CASE NO. 47778-5-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CEDAR COURT APARTMENTS, LLC
a Washington Limited Liability Company

Respondent/Plaintiff

v.

GUSTAVO & MARIA COLORADO
husband & wife, and the marital community composed thereof

Appellants/Defendants

BRIEF OF RESPONDENT
CEDAR COURT APARTMENTS, LLC

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I. INTRODUCTION

In twenty-two pages of an opening Brief, Appellants Gustavo and Maria Colorado have again failed to present what they failed to present at trial – a single fact supporting a finding of negligence on the part of the Cedar Court Apartments.[1] This includes the failure to present any evidence, *circumstantial or otherwise*, supporting a finding of negligence on the part of Cedar Court. After the Jury reached its verdict, the Trial Court correctly granted Cedar Court's motion for judgment as a matter of law. This Court should affirm the Trial Court and award Cedar Court its attorney's fees incurred in this appeal for the reasons set forth below.

II. STATEMENT OF THE CASE

On February 13, 2013, Gustavo and Maria Colorado executed a Rental Contract with Cedar Court for the rental of Unit 94 at the Cedar Court Apartments in Tacoma. The Colorados had been renters since 2008 (RP 182), and as an inducement to continue renting following the end of their lease term they were offered free carpet cleaning for their apartment. (RP 206). Gustavo Colorado went to the Cedar Court management office

[1] For the sake of clarity, the Appellants will be referred to as "the Colorados" and the Respondent will be referred to as "Cedar Court."

the morning of February 21, 2013 to arrange the carpet cleaning. (RE 207). He filled out a written request for the cleaning and informed the manager that the large burner on the stove was not operating and that the other burners were not heating properly. (RP 206 - 207). Mr. Colorado signed a maintenance request for the apartment's stove. Although the Colorados had known about the stove problem for a "few weeks," this was the first time they had reported the problem to Cedar Court management. (RP 172).

The Colorados prepared for the carpet cleaning that day by moving all of the furniture into their bathroom and kitchen. (RP 206). Mr. Colorado stacked boxes and furniture (including a mattress) around the stove in the kitchen such that it could not be accessed and testified that the "stove was blocked . . . I could not reach the stove" as a result. (RP 211 - 212). The Colorados then left the apartment sometime after 10 a.m. and did not return until around 2 p.m. when Mr. Colorado entered the apartment to determine whether the carpet cleaning had occurred. Mr. Colorado inspected the unit and discovered that the carpet cleaning had not occurred. The Colorados left the apartment, and returned around 4

p.m. to find (again) that the work had not yet begun. (RP 210 - 211).

The fire was then reported within approximately fifteen minutes of the Colorados' 4:00 p.m. Inspection. (RP 316). By the time the Colorados returned to the apartment, the fire had been extinguished.

A Fire Investigator from the City of Tacoma arrived at the scene. Upon completion of his investigation, the investigator concluded that the fire was caused by boxes (or some other fuel source) being place on top of the stove, with a burner being accidentally turned on. (RP 137). The investigator presented his conclusions to the Colorados that evening. (RP 320 - 321).

On February 14, 2014, Cedar Court commenced suit for breach of contract and negligence. (CP 1 - 6). On April 14, 2014, the Colorados answered, and filed counterclaims alleging breach of contract, tortious interference with business expectancy, emotional distress and negligence. (CP 7 - 14). All of the Colorados' counterclaims, except the negligence counterclaim, were dismissed by way of partial summary judgment. (CP 19 - 44; 161 - 163). The matter was tried to the Jury beginning on

February 19, 2015. Although the testimony from the trial will be discussed in greater detail below, critically, the Colorados did not dispute the Fire Investigator's conclusions as to the cause of the fire, and the Jury heard no evidence that anyone, other than the Colorados, had been in the apartment on the day of the fire.

At the conclusion of the trial, Cedar Court moved to dismiss the Colorados' remaining negligence counterclaim, but the Trial Court denied the motion. (RP 420 - 437). The Jury then returned a verdict that the cause of the fire was the negligence of Cedar Court. Cedar Court thereafter filed its motion for JNOV, which was granted on June 5th, 2015. (CP 711-718; 837).

III. ARGUMENT

1. Standard of Review

The appellate court reviews a trial court's grant/denial of a motion for judgment as a matter of law in a jury trial de novo, and engages in the same inquiry as the trial court. *Gorman v. Pierce County*, 176 Wn. App. 63, 74, 307 P.3d 795, *review denied*, 179 Wn.2d 1010, 316 P.3d 495 (2013). The appellate court reviews the evidence in a light most favorable

to the non-moving party. *Schorzman v. Brown*, 64 Wn.2d 398, 401 - 402, 391 P.2d 897 (1964). The appellate court reviews to determine if substantial evidence exists to support the Jury's verdict, *id.* at 401, and the trial court's grant of the motion should not be reversed unless substantial evidence exists to support the jury's verdict. *Comin v. Jackson*, 64 Wn.2d 7, 9, 390 P.2d 250 (1964). Stated differently, "A motion for judgment as a matter of law can be denied only when there is competent and substantial evidence on which the verdict can rest." *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC*, 138 Wn.App. 443, 453 - 454, 158 P.3d 1138, *review denied*, 163 Wn.2d 1013, 180 P.3d 1290 (2007); (citing *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968). Evidence is "substantial to support a verdict" so as to justify denial of the motion if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Id.*

2. *No Evidence Supported the Colorados' Contention That Negligence on the part of Cedar Court Caused the Fire*

The relevant provisions of CR 50(b) are as follows:

> (b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the

> court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment - and may alternatively request a new trial or join a motion for a new trial under rule 59. In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned:
>
> A) allow the judgment to stand,
> B) order a new trial, or
> C) direct entry of judgment as a matter of law

Here, Cedar Court properly presented its motion for judgment as a matter of law in the motion it presented prior to the Jury's verdict (VRP 418 - 423), and in thereafter presenting its post-verdict motion (CP 711 - 718). *Gorman v. Pierce County*, 176 Wn. App. at 85 - 86. The motion was properly granted due to the total absence of any evidence that any representative of Cedar Court accessed the apartment on the day of the fire.

The Colorados presented no evidence that *anyone*, other than the Colorados themselves, had been in the apartment on the day of the fire, and the Colorados did not dispute the testimony of the Fire Investigator as

to the cause of the fire. Lt. Kenneth Hansen of the Tacoma Fire Department performed an investigation as to the cause of the fire. (RP 112 - 113). Lt. Hansen's testimony included the methodology employed during the investigation (RP 117 - 131) and he testified that during the course of his investigation as to the cause of the fire he was not made aware of anyone other than the Colorado family being in the apartment on the day of the fire.[2] (RP 136). Lt. Hansen testified that this fact was confirmed by Mr. Colorado. (RP 131 - 132).

As to the cause of the fire, following a complete and thorough investigation, Lt. Hansen concluded, on a more-probable-than-not basis, as follows:

> From the time frame that the residents left the apartment, to when the fire was dispatched, to the amount of damage that was done, it was my conclusion that something was left on the top of the stove, the stove was accidentally turned on, and a fire had started in such a manner. (RP 137 - 138; ll. 20 - 6).

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Q Were you made aware in your investigation that anyone, other than the Colorados, were in the apartment the day of the fire?

A I was made aware that no one was in there other than the Colorados.

Conversely, the Colorados offered no testimony disputing this testimony as to the cause of the fire, and their counsel ultimately *conceded* in closing argument that "we don't disagree nor do we contend that Lieutenant Hansen got anything wrong." (RP 466; ll. 6 - 12).

Critically, the Colorados offered no evidence that anyone, other than the Colorados themselves, had entered their apartment at any time on the day of the fire and prior to the time of fire. Lt. Hansen's unrebutted expert opinion was that if a box [or fuel source] had been placed on the stove at 11:00 a.m., it would have caught fire well before the post-4:00 p.m. time of the fire. (RP 159; ll. 4 - 15). In Lt. Hansen's opinion, if a stove burner *had been* turned on (with a fuel source on top of it) between 11:00 and 4:00 p.m., the fuel source "even with a low heat, it would start to smolder." (RP 159; ll. 4 - 15). According to Lt. Hansen, "something" would have to have been placed on top of the stove (i.e., a fuel source) for fire to occur (RP 126) and the 15 - 20 minute time period following Mr. Colorado's 4:00 p.m. inspection of the apartment was "when all the action happens." (RP 158).

When asked if he had placed "a box or papers or anything on top of

the stove" to prepare for the carpet cleaners, Mr. Colorado's first answer was only that "I don't remember to do something like that." (RP 212; ll. 18 - 21). (The contention by the Colorados at page 5 of their Brief that Mr. Colorado "specifically denied" (at page 212) [that anything was on top of the stove] inaccurately characterizes his testimony) (*see* RP 212; ll. 18 - 21).

Mr. Colorado testified that he checked the apartment twice during the hours before the fire. (RP 202; ll. 22 - 24). Each time, he had to use his key to unlock the entry door. (RP 202 - 203; ll. 25 - 3). Mr. Colorado confirmed that each time he entered, he saw no sign that anyone had entered the apartment. (RP 203; ll. 2 - 4). Mr. Colorado also confirmed that he *did not smell smoke* at any time that he entered the apartment to check to see if the carpets had been cleaned. (RP 219; ll. 4 - 6). This means that the fire could only have started in an approximate fifteen to twenty-minute time frame between Mr. Colorado's 4:00 p.m. inspection, (RP 203; ll. 5 - 7), and the time when the apartment manger received the

report of a fire. (RP 316).[3] Ultimately, counsel for the Colorados *conceded* that something had been placed on the stove to cause a fire: "maybe a box, or something, maybe a binder." (RP 467; ll. 17 - 18).

No witnesses saw anyone enter the Colorado apartment on the day of the fire. The Colorados did not see anyone enter the apartment. They offered no evidence to even suggest that the apartment had been entered or accessed by anyone other than themselves prior to the fire. This lack of evidence eviscerates the Colorados' argument that "circumstantial" evidence was presented to the Jury.

The Colorados contend on pages 14 and 19 of their Brief that a purported "admission" from Deanna Hanshew, the Dobler Management Company Asset Manager, confirmed a Cedar Court employee had been in the apartment before the fire. Ms. Hanshew had not been to the Cedar Court apartments on the day of the fire at any time prior to the fire. (RP 254; ll. 22 - 23). Ms. Hanshew testified on direct examination and cross examination that she had no personal knowledge as to whom had been at

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Lt. Hansen confirmed that if the burners had simply been turned on without a fuel source, no fire would have resulted (RP 126; ll. 19 - 22).

or had entered the Colorado apartment on the day of the fire. (RP 254; ll. 17 - 21; (RP 262; ll. 11 - 17).

Ms. Hanshew testified that Exhibit 49, the document which formed the basis of her purported "admission," was a time line prepared *after the event* of the fire by "another manager" at her request. (RP 280 - 281; ll. 25 - 17). At best, the basis of Ms. Hanshew's "admission" was a time line prepared *after the event*, and which was factually incorrect when compared to the actual work orders prepared contemporaneously at the time of the actual events.

On re-direct examination, Ms. Hanshew was questioned about the February 21, 2013 work order. (Exhibit 6). She confirmed the standard operating procedure requires a maintenance person who entered the apartment to repair the stove to either sign or initial the work order and to write notes on the work order in the "work done" and "materials used" sections. (RP 276; ll. 18 - 24). The work orders also contain blank spaces for the date that the work is completed. (RP 293; ll. 14 - 18). Nothing on the work order indicated that the form had even been given to maintenance personnel. Given the absence of any such writing, there was no indication

that maintenance work had been performed on the stove. (RP 276; ll. 13 - 15). The same was true for the work order prepared for the carpet cleaning (Exhibit 6): Ms. Hanshew explained that in order for the carpet cleaner to receive payment for any cleaning performed, the work order must be affixed to the carpet cleaner's invoice. (RP 277; ll. 3 - 13).

Given the absence of any indication of maintenance work or cleaning work being indicated on the work order, Ms. Hanshew concluded that no maintenance or cleaning personnel had entered the Colorado apartment on February 22, 2013, (RP 277; ll. 17 - 21) and she concluded that her previous deposition testimony to the contrary (i.e., the "admission" alleged at pages 14 and 19 of the Brief of Appellants) was simply mistaken. (RP 278; ll. 4 - 6).

In the end, the Colorados presented no evidence that even *circumstantially* supported their theory of the case or the Jury's verdict – they did not rebut the fire investigator's expert opinion and ultimately *concurred* with the fire investigator's opinion that "something" (i.e., a source of fuel) had been placed on top of the stove; they confirmed that there was *no sign* that anyone (other than the Colorados) had entered their

apartment on the day of the fire; Mr. Colorado confirmed that when he checked the apartment at approximately 4:00 p.m. he did not "smell smoke." At the time of Cedar Court's motion for directed verdict, the best that counsel for the Colorados could offer in opposition was that

> Your Honor, everyone agrees, somebody had to do it. If it isn't them [the Colorados], we are in the process of elimination. That is what we want to be able to argue to the jury. (RP 431; ll. 12 - 15).

Although the Trial Court denied the motion for directed verdict, the Court correctly observed,

> All you are really arguing is that there is some possibility that somebody else did it. I suppose that may go to affect their burden. I don't see how you can prove by a preponderance of the evidence that they did anything because you can't even show they were there. (RP 431; ll. 16 - 21).

In response to the Colorados' argument (RP 432 - 433; ll. 8 - 19) that they possessed "circumstantial" proof of negligence on the part of Cedar Court that should go to the Jury, the Trial Court observed,

> No you don't. You have a mere possibility. It is not impossible that they did it. That's all you've got.

> I think the defense position is so weak that I'm almost inclined just to let them have this instruction, go forward and let the jury do it for me, I have to say. I just – I respect the Colorados. I think that they are the nicest people, but there is no way that [Cedar Court] had anything to do with the fire, and certainly not the carpet cleaners.
>
> The problem with the employee is that there is no evidence that the employee ever had the key. (RP 433 - 434; ll. 20 - 6).

"A verdict cannot be founded on mere theory or speculation." *Sortland v. Sandwick*, 63 Wn.2d 207, 211, 386 P.2d 130 (1963); (quoting *Arnold v. Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953)(see also *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 493 P.2d 1018 (1972)("It is the rule that a verdict cannot be founded on mere theory, speculation or conjecture.") and *Holman v. Coie*, 11 Wn.App. 195, 214, 522 P.2d 515 (1974) ("Suspicion, speculation or conjecture are insufficient . . .")).

In *Sortland v. Sandwick*, the plaintiff alleged that the negligence of two defendants caused an automobile collision. Where the plaintiffs one theory [of negligence as to defendant Swan] was speculative and conjectural and the other theory [as to defendant Sanwick] was supported by substantial evidence, the grant of the JNOV motion was appropriate. *Id.*

In *Miller v. Dep't of Labor & Indus.*, 1 Wn. App. 473, 462 P.2d 558 (1969), the appellate court reversed a jury verdict in favor of an injured worker [following dismissal of the industrial board claim] who claimed he had suffered a heart attack while lifting hay bales in his job where there was no testimony that the claimant had lifted more than the normal number of bales on the Saturday in question before he felt pain and tenseness in his arms. As the appellate court observed,

> No testimony indicates that the lift which precipitated the heart attack was any different from any other lift. There was no testimony offered from which we can infer that it was heavier than the ordinary bale or that it had fallen into an unusual position. A close examination of the record reveals no evidence that the lift causing the injury varies in even the slightest degree from any other.

Miller v. Dep't of Labor & Indus., 1 Wn.App. at 479. Citing numerous cases, including *Sortland v. Sandwick*, (supra) the appellate court concluded that "[w]hen there is nothing more substantial to proceed upon than two or more conjectural theories, the jury will not be allowed to speculate, and a judgment n.o.v. is proper." *Id.* at 480.

Having finally *admitted* (for the first time) in closing argument that

something had actually been placed on top of the stove (i.e., the source of fuel), the Colorados' final "theory," as stated in closing argument, was that Cedar Court's maintenance man came into the apartment unit at some unknown time and "turn[ed] on" the stove top. (RP 480; ll. 12 - 14; 482; ll. 19 - 22; 485; l. 24). This was advanced without any evidence of *anyone* other than the Colorados having entered the apartment unit on the day of the fire, ignores that the Colorados testified that they observed no signs of entry each time they inspected the locked apartment, further ignores that no signs of smoke/fire were detected upon such inspections.

Finally, this theory ignores that Mr. Colorado had inspected the apartment only 15 - 20 minutes before the fire (and *again* that there was no sign of entry, no sign of smoke), and would require the trier of fact to believe that within that short time window the maintenance man accessed what Mr. Colorado described as an "inaccessible" stove (RP 211 - 212; ll.24 - 2),[4] turned on the stove, placed the mattress, furniture and boxes

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Q Did you turn on the stove when you went back at 4:00?

A (By Mr. Colorado): No. It was not possible because the stove was blocked with some mattress, some furniture. I couldn't reach the stove.

back around the stove, and then locked and left the apartment (fire fighters were required to break down the locked front door to gain entry) all within a span of 15 - 20 minutes, and while a fire was starting! To be sure, the Colorados did not dispute Lt. Hansen's opinion that this 15 - 20 minute time frame was "when all the action happens." (RP 158).

The purported "theory" went beyond speculation and into the realm of pure fantasy, with no evidence "sufficient to persuade a fair-minded, rational person of the truth of the declared premise" to support it. The Trial Court did not err in granting JNOV.

3. *No Evidence Supported Negligence On The Part of Cedar Court as the Cause of the Fire Under Any Other Available Theory.*

No evidence supports the verdict of negligence on the part of Cedar Court, under any theory available to the Colorados. The Colorados testified that they were aware of the problem with stove burners for "some weeks," but that they did not report the problems until the morning of February 21, 2013. (RP 172). The fire occurred only a few hours later that same day. The problem the Colorados experienced was that the burner would not *turn on,* and the Colorados confirmed that the burners

never turned on "by themselves." (RP 173). As a result, there was no evidence that any problems with the stove somehow spontaneously started the fire. To that end, when opining as to the cause of the fire, Lt. Hansen confirmed that no circuit breakers had been tripped, and confirmed there were no other visible signs of any electrical or wiring problems. (RP 120 - 121).

There were no facts presented supporting a claim of negligence against Cedar Court. Although the Colorados ultimately argued that Cedar Court was negligent solely upon a common-law negligence theory, (CP 683 - 704) no facts exist to support negligence under any theory available.

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances. *System Tank Lines v. Dixon*, 47 Wn.2d 147, 151, 286 P.2d 704 (1955); WPI 10.01. It should be noted that the emphasis in WPI 10.01 is in the "doing of some act." Prosser, *Law of Torts*, 4th Ed., explains at page 145 as follows:

> The standard imposed by society is an external one, which is not necessarily based upon any moral fault of the individual; and the failure to conform to it is negligence, even though it may be due to stupidity, forgetfulness, an excitable temperament, or even sheer ignorance. The almost universal use of the phrase "due care" to describe conduct which is not negligent, should not be permitted to obscure the fact that the real basis of negligence is not carelessness, but behavior which should be recognized as involving unreasonable danger to others.

A party alleging negligence has the burden of proving each of the following propositions:

1. That the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

2. Damage to property; and

3. That the negligence of the defendant was a proximate cause of the damage to plaintiff's property.

WPI 21.02. The first element also embodies the requirement of a duty to act or refrain from acting. The existence of a duty is a question of law. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998).

In Washington, a tenant may premise an action against a landlord

based on three premises: the rental agreement, the common law, and the Residential Landlord Tenant Act ("RLTA" RCW 59.18 *et seq.*). *Dexheimer v. CDS, Inc.*, 104 Wn.App. 464, 470, 17 P.3d 641 (2001). As shown below, no facts support the Jury's verdict under any theory.

a. No Facts Support Liability Due to Breach of Rental Agreement

No facts show that Cedar Court breached its duties under the terms of the Rental Contract, which provided the following:

> MAINTENANCE: (3)....The renter(s) shall be responsible for all repairs required for any damages caused by his/her negligence and that of his/her family or guests.....
>
> (4) "Request for maintenance work will be performed during reasonable hours at management's convenience."

Although the Colorados were aware of problems with stove burners for "some weeks," they did not report the problems until the morning of February 21, 2013. (RP 172). The fire occurred only hours later that same day. The problem reported was that the burner would not turn on. The Colorados confirmed that the burners never turned on "by themselves" and did not argue, nor did the facts suggest, that the stove was somehow

inherently dangerous or presented some type of immediate danger. Similarly, the Colorados did not argue or present evidence that Cedar Court's failure to perform maintenance on the stove, on the same day the problem was reported, somehow violated the Rental Contract.

b. No Facts Support Liability Under Common Law-Latent Defect Theory

At common law, a landlord could be held liable for injury under the latent defect theory or under the *RESTATEMENT (SECOND) OF PROPERTY*. Generally, under common law, a landlord has no duty to repair non-common areas absent an express covenant to repair. *Martini v. Post*, 178 Wn.App. 153, 168. 313 P.3d 473 (2013). However, a landlord is subject to liability for harm to the tenant caused by (1) latent or hidden defects in the leasehold, (2) that existed at the commencement of the leasehold, (3) of which the landlord had actual knowledge, and (4) of which the landlord failed to inform the tenant. *Martini*, 178 Wn.App, at 169. Here, an improperly functioning stove could not be classified as a "latent" defect because the Colorados knew of the defect but Cedar Court did not, until reported on the day of the fire. (RP 172). No evidence was presented that Cedar Court had knowledge of the problem, or reason to

know, until it was reported the morning of the fire.

The *RESTATEMENT (SECOND) OF PROPERTY*: *Landlord Tenant* § 17(6) (1977) was adopted as a source for landlord liability by Division Three in *Lian v. Stalick*, 106 Wn.App. 811, 25 P.3d 467 (2001) and *Lian v. Stalick*, 115 Wn.App. 590, 62 P.3d 933 (2003) (*Lian II*). Under the *RESTATEMENT*, a landlord is subject to liability for physical harm to tenants and their guests caused by:

> A dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:
>
> (1) an implied warranty of habitability or
>
> (2) a duty created by statute of administrative regulation.

Lian II, 115 Wn., at 595.

This rule applies even when the dangerous condition occurs in an area of the premises under the tenant's control, so long as the defect constitutes a violation of the implied warranty of habitability or a duty imposed by statute or regulation. *Id.* at 594. To establish liability under §17.6, the tenant must show:

> (1) that the condition was dangerous, (2) that the landlord was aware of the condition or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition, and (3) that the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation. *Id.*

The primary issue for a claim under §17.6 is whether the condition of the stove violated the implied warranty of habitability. Some courts maintain that in Washington, the warranty of habitability has been legislatively codified in the RLTA. *Pickney v. Smith*, 484 F. Supp.2d 1177, 1181-82 (W.D. Wash. 2007). Division One recently concluded, however, that the implied warranty of habitability has not been superseded by statute. *Landis & Landis Constr., LLC v. Nation*, 171 Wn.App. 157, 163, 286 P.3d 979 (2012), *review denied*, 177 Wn.2d 1003 (2013). Regardless of the warranties' codification in the RLTA, Washington appellate courts have reached opposing conclusions as to what conditions are sufficiently "dangerous" to make a residence "uninhabitable," and the Washington Supreme Court has not decided the issue. *Pickney*, 484 F. Supp.2d at, 1181 - 82. In this case, no evidence was presented, nor was any argument made, that the apartment was "uninhabitable" due to the

failure of a stove burner to turn on. No evidence was presented, or any claim made, that the stove presented a "danger." To the contrary, the Colorados made no such claim and lived with the problem for several weeks before even reporting it.

Division One has held that a condition does not violate the warranty of habitability unless the condition is so severe that the dwelling is actually unfit to live in. *Write v. Miller*, 93 Wn.App. 189, 200-01, 936 P.2d 934 (1998). Division Three has rejected this bright line rule, and in *Lian I*, based on the Court's holding in *Atherton Condominium Apartment-Owners Association Board v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250(1990), stated that a "condition violates the warranty of habitability if it poses an actual or potential safety hazard to its occupants. *Pickney*, 484 F. Supp.2d at, 1183. Subsequent to these cases, Division Two has held that "the appropriate standard of habitability is whether the violations present a substantial risk of future danger." *Landis*, 171 Wn.App. at 166.

Here, the uncontroverted facts were as follows: (1) the Colorados observed that stove did not heat properly and that the large burner would

not heat at all; (2) the Colorados never complained of the stove turning on spontaneously; (3) the complaint on the date of the fire was their only complaint about the apartment; (4) the Colorados never complained of exposed wiring, or that the stove presented any type of "danger;" and (5) their complaint was not lodged until the day of the fire. As a result, the facts presented to the Jury did not implicate a level of potential dangerousness necessary to substantiate negligence.

As to a claim based upon breach of warranty, in order to prove a breach of the warranty, the violation must "present a substantial risk of future danger." *Landis*, 171 Wn.App. at 166. In *Landis*, the court held that the warranty was breached by an infestation of rodents, recognizing the "inherently high-risk" of spreading disease. *Id.* In *Foisy* v. Wyman, 83 Wn.2d 22, 28, 515 P.2d 160 (1973), the warranty was breached by defects that included a lack of heat, no hot water tank, broken windows, a broken door, water running through the bedroom, an improperly seated and leaking toilet, a leaking sink, broken water pipes in the yard, and termites in the basement.

Under the facts presented to the Jury in this case, the condition of

the stove on "11/18" and thereafter on February 21, 2013, did not violate the implied warranty of habitability. No evidence presented, nor was any argument made, that the condition of the apartment was somehow uninhabitable or that the conditions somehow posed a threat "substantially dangerous" enough to violate the warranty. Mrs. Colorado confirmed that there had been no problems with the stove after the 11/18 servicing until only a "few weeks" before the February, 2013 fire. (RP 172). The only evidence presented was, according to the Colorados, of an improperly heating stove. They did not present evidence or argue that this somehow compromised their health or safety.

c. No Facts Support Liability Under the RLTA

A tenant may premise an action against a landlord based on Washington's RLTA, RCW 59.18 *et seq.* "The RLTA does not create a generally actionable duty on the landlord's part to keep the premises "safe" or fit for human habitation. Any defects that allegedly violate the RLTA's warranty of habitability must constitute violations of the landlord's specific duties set forth in RCW 59.18.060." *Johnson v. Miller*, 178 Wn.App. 1045, * 6, citing *Lian I*, 106 Wn.App. at 816-18. In relevant part, RCW 59.18.060 requires a landlord to:

> (3) Keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident;
>
> (5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy;
>
> (8) Maintain all electrical, plumbing, heating, and other facilities and appliances supplied by him or her in reasonably good working order.

RCW 59.18.060 (2013).

As to the stove, Cedar Court had a duty to maintain the stove in "reasonably good working order." This statute did not render Cedar Court strictly liable: "[i]nstead, RCW 59.18.060 speaks in terms of maintaining the demised premises in 'reasonably good repair' and the courts have held that no violation occurs until a reasonable time after notice of the defect." *O'Brien v. Detty*, supra, at 622 - 623. *Lincoln v. Farnkoff*, 26 Wn.App. 717, 720, 613 P.2d 1212 (1980) *abrogated by Dexheimer v. CDS, Inc.*, 104 Wn.App. 464, 17 P.3d 641 (2001).

No evidence was presented, nor did the Colorados argue, that Cedar Court somehow breached the RLTA. The court, in *O'Brien v.*

Detty, 19 Wn.App. 620, 622-23, 576 P.2d 1334 (1978), examined the Residential Landlord -Tenant Act of 1973 and found that the Landlord had not breached the Act where the landlord promptly investigated the defect, but did not properly fix it. Here, the record indicates that repairs had been made promptly after the Colorados made the "11/18" request. In addition, the "11/18" repairs were in compliance with RLTA as the stove was in "good working condition" afterwards. (RP 172).

Although case law has held a landlord has a "reasonable time" to make repairs, *supra, O'Brien*, 19 Wn.App. at, 622-23, the RLTA provides the following time limits in which a landlord is expected to act under certain circumstances:

> (1) Where the defective condition involves hot or cold water, heat, electricity or is imminently hazardous, the landlord has 24 hours to take action.
>
> (2) Where the defective conditions involve the refrigerator, range/oven or major plumbing fixture, the landlord has 72 hours to respond/repair.

RCW 59.18.070(2) (2013).

The record supports that between the "11/18" work order and the

February 21, 2013 request for repairs, Cedar Court was not given any notice of any problem with the stove. The was no evidence presented to suggest the stove was a danger. As such, upon receiving the February 21, 2013 notice, Cedar Court had at least 72 hours to make repairs. Before Cedar Court could act, the loss had already occurred.

4. Award of Attorney's Fees On Appeal Appropriate

Paragraph 8 of the February 13, 2013 *Rental Contract* executed between the parties provides as follows:

> 8. DEFAULT/ATTORNEY FEES: In the event Resident fails to comply with any of the terms of this Rental Contract, the Resident shall be in default. If Resident is in default, this Rental Contract shall terminate and upon such termination Resident shall quit and surrender the premises, but shall remain liable for the performance of all obligations and conditions contained in this Rental Contract. Resident agrees to pay all expenses and attorney's fees expended or incurred by the property owner and/or his/her agent by any reason of any default or breach by Resident(s) of any terms of this Rental Contract. The venue for any suit pertaining to any claims arising out this Rental Contract, including any suit pertaining to the collection of any sums owed pursuant to this Agreement, shall be Pierce County Washington.

An award of attorney fees to a "prevailing party" under RCW 4.84.330,[5] which governs attorney fees clauses in written instruments is mandatory. *Singleton v. Frost,* 108 Wash.2d 723, 729, 742 P.2d 1224 (1987).

This Court should affirm the Trial Court in all respects. In doing so, Cedar Court will be entitled to its attorney's fees as the prevailing party in this appeal, and attorney's fees should be awarded.

IV. CONCLUSION

No evidence, direct or circumstantial, supported the Jury's verdict of negligence on the part of Cedar Court. Without question, the Colorados failed to present evidence "sufficient to persuade a fair-minded, rational person of the truth of the declared premise." The Colorados asked the Jury to return a verdict in their favor based on pure fantasy. This Court should

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[5] RCW 4.84.330 provides as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

affirm the Trial Court's grant of JNOV and award Cedar Court its attorney's fees as the prevailing party on appeal.

RESPECTFULLY SUBMITTED this 29th day of April, 2016.

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Attorney for Respondent, Cedar Court Apartments

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 29th day of April, 2016, I [X] e-mailed [X] mailed via regular U.S. mail [ ] faxed [ ] delivered by legal messenger a true and correct copy of this document to the below counsel for Appellants:

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DATED this 29th day of April, 2016, at Tacoma, Washington.

Sara B. Walker
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