement of Facts in support of its Response to KB
26 Home's Motion (hereinafter "Response"). Plaintiff submitted her Affidavit in support of the
27 same. Plaintiff was deposed in this matter on June 10, 2010. At her deposition, Plaintiff gave
28 several statements which directly contradicted her Affidavit and her Response and Statement of

1 Facts relying upon the same. Rule 56(e), *Ariz.R.Civ.P.*, provides a court may permit affidavits to
2 be supplemented or opposed by depositions. Supplementation is proper, here, as Plaintiff's
3 recent deposition testimony contradicts her Affidavit on points Plaintiff is relying on as being
4 dispositive in regards to KB Home's Motion. The contradictory statements are as follows:

5 **Plaintiff's Statement of Fact No. 6:** "Plaintiff did not see the debris on the curb and
6 appreciate the danger of the curb and the rebar because she was following closely behind Chad."
7 In making this statement, Plaintiff was relying on her Affidavit, nos. 7 and 8, in which she stated
8 she did not see the debris on the curb, the "rebar" sticking up, nor the yellow construction tape
9 in and around the area she fell until after she fell.

10 At her deposition, Plaintiff testified she did actually see the concrete forms, concrete
11 form stakes (what Plaintiff referred to as "rebar"), and orange caps on stakes **before** she fell. *See*
12 *relevant portions of Plaintiff's Deposition Transcript¹, Lines 17-22 and 1-6, Page 22 Lines 18-*
13 *23, Page 26, attached hereto as Exhibit "A".* Also, during her deposition Plaintiff stated she
14 did see the "debris", gravel and dirt, on the curb **before** falling. *See relevant portions of*
15 *Plaintiff's Deposition Transcript, Lines 10-11, Page 29 Lines 21-25, Page 33; Lines 1-8, Page*
16 *34, attached hereto as Exhibit "A".* Plaintiff also admitted she saw the yellow construction tape
17 at and around the area where she alleges she fell **before** she fell. *See relevant portions of*
18 *Plaintiff's Deposition Transcript, Lines 10-25, Page 63 Lines 11-22, Page 68; and Lines 1-4,*
19 *Page 64, attached hereto as Exhibit "A".*

20 As to the portion of Plaintiff's Statement of Fact No. 6 claiming Plaintiff did not
21 "appreciate the danger," Plaintiff's deposition testimony contradicts the same, as she testified
22 she not only observed the "debris," curb, and "rebar"/stakes, prior to choosing to walk across the
23 same, but she also admitted that orange caps and yellow tape signify "caution." *See relevant*
24 *portions of Plaintiff's Deposition Transcript, Lines 20-25, Page 68 Lines 13-15, Page 72; and*
25 *Lines 2-8, Page 69 Lines 7-19, Page 73, attached hereto as Exhibit "A".* Further, Plaintiff
26 admits she noticed the bright orange caps prior to falling because "bright orange stands out".

27
28 ¹ Counsel for Defendant has not yet been provided the final draft of the transcript of Plaintiff's deposition. The attached transcript is the reporter's rough draft of the same. Counsel for Defendant will provide the final draft upon receipt of the same.

1 See relevant portions of Plaintiff's Deposition Transcript, ~~Lines 4-18, Page 4~~ Lines 13-15,
2 Page 46; ~~and Line 19, Page 42~~, attached hereto as Exhibit "A".

3 Thus, it is clear from Plaintiff's recent deposition testimony that Plaintiff did see the
4 debris, curb, rebar/stakes with orange caps, and yellow caution tape. Further, Plaintiff
5 appreciated the significance of the same.

6 **Plaintiff's Statement of Fact No. 7:** "The yellow construction tape in that area was
7 laying on the ground. There were cardboard boxes, hoses pipes, cans and other construction
8 materials laying in the front yard, along the yet-to-be-poured sidewalks, and in the driveway."
9 Plaintiff supported this statement with her Affidavit in which she states there was debris
10 including cans, hoses, pipes, and cardboard boxes in the front yard, and the driveway was
11 blocked with larger cans.

12 At her deposition, Plaintiff admitted she did not actually know whether the driveway was
13 blocked and could not say that there was not a clear path to the home. See relevant portions of
14 Plaintiff's Deposition Transcript, ~~Lines 4-15, Page 66~~ Lines 17-25, Page 70; and Lines 1-4,
15 Page 71, attached hereto as Exhibit "A". Further, Plaintiff could not recall with any specificity
16 the locations of the alleged "debris" in the front yard or what it consisted of. By claiming the
17 "driveway was blocked" in her Response, Plaintiff was attempting to justify her choice to walk
18 across an area which was clearly marked and the condition of the same was open and obvious,
19 as she admits. However, she admitted at her deposition she could not say there was not a clear
20 pathway to the house. Rather, she just chose the path that she chose.

21 Plaintiff submitted her Response and Affidavit attempting to create issues of fact.
22 However, it is clear from Plaintiff's direct contradictory statements made in her deposition and
23 from those other issues raised by KB Home in its Motion and Reply brief that there is no
24 genuine issue as to any material fact and KB Home is entitled to summary judgment. Further,
25 parties cannot thwart the purposes of Rule 56 by creating issues of fact through affidavits that
26 contradict their own deposition testimony, and any affidavit which does contradict deposition
27 testimony should be disregarded for the purposes of summary judgment. *MacLean v. State Dept.*
28 *of Educ.*, 195 Ariz. 235, 986 P.2d 903 (1999). For the foregoing reasons and for those set forth

1 in KB Home's Motion and Reply Brief, KB Home respectfully requests this Court grant its
2 Motion.

3 DATED this _____ day of _____, 2010.

4 LORBER, GREENFIELD & POLITO, LLP

5
6 By: _____
7 Holly Davies, Esq.
8 Amy Wilkens, Esq.
9 230 West Fifth Street
10 Tempe, Arizona 85281
11 Attorneys for Defendants

11 Original of the foregoing filed this
12 _____ day of _____, 2010, with:

13 The Clerk of Court
14 PIMA COUNTY SUPERIOR COURT
15 110 West Congress
16 Tucson, AZ 85701

15 Copy of the foregoing hand-delivered
16 this ___ day of _____, 2010, to:

17 The Honorable Stephen Villarreal
18 PIMA COUNTY SUPERIOR COURT
19 101 West Jefferson Street, ECB 611
20 Tucson, AZ

19 Copy of the foregoing mailed this
20 _____ day of _____, 2010, to:

21 Michael Drake, Esq.
22 3085 West Ina Road, Suite 111
23 Tucson, AZ 85741
24 *Attorneys for Plaintiff*
25
26
27
28

EXHIBIT A

Certified Copy

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

MARSHA ANDERSON-O'BRIEN,

NO. CV2008 5032

Plaintiff,

vs.

KB HOME TUCSON, INC.; KB HOME
SALES-TUCSON INC.; KB HOME; JOHN
DOES 1-3 and ABC CORPORATIONS
1-3,

Defendants.

DEPOSITION OF

MARSHA ANDERSON-O'BRIEN

June 10, 2010
1:00 p.m.

LAW OFFICE OF MICHAEL DRAKE
3085 WEST INA ROAD, SUITE 111
TUCSON, ARIZONA 85741

Pamela L. Lohr, RPR, CCR No. 50035



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1 Q. Okay. Did you see any metal stakes next to the
2 forms?

3 A. Yes.

4 MR. DRAKE: At what point in time now are we
5 speaking of?

6 MS. DAVIES: I'm sorry. In front of lot 75,
7 the lot you marked with an X.

8 MR. DRAKE: But at what point in time?

9 MS. DAVIES: As she is walking up to the lot.

10 MR. DRAKE: Okay.

11 BY MS. DAVIES:

12 Q. Did you see any stakes next to the forms in the
13 front of the lot?

14 A. I didn't look. I didn't look at the stake. I
15 didn't see -- it's difficult to explain. I did not realize
16 that was the house we were going to. Coming around the
17 corner I wasn't -- I was busy talking to Chad.

18 Q. Okay. Prior to your fall, did you see the forms in
19 front of the house?

20 A. Yes.

21 Q. Prior to your fall, did you see the metal stakes in
22 front of the house?

23 A. Yes.

24 Q. Prior to your fall, did you see the yellow
25 construction tape in front of the house?



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1 gravel if you didn't see the curb before you stepped on it?

2 A. Restate the question.

3 Q. Sure. How did you know the curb had gravel and dirt
4 on it when you just stated previously you didn't see the
5 curb before you fell?

6 A. All I remember is seeing gravel and dirt and walking
7 across behind Chad.

8 Q. So do you now think in putting the whole accident
9 together that you did actually see the gravel and dirt on
10 the curb before you fell?

11 A. No. I don't know. I don't recall. I don't recall.

12 Q. Okay. I'm going to ask this question again just
13 because I'm still not clear on the answer.

14 So how did you know there was gravel or dirt
15 on the curb if you can't see the curb before you fell?

16 A. The street was paved and there was curbing as we
17 were coming around on the other streets.

18 Q. Okay. I'm sorry. That still doesn't answer my
19 question.

20 A. Well, I don't know.

21 Q. Did you assume there was gravel or dirt on the curb
22 and that's why you fell?

23 A. No, I didn't assume it. There are. There was.

24 Q. But you did not see the curb before you fell?

25 A. I didn't -- I didn't realize -- I didn't see the



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1 curb. I followed after Chad and I slipped on the dirt and
2 gravel.

3 Q. That you didn't see?

4 A. I did see the dirt, yes. The dirt was there.

5 Q. When did you see the dirt and the gravel?

6 A. As I was following behind Chad.

7 Q. You saw the dirt and the gravel on the curb?

8 A. Yes.

9 Q. In your complaint it states that the home where you
10 fell was lot 54, 55 or 56. I assume that was a misstatement
11 and now everybody agrees it was lot 75; is that correct?

12 A. Yes.

13 (At this time, Deposition Exhibit Numbers 2
14 and 3 were marked for identification.)

15 BY MS. DAVIES:

16 Q. I'm going to show you some photographs that have
17 been marked as Exhibit 2 and Exhibit 3 and ask you some
18 questions about them.

19 On the front page of the photographs is a
20 copy of what was in the disclosure statement, how these were
21 produced, just so you understand the documents as I hand
22 them to you.

23 The first stack, this is what I've marked as
24 Exhibit 2. The second stack is what's been marked as
25 Exhibit 3. And I have just identified the pages in



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1 That's swept clean or blown clean. There is caution tape
2 that's in place. The wood forms were there. Rebar was
3 there, however, there is orange caps on the rebar and it
4 appears that some of the other construction stuff has been
5 moved away.

6 Q. And before you fell, when you were walking up to the
7 house, which one of the metal stakes did not have an orange
8 cap on them?

9 A. Several.

10 Q. Which several?

11 A. I can't tell you exactly which ones now, but not all
12 of them will were covered.

13 Q. Why were you noticing that as you walked up to the
14 house?

15 A. Orange, bright orange, stands out.

16 Q. And then you said some of the caution tape was not
17 there. Which caution tape was not there when you -- before
18 you fell? If you want to mark it, here, you can mark
19 slashes on --

20 A. The caution tape that would be in our path of
21 walking -- this caution tape was not here.

22 Q. So why don't you put little purple dashes through
23 the caution tape that you believe was not there at the time
24 you fell.

25 A. All the way across here?



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1 if there was construction tape as a barrier across as this
2 is. There wasn't construction tape across here as a
3 barrier. It was down. And earlier, I think I tried to
4 state that around the corner there was some construction
5 tape but didn't continue all the way down because it was on
6 the ground.

7 MR. DRAKE: Okay. That's the answer to that
8 question. I'm taking a break, please.

9 (At this time, a short break was taken.)

10 BY MS. DAVIES:

11 Q. So prior to your fall you saw the construction tape
12 on the ground?

13 A. Yes.

14 Q. And you saw Chad step over the construction tape on
15 the ground?

16 A. Yes.

17 Q. And then on number 8 of the affidavit it says:

18 "After I fell I saw the yellow barrier
19 construction tape was laying on the ground." So it's both
20 before you fell and after you fell that you saw the
21 construction tape on the ground?

22 A. As I fell forward, yes. The answer is yes.

23 Q. And then going on and number 8 it says:

24 "In that area there was other debris
25 including cans, hoses, pipes and cardboard boxes."



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1 MR. DRAKE: Yes.

2 THE WITNESS: Here where the cardboard boxes
3 are there were pipes lying there on the ground.

4 BY MS. DAVIES:

5 Q. And you're pointing to Exhibit 2(f) to the left-hand
6 side of the photo, left of the area you fell; is that
7 correct?

8 Did I describe it correctly, left of the area
9 you fell? Here, circle it with a blue pen. That will make
10 it easier. Mark just what you were pointing at on Exhibit
11 2(f) is where the cardboard boxes and pipe were located.

12 A. How do you want me to mark?

13 Q. Circle it. Circle the area. So you marked on 2(f)
14 a circle and that's where the pipes and the cardboard boxes
15 are, correct?

16 A. Correct.

17 Q. And then it says:

18 "The driveway was blocked with larger cans."

19 Could you not walk up the driveway because it
20 was blocked with larger cans?

21 A. I followed Chad.

22 Q. That wasn't my question.

23 A. Right.

24 Q. Could you have walked up the driveway or was it
25 blocked by the larger cans?



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1 A. I don't know. I don't know.

2 Q. Do you know if the driveway was blocked by large
3 cans?

4 A. I don't know.

5 Q. So in regard to you following closely behind Chad,
6 the only thing you could not see, according to your
7 affidavit, was the debris on the curb and the rebar, the
8 actual bar sticking up as you fell upon it; is that correct?

9 A. State it again, please.

10 Q. Sure. In your affidavit you refer to "because I was
11 following closely behind Chad," so I'm asking because you
12 were following closely behind is it your testimony that the
13 only things that you could not see were the debris on the
14 curb or the rebar sticking up, the one that you fell on?

15 A. Yes.

16 Q. Bullet point number 9 to your affidavit says prior
17 to your fall I did not see nor appreciate that the condition
18 of the area over which Chad led me was dangerous. What
19 would you have needed to see to appreciate the condition of
20 the area you were walking?

21 A. He would not have led us to the house or showed us
22 the house if it was a dangerous area.

23 Q. So he would have needed to tell you it was a
24 dangerous area for you to appreciate it was a dangerous
25 area?



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1 A. I did not appreciate it at this time as a dangerous
2 area.

3 Q. I'm asking you: What did you need to see to
4 appreciate it was a dangerous area?

5 A. Barriers.

6 Q. What kind of barriers?

7 A. Yellow tape. Whatever the standard is to -- and not
8 be there.

9 Q. So whatever the standard person would have
10 appreciated as a -- appreciated the condition to be, that's
11 what you would have needed, too?

12 A. I didn't perceive it as dangerous.

13 Q. Did you perceive it as you should proceed with
14 caution?

15 A. Yes.

16 Q. Why did you think you needed to proceed with
17 caution?

18 A. I didn't perceive it as dangerous. We were
19 following Chad. We walked right in his footsteps. He made
20 it across just fine.

21 Q. How tall is Chad?

22 A. I have no idea.

23 Q. What -- how tall do you think Chad is?

24 A. Six foot.

25 Q. How young do you think Chad is?



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1 A. Thirty-ish.

2 Q. How often do you think Chad works on a construction
3 site?

4 A. I have no idea.

5 Q. How often do you walk around construction sites?

6 A. Never.

7 Q. Did you know what the orange caps on the metal
8 stakes was for?

9 A. I know what they're there for; caution.

10 Q. What did you assume the caution tape that you saw in
11 other areas of the project and laying on the ground was for?

12 A. To pour concrete.

13 Q. The caution tape was there to pour concrete?

14 A. The forms are there to pour concrete.

15 Q. But what was the caution tape there for?

16 A. I don't know.

17 Q. When you see yellow construction tape or caution
18 tape what do you assume it to mean?

19 A. Caution.

20 Q. There is the four photos attached to your affidavit,
21 your statement in number 10 says:

22 "The four photos attached as Exhibit B to
23 Plaintiff's separate statement of fact accurately
24 portray the condition of the area where I fell
25 before the area was cleaned up by defendant."



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REPORTER'S CERTIFICATION

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I, PAMELA L. LOHR, RPR, a Certified Shorthand Reporter
in and for the State of Arizona, do hereby certify:

That the foregoing witness was by me duly sworn; that
the deposition was then taken before me at the time and
place herein set forth; that the testimony and proceedings
were reported stenographically by me and later transcribed
into typewriting under my direction; that the foregoing is a
true record of the testimony and proceedings taken at that
time.

IN WITNESS WHEREOF, I have subscribed my name this 21st
day of June, 2010.

Pamela L. Lohr

PAMELA L. LOHR, RPR

CERTIFICATE NO. 50035



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EXHIBIT 2

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IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

MARSHA ANDERSON-O'BRIEN,

NO. CV2008 5032

Plaintiff,

vs.

KB HOME TUCSON, INC.; KB HOME
SALES-TUCSON INC.; KB HOME; JOHN
DOES 1-3 and ABC CORPORATIONS
1-3,

Defendants.

~~~~~

**DEPOSITION OF**

**ROBIN ANDERSON**

June 10, 2010  
8:00 a.m.

LAW OFFICE OF MICHAEL DRAKE  
3085 WEST INA ROAD, SUITE 111  
TUCSON, ARIZONA 85741

Pamela L. Lohr, RPR, CCR No. 50035



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1 Q: Your mother following Chad?

2 A. My mom was following Chad and I was behind my mom.

3 Q. So describe for me if you will the events as they  
4 occurred, and I don't want to -- I want you to describe it  
5 for me. So as you went from Vista Overlook to -- basically,  
6 the front door of the home is where you were headed,  
7 correct?

8 A. Yes.

9 Q. Describe for me the events that occurred. So you  
10 were going to view the home on lot 75, correct?

11 A. Yeah.

12 Q. And tell me what pathway you took to the front of  
13 the home and what occurred during your walk to the front of  
14 the home.

15 A. Okay. Chad was talking and Chad walked across the  
16 front yard to the front door and my mom followed Chad and I  
17 followed my mom and my mom was behind Chad and she slipped  
18 and fell.

19 Q. Okay. So where was Chad when your mother slipped  
20 and fell? Do you recall?

21 A. Closer to the front door.

22 Q. Okay. And where were you?

23 A. I was behind my mom.

24 Q. About how close would you say?

25 A. Maybe two feet behind my mom.



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1 Q. So you saw her fall?

2 A. Yes.

3 Q. And about how far ahead was Chad from your mom when  
4 she slipped and fell? You said he was closer to the door?

5 A. Yeah, my guess is maybe six feet or so.

6 Q. Okay. Again, we are going to look at the  
7 photographs and you can tell me in more detail, but if you  
8 recall, what was the positioning of your mother when she  
9 fell? Where was she? Was she still on the street? Was she  
10 in the front yard of the home? Do you recall?

11 A. She had stepped from the street towards the home and  
12 she fell.

13 Q. Okay. What did she fall on?

14 A. She slipped on the curb.

15 Q. Okay. So there was a curb in between the street and  
16 the front yard of the home?

17 A. Yes.

18 Q. What kind of curb was it?

19 A. What do you mean?

20 Q. Was it a squared off curb? Was it a, basically, a  
21 smooth curve? Do you recall?

22 A. It was -- I don't know how to describe it. It's  
23 just like a lifted, kind of smooth on one side and pointed  
24 at the -- on the other. I don't know how to explain that.

25 Q. Okay. Which side did she fall on; the smooth side



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C20085032

Robin Anderson

June 10, 2010

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I, PAMELA L. LOHR, a Certified Shorthand Reporter in and for the State of Arizona, do hereby certify:

That the foregoing witness was by me duly sworn; that the deposition was then taken before me at the time and place herein set forth; that the testimony and proceedings were reported stenographically by me and later transcribed into typewriting under my direction; that the foregoing is a true record of the testimony and proceedings taken at that time.

IN WITNESS WHEREOF, I have subscribed my name this 21st day of June, 2010.

*15/ Pamela L. Lohr*

PAMELA L. LOHR, RPR

CERTIFICATE NO. 50035



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**APPENDIX  
EXHIBIT 14**

FILED  
PATRICIA A. NOLAND  
CLERK, SUPERIOR COURT

2010 AUG 27 PM 4:29

J. WHITNELL, DEPUTY

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4 hdavies@lorberlaw.com  
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5 Attorneys for Defendants KB HOME Tucson Inc., KB HOME  
6 Sales-Tucson Inc., KB HOME

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

8 **IN AND FOR THE COUNTY OF PIMA**

9 MARSHA ANDERSON O'BRIEN,

10 Plaintiff,

11 v.

12 KB HOME TUCSON INC.; KB HOME  
SALES-TUCSON INC.; KB HOME; JOHN  
13 DOES 1-3 and ABC CORPORATIONS 1-3,

14 Defendants.

Case No. C2008 5032

**KB HOME'S SUPPLEMENTAL REPLY  
BRIEF IN SUPPORT OF ITS MOTION  
FOR SUMMARY JUDGMENT**

(Assigned to the Honorable Stephen  
Villarreal)

15  
16 Defendants KB HOME Tucson Inc., KB HOME Sales-Tucson Inc., and KB HOME  
17 (collectively "KB Home"), by and through undersigned counsel, hereby submit the following  
18 Supplemental Reply Brief in Support of its Motion for Summary Judgment, per this Court's  
19 Ruling dated July 21, 2010. This Supplemental Reply Brief is supported by the accompanying  
20 Memorandum of Points and Authorities, KB Home's Supplemental Brief, KB Home's Motion,  
21 Separate Statement of Facts, Reply, Supplement, and the entire record before this Court.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. The sham affidavit doctrine applies to the instant matter and Plaintiff's self-**  
24 **servicing affidavit should be disregarded accordingly.**

25 Plaintiff argues, in her Supplemental Brief, that the sham affidavit doctrine only applies  
26 where a "favorable affidavit is submitted to defeat summary judgment and which contradicts  
27 prior unfavorable deposition testimony." Plaintiff suggests the sequencing of her contradicting  
28 statements in this matter preclude the application of the sham affidavit rule, as her affidavit was

1 submitted prior to her deposition testimony. Plaintiff's argument is directly contradicted by  
2 relevant authority, including the authority cited by Plaintiff. In fact, the sequencing of the  
3 deposition and affidavit in the instant matter makes it more clear that Plaintiff's affidavit is a  
4 sham affidavit under Rule 56, as Plaintiff's deposition occurred after her affidavit and she was  
5 cross-examined on those statements made in her affidavit and contradicted the same.

6 In making her argument, Plaintiff cites to the same matters in her Supplemental Brief as  
7 KB Home relied upon in its Supplemental Brief, *Wright v. Hills*, 161 Ariz. 583, 780 P.2d 416  
8 (1989), and *Allstate Indem. Co. v. Ridgely*, 153 P.3d 1069, 214 Ariz. 440 (2007). Plaintiff  
9 concludes from these matters that the sham affidavit doctrine only applies to affidavits which  
10 contradict prior deposition testimony or in cases where the "subsequent event" is specifically  
11 intended to thwart Rule 56. Plaintiff misapplies and misreads the cited authority. In neither of  
12 the cited matters were the circumstances precisely the same as the instant. The *Wright* court  
13 held that a party's prior deposition testimony cannot be contradicted by the party's subsequent  
14 affidavit submitted to defeat summary judgment. The *Allstate* court dealt with the issue of  
15 whether a party could use a former party's deposition testimony to contradict the former party's  
16 prior sworn statement to defeat summary judgment. While neither of the cited matters deal with  
17 precisely the same factual scenario as the instant, the *Allstate* matter relies upon a federal case  
18 which does. *Allstate* at 1072 citing *Darnell v. Target Stores*, 16 F.3d 174 (1994).

19 In the *Darnell* matter, the plaintiff submitted three affidavits to defeat summary  
20 judgment, his own and those of two former co-workers. The *Darnell* court found each of the  
21 affidavits were a sham and did not defeat summary judgment. The plaintiff's affidavit was  
22 contradicted by his own previous deposition testimony. The plaintiff's co-worker's affidavits  
23 were contradicted by their **subsequent** deposition testimony. As quoted in *Allstate*, the co-  
24 workers affidavits would have prevented summary judgment, but their later, contradictory  
25 deposition testimony supported the entry of summary judgment. *Id* at 1072. Further, the  
26 *Allstate* court recognized that the timing in the *Darnell* scenario is reverse from that in *Wright*,  
27 but the rule is the same, "self serving affidavits that were contradicted by their own **subsequent**

28

1 deposition testimony could not defeat a motion for summary judgment” (emphasis added).  
2 *Allstate* at 1072 citing to *Darnell* at 177.

3 Thus, Plaintiff’s claim that the timing of Plaintiff’s contradictory statements in the instant  
4 matter precludes the application of the sham affidavit doctrine is wholly unsupported. The sham  
5 affidavit rule is purposed to bar parties from thwarting the purposes of Rule 56 by creating  
6 issues of fact through affidavits that contradict their own deposition testimony-whether the  
7 deposition testimony is given before or after the affidavit. In the instant matter, Plaintiff offered  
8 her affidavit solely for the purpose of opposing/defeating KB Home’s Motion for Summary  
9 Judgment. When asked about her affidavit at her subsequent deposition, Plaintiff contradicted  
10 her statements made in her affidavit. As the above-cited authority shows, this is precisely the  
11 scenario the sham affidavit doctrine is aimed to avoid and Plaintiff’s affidavit should be  
12 disregarded accordingly.

13 **II. Plaintiff’s statements made in her affidavit and in her deposition are clearly**  
14 **contradictory.**

15 Plaintiff attempts to convolute the application of the sham affidavit doctrine by claiming  
16 the same does not apply because Plaintiff’s deposition testimony contradicts itself, as well as the  
17 affidavit. While Plaintiff may have flip-flopped on certain issues, it remains that when Plaintiff  
18 was cross-examined specifically on those statements made in her affidavit, Plaintiff admitted  
19 that she did, in fact, see the yellow construction tape and orange-capped form stakes, curb, and  
20 alleged debris, in and around the area where she ultimately fell<sup>1</sup>. Plaintiff affirms the same in  
21 her Supplemental Brief. Regardless, the fact that Plaintiff gave seemingly contradicting  
22 statements within her deposition does not serve to invalidate the application of the sham  
23 affidavit doctrine. In the other matter relied upon by the *Allstate* court, *Slowiak v. Land O’Lakes,*  
24 *Inc.*, 987 F.2d 1293(1993), the court considered contradicting statements of a party made in the  
25 party’s affidavit and deposition, noting the party’s deposition itself “seems at times not only to  
26 be at odds with his supplemental affidavit, but at odds with itself.” This did not preclude the  
27

28 <sup>1</sup> Counsel for KB Home, undersigned, will provide the Court with a complete copy of the transcript of Plaintiff’s deposition upon Court’s request.

1 application of the federal sham affidavit rule, but reinforced the same. The *Slowiak* court found  
2 where there is no explanation of the conflicting statements, one cannot create genuine issues of  
3 material facts based on the same. Under the circumstances, where a party has given conflicting  
4 statements, that party must offer an explanation for the contradictions, i.e. that the party was  
5 confused or new evidence led to the contradictions. *Id* at 1297. In the instant matter, Plaintiff  
6 has had the opportunity to give an explanation for why she made statements in her deposition  
7 that contradict her affidavit. However, Plaintiff has failed to offer any explanation. Instead,  
8 Plaintiff attempts to justify the contradictory statements made with additional contradictory  
9 statements.

10 As cited in KB Home's Supplemental Brief, Plaintiff made statements in her deposition  
11 which clearly contradict her affidavit. Plaintiff admits in her Supplemental Brief that she made  
12 statements contradicting her affidavit and yet offered no explanation for the contradictory  
13 statements. The sham affidavit rule clearly applies.

14 **III. Plaintiff failed to raise any genuine issue of material fact in response to KB**  
15 **Home's Motion, whether by affidavit or otherwise.**

16 As a last ditch effort to create issues of fact to preclude summary judgment, Plaintiff  
17 offers a third argument in her Supplement, which is not responsive to this Court's request for  
18 supplemental briefing on the application of the sham affidavit doctrine. Plaintiff claims if this  
19 Court applies the sham affidavit rule, it does not mean that KB Home is entitled to summary  
20 judgment. Plaintiff is incorrect. The basis of KB Home's Motion is that the condition which  
21 Plaintiff encountered was open and obvious. Plaintiff's Response to KB Home's Motion was  
22 submitted with and supported only by its Separate Statement of Facts. Those facts that were  
23 disputed by Plaintiff, as set forth in her Separate Statement of Facts, were supported solely by  
24 Plaintiff's affidavit submitted therewith. Thus, Plaintiff offered only her affidavit to oppose KB  
25 Home's Motion. Accordingly, if Plaintiff's affidavit is disregarded per the sham affidavit rule,  
26 Plaintiff has failed to raise any genuine issues of material fact and summary judgment is proper.

27 Those items raised in Plaintiff in her Supplemental Brief as remaining "material issues of  
28 fact" are neither facts supported by any evidence, nor are they material. Plaintiff never

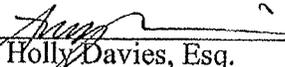
1 attempted to support these additional items in separate statement of facts, supported by  
2 evidence. In addition to being irrelevant to KB Home's Motion, the additional items raised in  
3 Plaintiff's third argument are relevant to standard of care issues for which expert opinion is  
4 required per A.R.S. § 12-2602. Plaintiff has already argued to the Court that such expert  
5 opinion is not necessary, as the corresponding standard of care is not at issue in this matter. The  
6 Court has already accepted Plaintiff's position on that issue. It is improper for Plaintiff to now  
7 try to argue in her Supplemental Brief regarding the sham affidavit rule that there is a standard  
8 of care issue, particularly as Plaintiff never complied with the statutory requirements regarding  
9 the same. It is clear these additional items were raised as smoke in mirror tactics to distract  
10 from the fact that Plaintiff clearly contradicted the only "evidence" she previously offered to  
11 defeat KB Home's Motion, her affidavit. As Plaintiff's affidavit is clearly a sham, Plaintiff has  
12 failed to raise any genuine issues of material fact and summary judgment is appropriate.

13 **CONCLUSION**

14 Plaintiff's affidavit is clearly contradicted by her deposition testimony. Plaintiff's  
15 affidavit was offered solely to defeat KB Home's Motion for Summary Judgment. The sham  
16 affidavit doctrine applies to the instant matter where a party attempts to thwart Rule 56 by  
17 attempting to create issues of fact through an affidavit which clearly contradicts Plaintiff's  
18 deposition testimony. For the foregoing reasons and those set forth in KB Home's Motion and  
19 its related briefs, KB Home respectfully requests this Court disregard Plaintiff's affidavit per the  
20 sham affidavit rule and grant KB Home's Motion for Summary Judgment, as there are no  
21 genuine issues of material fact.

22 DATED this 27<sup>th</sup> day of August, 2010.

23 LORBER, GREENFIELD & POLITO, LLP

24  
25 By:   
26 Holly Davies, Esq.  
27 Amy Wilkens, Esq.  
28 230 West Fifth Street  
Tempe, Arizona 85281  
Attorneys for Defendant KB HOME

1 Original of the foregoing filed this  
2 27 day of August, 2010, with:

3 The Clerk of Court  
4 PIMA COUNTY SUPERIOR COURT  
5 110 West Congress  
6 Tucson, AZ 85701

7 Copy of the foregoing hand-delivered  
8 this 27 day of August, 2010, to:

9 The Honorable Stephen Villarreal  
10 PIMA COUNTY SUPERIOR COURT  
11 110 West Congress  
12 Tucson, Arizona 85701

13 Copy of the foregoing mailed this  
14 27 day of August, 2010, to:

15 Michael Drake, Esq.  
16 3085 West Ina Road, Suite 111  
17 Tucson, AZ 85741  
18 *Attorneys for Plaintiff*

19 Carrie Keel  
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**APPENDIX  
EXHIBIT 15**

SEP 02 2010

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ARIZONA SUPERIOR COURT, PIMA COUNTY

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HON. STEPHEN C. VILLARREAL  
JUDGE

CASE NO. C20085032

BY: R. ST. GERMAINE, DEPUTY

DATE: September 1, 2010

MARSHA ANDERSON O'BRIEN,  
Plaintiff,

VS.

KB HOME TUCSON INC,  
KB HOME SALES-TUCSON INC, and  
KB HOME INC,  
Defendants.

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**RULING**

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**IN CHAMBERS UNDER ADVISEMENT RULING RE: MOTION FOR SUMMARY JUDGMENT:**

Defendants have filed a motion for summary judgment. The motion was fully briefed, argued, and supplemental pleadings were filed on the sham affidavit rule and the matter was taken under advisement.

Plaintiff's suit arose out of an incident which occurred at defendants' property in Tucson, Arizona. Plaintiff was viewing homes for potential purchase along with an employee of defendants when she walked onto a sloped curb which contained sand and gravel and slipped and fell to the ground allegedly causing personal injury.

Defendants allege this condition was open and obvious pursuant to §343(A) of the Restatement (Second) of Torts, they owed her no duty to warn of the condition and are not liable as a matter of law. Plaintiff denies that the condition was open and obvious and stated in an April 2010 affidavit submitted in opposition to the motion for summary judgment that she did not see the condition on the curb. However, in a June 2010 deposition she testified that she saw the condition and appreciated it prior to stepping onto the curb.

The question before the Court is the applicability, if any, of the sham affidavit rule. *Allstate v. Ridgely*, 214 Ariz. 440, 153 P.3d 1069 (App. 2007); *Wright v. Hills*, 161 Ariz. 583, 588, 780 P.2d 416, 421 (App. 1989). Plaintiff claims the sham affidavit rule does not apply because the affidavit and the subsequent deposition testimony are not clearly contradictory but even if they are, there remain factual issues in dispute. Defendants

Marti Ackermann  
Judicial Administrative Assistant

RULING

Page 2

Date: September 1, 2010

Case No.: C20085032

counter that the affidavit and deposition are contradictory and that plaintiff has failed to support the remaining facts by competent evidence.

The Court finds that the application of the sham affidavit rule is appropriate on the facts before it. Plaintiff's affidavit is clearly contradicted by her deposition testimony. The Court will disregard the affidavit and accept plaintiff's subsequent deposition testimony, given under oath and subject to cross examination, that she did see and appreciate the condition prior to stepping onto the curb.

Therefore, plaintiff has failed to create a factual dispute on the issue of open and obvious condition. The Court finds that the condition was open and obvious as a matter of law. Moreover, plaintiff has failed to establish and develop a legal theory for her claim that defendant's employee led her to the debris field on the curb. It is unclear to the Court if this claim is separate from the premises liability aspect of this case or whether it rests on an independent legal liability theory. If it is part of the premises liability theory it must fail based upon the Court's ruling on the open and obvious condition. If it is based on an independent theory, there has been very little argument and no affidavits or expert testimony offered by plaintiff to support it.

Similarly, plaintiff has not established a legal theory of liability concerning her claim that the defendants violated company policy regarding leading her to the construction site and failing to bend the rebar flat. This appears to be a standard of care issue for which plaintiff has not come forth with affidavits and expert testimony to establish a triable issue and defeat the motion for summary judgment.

Accordingly, defendants' motion for summary judgment is hereby GRANTED. The jury trial set for November 16, 2010, at 9:00 a.m. is hereby vacated. Defendants are directed to lodge an appropriate form of judgment together with a verified statement of taxable costs within thirty days of the date of this ruling.



HON. STEPHEN C. VILLARREAL

Cc: Amy Wilkens, Esq.  
Holly P. Davies, Esq.  
Michael Drake, Esq.  
Clerk of Court - Under Advisement Clerk

Marti Ackermann  
Judicial Administrative Assistant

**APPENDIX  
EXHIBIT 16**

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FILED PATRICIA A. NOLAND SUPERIOR COURT

MICHAEL DRAKE  
Attorney at Law  
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Tucson, AZ 85741  
(520) 624-2488  
State Bar No: 003042  
Michael.Drake@azbar.org

10 OCT -5 PM 1:51

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C. LARRIBAS, DEPUTY

Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

MARSHA ANDERSON O'BRIEN,

Plaintiff,

v.

KB HOME TUCSON, INC.; KB HOME  
SALES - TUCSON, INC.; KB HOME, INC.;  
JOHN DOES 1-3 and JANE DOES 1-3;  
ABC CORPORATIONS 1-3,

Defendants.

NO. C20085032

NOTICE OF APPEAL

Assigned to Judge Stephen Villarreal

Notice is hereby given that Plaintiff's appeal to the Court of Appeals of the State of Arizona, Division 2, from the Order made and entered in this action on September 1, 2010 in favor of Defendants. The Order granted Defendants' Motion for Summary Judgment.

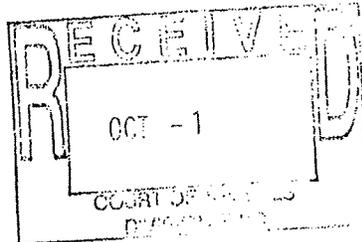
Dated this 29 day of September, 2010.

*Michael Drake*

Michael Drake  
Attorney for Plaintiff

A copy of the foregoing was mailed this 29 day of September, 2010, to:

Holly Davies, Esq.  
Amy Wilkens, Esq.  
Lorber, Greenfield & Polito, LLP  
230 W. Fifth Street  
Tempe, AZ 85281  
Attorney for Defendants/Appellees



NOT FOR SETTLEMENT  
INDEX OF RECORD REQUIRED

DATE 10/4/10 *S*

*Appeals*

11-15

*all fees paid*

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A copy of the foregoing Notice of Appeal  
hand-delivered this 27 day of September,  
2010, to:

Honorable Stephen C. Villarreal  
Judge, Division 4  
Pima County Superior Court  
110 W. Congress Street  
Tucson, AZ 85701