NO. 91957-7

THE SUPREME COURT OF THE STATE OF WASHINGTON

RENATO FIGURACION and JOLEEN FIGURACION, individually and the marital community comprised thereof and S.F., by and through her Parent/Guardian JOLEEN FIGURACION, a minor child,

Petitioners,

v.

REMBRANDT REALTY TRUST; THE NEIDERS COMPANY, LLC, a Washington Corporation,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. Identity of Respondents

Rembrandt Realty Trust and the Neiders Company, LLC are the Defendants in the underlying action. Defendants rented an apartment to the Petitioners, Renato and Joleen Figuracion, wherein the Figuracion's daughter, S.F., was injured on a steam radiator within the apartment unit.

II. Introduction

Petitioners, Renato and Joleen Figuracion individually and on behalf of S.F., their minor child, have failed to demonstrate the existence of any considerations governing review as required by RAP 13.4. The trial court and the Court of Appeals properly evaluated the question of duty under existing case authority. Accordingly, Respondents respectfully request that the Petition for Review be denied.

III. Statement of the Case

Dan Figuracion (Renato Figuracion's father) and Joleen Faker (Joleen Figuracion's maiden name) signed a lease for a unit in the Rembrandt Apartments for the period from May 22, 2008, to April 30, 2009. (CP 260). During the period of the lease term, Joleen Figuracion resided in the apartment with her daughter, S.F., her son, C.F., and her husband, Renato. (CP 263).

After the Figuracions took possession of the apartment, Rembrandt could not enter it without asking for permission. The apartment contained

an uncovered steam radiator, which was located in the living room of the apartment. The radiator was controlled by means of an on-and-off valve on the individual unit. Rembrandt controlled the central boiler which supplied steam to the individual apartments within the building. Upon taking possession of the leased premises, the Figuracions stacked boxes and other items around the radiator. The radiator kept the apartment very warm. Joleen Figuracion testified that she was aware that the radiator got hot enough to cause her to wear only shorts and a t-shirt in the apartment. (CP 281-82).

On or about April 27, 2009, C.F. and S.F. (who were three years old and one year old, at the time, respectively) were playing unattended while Joleen was in another room and no one else was present at the apartment. (CP 270-73). Joleen heard crying from S.F. in the other room, and told C.F. to play nicely with S.F. Joleen again heard S.F. crying and again did not check on her. *Id.* After waiting approximately two minutes and listening to S.F.'s cries, Joleen went to check on her. *Id.* At that time, Joleen discovered that S.F. was wedged between some boxes and the unit's radiator. (CP 273-77; CP 285). Joleen testified that the boxes were prohibiting S.F. from moving out of the area behind the radiator. *Id.*

The radiator was not in violation of any applicable code, statute, ordinance or regulation at the time of the subject injury. (CP 325 at ¶ 5;

CP 791 at ¶ 9). The steam radiator, like all steam radiators, operated through the function of steam transitioning from a gas to a liquid condensate phase. (CP 325 at ¶ 4). All steam radiators may be hot to the touch when operating. *Id.* The subject radiator was affixed with tenant operable manual control valves, allowing the tenant to turn the radiator on and off. *Id.* Additionally, the Tacoma Housing Authority's Housing Standards Checklist, which was generated for the same unit that was occupied by the Figuracions at the time of the accident, documents that there were no code or regulation violations posed by the radiator unit. (CP 756-757). Moreover, City of Tacoma permitting documents reveal that the apartment building's central boiler, which provides steam for the individual radiator units, was inspected and certified. (CP 759-767). The record shows, therefore, that the radiator did not violate any statute, ordinance, regulation or code.

Further, there is no evidence that the radiator unit within the Figuracion's apartment was defective or otherwise in need of repair. Subsequent to the injury, Renato Figuracion turned the radiator off. (CP 85). Clearly this refutes any contention that the on-off valve had been "stuck." Moreover, the only maintenance request relating to the subject radiator was received on May 4, 2009 (CP 775). Since the injury occurred on April 27, 2009, the only maintenance request, therefore, was generated

after the incident.

IV. Argument Why Review Should Be Denied

A Petition for Review will be accepted by the Supreme Court only if: (1) the decision of the Court of Appeals is in conflict with a previous decision of the Supreme Court; (2) the decision of the Court of Appeals is in conflict with a previous decision of the Court of Appeals; (3) the decision of the Court of Appeals involves a significant question of law under the Constitution of the State of Washington or the Constitution of the United States; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

Petitioners suggest that the decision of the Court of Appeals in the subject suit conflicts with a previous decision of the Court of Appeals. RAP 13.4(b)(2). Notably, Petitioners provide no support for this assertion and specifically fail to cite to any previous Appellate Court decision with which the subject decision conflicts. Further, Petitioners contend that the subject suit involves an issue of substantial public interest war ranting review. RAP 13.4(b)(4). Rembrandt respectfully disagrees. This case involved a non-defective, legally compliant radiator unit. Should the Court of Appeals' decision be reversed it would inappropriately and unfairly extend liability and in effect would create precedent wherein a landlord may be liable for any and all injuries that may occur in an

apartment. For example, a landlord could be liable if a child is injured on a non-defective, legally compliant stove top merely because the child came in contact with the hot stove top. Liability is not fairly placed on the landlord in such circumstances. The Court of Appeals correctly applied the law. If the decision was reviewed and reversed then it would involve a matter of substantial public interest because it would signal the creation of law stating that a landlord would in effect be the insurer of his or her tenants. The trial court and the Court of Appeals properly evaluated the issues under existing law. Both courts properly determined that Rembrandt did not breach any duty it owed the Figuracions.

A. The Appellate Court's Decision Does Not Conflict with a Previous Decision of the Supreme Court or the Court of Appeals.

1. *The Figuracions Had Exclusive Possession and Control of the Radiator.*

Petitioners assert that the Court of Appeals erred in determining that the Figuracions had exclusive possession and control over the radiator within their apartment unit. Petitioners contend that the Court of Appeals failed to examine whether Rembrandt retained possession or control over the radiator by virtue of the fact that Rembrandt controlled the central boiler. This assertion is patently incorrect.

A tenant may bring a claim against a landlord for personal injuries

under both the common law and the Residential Landlord Tenant Act (RLTA). *Martini v. Post*, 178 Wn. App. 153, 167, 313 P.3d 473 (2013). Under the *Restatement (Second) of Property: Landlord & Tenant* §§ 17.3 and 17.4 (1977), a landlord may be liable for conditions on a portion of the leased premises that he retains in his control if the tenant is entitled to use it or if it is necessary to the safe use of the leased part. After conducting a thorough analysis as to whether the radiator was located within a "common area" (and holding that it was not because there was no evidence that other tenants used the radiator), the Court next considered whether Rembrandt retained any control or possession over the radiator. The Court determined that exclusive control and possession of the radiator had passed to the Figuracions upon their lease of the premises. The Figuracions possessed the apartment. Rembrandt was required to ask for permission to enter the apartment. S.F. was injured on the radiator within the apartment, not on the central boiler. Further, the Figuracions were not entitled to use the central boiler.

Petitioners contend that other jurisdictions have determined that the landlord may retain control or possession over central heating systems. While this may be so, this is not the law in Washington. In fact, the only Washington State case Petitioners cite in support of this contention, namely *Thomas v. Hous. Auth. of Bremerton*, is readily distinguished from

the present matter. In *Thomas*, a small child was burned when she fell into a bathtub full of hot water in her apartment unit. *Thomas v. Hous. Auth. Of Bremerton*, 71 Wn.2d 69, 426 P.2d 836 (1967). Notably, the Court did not examine the issue of whether the landlord retained control of the water heater within the apartment for purposes of *Restatement (Second) of Property: Landlord & Tenant* §§ 17.3 and 17.4. Rather, the Court examined whether the child's injury was foreseeable and whether the temperature of the water was a latent condition. *Id.* at 72, 74-75. The Court noted that the subject water heater contained a set screw which allowed one to adjust the temperature from extreme hot to extreme cold. *Id.* at 71. At the time of the injury, the temperature was set to the highest setting, which produced water ranging from 180 to 208 degrees Fahrenheit. *Id.* Prior to the injury, the child's uncle complained to maintenance staff, during an occasion in which the water heater was being serviced, that the water in the apartment was "too hot." Despite this, the maintenance person failed to lower the temperature setting of the water heater while the unit was being serviced. *Id.* at 76. In fact, the water heater in the child's apartment unit was serviced three separate times at her family's request, prior to the injury, during the time the family resided there. *Id.* at 71. On the basis of the uncle's complaint, and the fact that the maintenance staff "knew that water from this type of hot water tank

could and did reach 200 degrees, and hotter, when the thermostat was out of adjustment or the lever was on the highest setting," the Court held the evidence supported a finding that the injury was foreseeable. *Id.* at 72-73, 76. Further, the Court held that there was no way for the average person to determine the difference between safe and unsafe water temperatures being produced by the hot water tank without the use of a high range thermometer, and in so determining found the water temperature to be a latent condition. *Id.* at. 75. The facts in *Thomas* are distinguishable from the present case because there is no evidence that Rembrandt knew that the radiator within the Figuracions' apartment unit was defective or that it was capable of reaching dangerously hot temperatures. Moreover, *Thomas* involved water flowing from a hot water tank that was to be used for bathing and for consumption. Thus, one would logically expect that the water heater would be set to a temperature range that would be safe for such purposes. This is different from the reasonable or safe temperature setting for a radiator, the specific purpose of which is to heat a living environment.

Generally, areas that are necessary to a tenant's use of the premises, and are for exclusive use of the tenant pass as an appurtenant to the leased premises. *Andrews v. McCutcheon*, 17 Wn.2d 340, 344-45, 135 P.2d 459 (1943). A landlord generally has no liability over non-common

areas once exclusive control has passed to the tenant. *Aspon v. Loomis*, 62 Wn. App. 818, 826, 816 P.2d 751 (1991).

Petitioners are unable to cite to any Washington State case law addressing the issue of whether a landlord retains control over an individual radiator unit within a tenant's apartment. However, there is precedent from this Court which helps inform the issue. In *Resident Action Council v. Seattle Hous. Auth.*, this Court addressed the issue of whether a landlord retained control over the exterior surface of doors leading to tenant's apartments for purposes of a First Amendment analysis. *Resident Action Council v. Seattle Hous. Auth.*, 162 Wn.2d 773, P.3d 84 (2008). The Court determined that the landlord did not retain control over the exterior surfaces of the door. In so holding the Court indicated that:

> Unlike [] hallways and other such common areas, other tenants and the general public have no right of access to the outer surface of unit doors....Nor does a landlord's control over a hallway, in itself, signal the landlord's intent to reserve control over an adjoining surface that is not common. It is not significant to this inquiry that the door, when closed, serves as part of the hallway. To the extent that a resident's use of his or her door does not interfere with use of the common area, the landlord's control over the common area does not imply a reservation of control over the adjacent door. Nor would [the landlord] impliedly retain control despite its responsibility for repair and replacement and liability for defective doors...[The landlord] has a duty to maintain doors under the [RLTA] and local codes...[The landlord] has a duty to maintain that is a function of statutory responsibilities, so maintenance is not tantamount to asserting a right of control.

Id. at 780-81.

Here, the Figuracions had exclusive control over the radiator. No other tenants had a right to access the radiator within the Figuracion's apartment unit. Rembrandt could not access the radiator in the apartment without the permission of the Figuracions. The radiator was wholly separate and apart from any common areas within the Rembrandt Apartments building. Nothing in the lease agreement indicated intent on the part of Rembrandt to retain control over the radiator.

Additionally, Rembrandt's control over the central boiler, in and of itself, does not imply an intent to reserve control over the radiator within the Figuracion's apartment. As indicated above, even if the landlord exerts control over a common area that adjoins a non-common area, this does not indicate the intent to reserve control over the non-common area. The central boiler did not "adjoin" the radiator within the Figuracion's apartment. The central boiler was not a common area and was separate from the Figuracion's apartment. So, even if Rembrandt exerted control over the central boiler, this does not signify that Rembrandt retained control over the radiator in the Figuracion's apartment.

Even assuming *arguendo*, that when steam from the central boiler was pumped to the radiator in the apartment that the central boiler became "adjoined" to the radiator, this still does not mean that Rembrandt

intended to retain control over the individual radiator. As highlighted above, it did not affect the Court's analysis in *Resident Action Council* that when closed, the exterior surfaces of the tenant-controlled doors are a part of the common area hallway. At all times, the radiator was under the exclusive possession and control of the Figuracions. The Figuracions had the exclusive ability to control the radiator unit within their apartment. Rembrandt could not and did not retain control over the radiator. Additionally, the fact that Rembrandt had a duty under the RLTA to maintain and repair the heating system does not mean that Rembrandt asserted control over the radiator unit within the Figuracion's apartment.

2. Rembrandt Did Not Breach any Duties Under RLTA.

Petitioners contend that the Court of Appeals erroneously held that Rembrandt did not breach a duty owed to the Figuracions under the RLTA.

The RLTA states that a landlord must comply with a list of fifteen enumerated duties. RCW 59.18.060. Breach of one of the RLTA duties may be a basis for a tenant's personal injury claim. *Tucker v. Hayford*, 118 Wn. App. 246, 257-58, 75 P.3d 980 (2003). Petitioners suggests that the fifteen listed duties are "merely examples of how a landlord can go about in complying with such duties" and that the RLTA implies a "general duty to maintain fitness." Petition for Review at 17. This

assertion directly contradicts established Washington law, wherein it has been determined that the RLTA does not create a general duty to "keep the premises fit for human habitation." *Lian v. Stalick*, 106 Wn. App. 811, 816, 25 P.3d 467 (2001).

Accordingly, in order to maintain a claim under the RLTA, Petitioners must show that Rembrandt breached one or more of the fifteen duties. Petitioners cannot make such a showing. Rembrandt repeatedly requested the Figuracions identify a specific RLTA code provision that was violated with respect to steam radiators in support of their claim. (CP 300-323). Petitioners cannot because Rembrandt did not violate any RLTA code section.

Instead of tying their RLTA claim directly into one of the fifteen provisions, Petitioners now rely on a theory that the radiator was "too hot" without making the requisite showing that the radiator was in violation of any specific code or ordinance. Radiator covers are not required by any statute, ordinance or code, so this cannot be a basis for liability on the part of Rembrandt.

Petitioners allege that RCW 59.18.060(3) ("keep any shared or common areas visually clean, sanitary, and safe from defects increasing the hazard of fire or accident") should apply here based on Petitioners' flawed argument that Rembrandt retained control over the central heating

system. As discussed above, there is no evidence that the radiator within the apartment constituted a common area or that Rembrandt retained control over the radiator. Thus, this argument fails. Also, Petitioners state that Rembrandt, under RCW 59.18.060(8) had a duty to keep the heating system in "good working order" and that fulfilling this duty means that "appliances should be safe." Petition for Review at 18. There is no evidence that the radiator was defective in any way or otherwise was not in good working order. Rather, the radiator was maintained in good working order because it operated correctly and performed the function it was supposed to perform, namely it heated the apartment. Accordingly, the Petition for Review should be denied on the basis that there was no violation of the RLTA.

3. Rembrandt Did Not Breach any Common Law Duty.

a. Implied Warranty of Habitability

Petitioners assign error to the Appellate Court's determination that the implied warranty of habitabilit y only applies where a statutory or regulatory violation is present. Rather, Petitioners assert that proving a violation of the implied warranty of habitability only requires a showing of an "actual or potential safety hazard to the tenants." Petition for Review at 12.

Under the Restatement (Second) of Property: Landlord & Tenant § 17.6 (1977):

> A landlord is subject to liability for physical harm caused to the tenant...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 or administrative regulation.

At the outset, Petitioners have shown no evidence that the radiator, on its own, created a "dangerous condition" or that it was defective in any manner. The mere fact that the radiator got hot, as it was supposed to in order to perform its function of heating the apartment, does not mean that the radiator constituted a dangerous condition. Additionally, as discussed above, Petitioners failed to show that Rembrandt breached a duty owed to the Figuracions under either the RLTA or any other applicable statute or ordinance. Accordingly, assuming for argument sake that the radiator was a "dangerous condition" then liability may only attach if Rembrandt violated the implied warranty of habitability.

Washington case law indicates that any breach of the duty of the implied warranty of habitability is determined on a case-by-case basis. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 522, 799 P.2d 250 (1990). The standard of

habitability is whether the condition presents a *substantial risk of future danger* not, as Petitioners assert, whether the condition is an actual or potential safety hazard to the tenants. *Landis & Landis Constr., LLC v. Nation*, 171 Wn. App. 157, 166-67, 286 P.3d 979 (2012). Petitioner mistakenly asserts that the Court of Appeals held that a breach of the implied warranty of habitability may only be found upon a showing of a regulatory or statutory violation. Petition for Review at 12. The Appellate Court did not arrive at such a conclusion. Rather, the Appellate Court pointed out that Washington Courts interpreting the standard on a case-by-case basis have only adopted section § 17.6 liability to the extent that any violation of the implied warranty of habitability stemmed from a codified law. The Appellate Court did note that no Washington State case found liability under the implied warranty of habitability where there was no evidence of a defective or legally noncompliant condition. Accordingly, although a breach of the implied warranty of habitability does not require a showing of a breach of a statute or code, this is immaterial to the present case. The radiator within the Figuracions' apartment was non-defective and legally compliant. It did not present a substantial risk of future danger simply because the unit got hot, which was required for its utility. To hold otherwise would in effect make a landlord an insurer of his or her tenants. The steam radiator unit in the Figuracions' apartment, although outmoded,

is theoretically no different than the modern gas fireplace inserts commonplace in residential units today. If S.F. had been burned because she came in contact with the glass front of a non-defective, legally compliant fireplace insert, the analysis would be the same. Rembrandt cannot be held liable on the basis that the Figuracions failed to supervise S.F. or otherwise child-proof their apartment.

b. Duty Owed to Invitees.

Petitioners assert that the Court of Appeals erroneously denied their claim that Rembrandt owed a duty to the Figuracions based on the Figuracions' status as invitees pursuant to the *Restatement (Second) of Torts* § 343 (1965). Under § 343 a landowner is subject to liability for harm caused to his or her tenants by a condition on the land, if the landowner (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to tenants; (b) should expect that the tenants will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect the tenants against danger. *Restatement (Second) of Torts* § 343 (1965).

Section 343, however, relates to landlord liability where a tenant has been injured on land the landlord possesses, which means common areas. *Id.* Here, the injury did not take place in a common area. S.F. was

injured on the radiator within her family's individual apartment unit, which the Figuracions alone possessed. Despite this, Petitioners contend that § 343 should apply to the pending matter because Rembrandt retained control of the radiator within the Figuracions' apartment, and therefore the "same principles should have been applied." Petition for Review at 16. As discussed above, Rembrandt did not retain any control over the radiator unit. Accordingly, this claim must fail as well.

Assuming for argument sake that § 343 did apply in the present situation, Petitioners' argument still fails. The evidence shows that Renato and Joleen appreciated that the radiator might pose a threat to their children as evidenced by the fact that they stacked boxes and other items around the radiator to prevent their children from accessing the unit.

B. Petitioners' Request that Their Parental Immunity Claim be Reviewed Should be Denied.

Petitioners request that this Court review Petitioners' motion for partial summary judgment, submitted to the trial court but not addressed by the Court of Appeals, on the grounds that Joleen Figuracion did not engage in willful and wanton misconduct in the supervision of S.F., and therefore should be granted parental immunity. The Court of Appeals properly refrained from analyzing the issue because Petitioners failed to make a threshold showing that Rembrandt breached a duty it owed to the

Figuracions. For the reasons stated above, this Court should also deny Petitioners' request for review of the parental immunity issue because Petitioners have failed to make any showing why the decision of the Appellate Court should be reviewed.

V. Conclusion

Respondents respectfully request that the Petition for Review be denied. Both the trial court and the Appellate Court properly evaluated the question of duty under existing case authority. Petitioners have failed to demonstrate their Petition satisfies criteria for this Court's review established in RAP 13.4(b). Therefore, the Petition should be denied.

Respectfully submitted this 14th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

RECIPIENT	DELIVERY INSTRUCTIONS
Counsel for Plaintiffs Paul Lindenmuth Ben F. Barcus & Associates 4303 Ruston Way Tacoma, WA 98402-5313	( ) **Via U.S. Mail** (X) **Via Legal Messenger** (X) **Via E-MAIL** ( ) **Via Overnight Mail**

DATED this 14th day of August, 2015, at Seattle, Washington.

Magdalen Diaz, Legal Secretary

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Please find the attached document for e-filing for the matter below:

- Renato and Joleen Figuracion v. Rembrandt Realty Trust, et al.
- Supreme Court No. 91957-7
- Respondents Answer to Petition for Review, e-filed by the undersigned.

Thank you,

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