IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

No. ~~45579~~ 45779-2-II

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,

Appellant,

v.

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

Respondents.

APPELLANT'S OPENING BRIEF

The Law Offices of Ben F. Barcus & Associates, PLLC
Paul A. Lindenmuth – WSBA #15817
Of Attorneys for Plaintiff
4303 Ruston Way
Tacoma, WA 98402
(253)752-4444/Facsimile:(253)752-1035
paul@benbarcus.com

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I. INTRODUCTION

This lawsuit arises out of an incident where S.F., a toddler, received second and third-degree burns after coming into contact with a steam radiator located in an apartment owned and operated by the defendants. At the time she was severally burned, S.F. was 13 months old (DOB: 3/23/08). She resided in the apartment with her parents, Joleen and Renato Figuracion, and her 2½-year-old brother C.F. (DOB: 8/14/06). The details as to how S.F. was burned will be discussed below in detail. At the outset, it is noted that these injuries occurred after S.F.'s parents made reasonable efforts to ameliorate the inherent hazard created by the presence of steam radiators in the apartment unit where two toddlers resided.

It was undisputed below that several months prior to this injury-producing event, (May/June of 2008), the parents had made specific inquiry of defendant management personnel, as to whether or not they could place a cover over the radiator, in order to ensure child safety. Specifically while the parents were engaging in a "walk-through" of the apartment unit, prior to entering into a one-year lease, Renato Figuracion asked whether or not he could build a cover to place over the radiator in order to protect his children. At that

time, Defendant management personnel misrepresented to the plaintiff's parents that a radiator cover would violate "code" and that the radiator's never got hot enough to cause any kind of burn. Such information proved to be patently false.

Nevertheless, given such limitations on their ability to act, the parents made reasonable efforts to try to "make safe" the radiator by stacking boxes around it, thus creating a barrier preventing the children from having access. Unfortunately, such remedial efforts proved to be fruitless and S.F. received severe second and third-degree burns to her abdomen and other parts of her body from a radiator, which according to defendant management personnel at the time of the walk-through, never could get hot enough to create to cause any significant injury.

As explored below, Washington's law, under a wide variety of theories, (both common law and statutory) obligates landlords to provide a residence to its tenant that is **safe**. Contrary to the landlord's position below, simply because this case involves a steam radiator does not change such obligations.

As will be explored below, plaintiffs' position is similar to that articulated in a dissent authored by Judge Saxe in the case of *Rivera v. Nelson Realty, LLC*, 799 A.D. 3d 316,

799 N.Y.S. 2d 198 (N.Y. App. 2005) affirmed, 7 N.Y.3d 706, 858 N.E. 2d 1127, 825 N.Y.S., 2d 422 (2006), which observed:

> *The lack of a specific statutory duty to furnish radiator covers does not absolve defendants of all responsibility. First of all, while violation of a specific statute establishes negligence, and a violation of regulation may be considered as evidence of negligence, the lack of an applicable statute does not preclude the existence of negligence founded upon a property owner's common-law duties ... to maintain premises in a reasonable safe condition. That a radiator was functioning as intended does not alone establish that it was safe. The question of what was reasonably safe must depend upon the particular circumstances and presents an issue for resolution an issue for resolution by a jury. Where defendants knew that children live in the apartment, and that the hot, uncovered radiator presented a hazard to them, the question of whether the apartment was leased in a reasonable and safe condition should not be determined as a matter of law. The existence of a case dating from 1945 absolving a landlord from any liability where a child was burned by a hot radiator is not dispositive. Not only was there no discussion in that brief memorandum opinion of a landlord's obligation to maintain premises in a reasonably safe condition, but there was certainly no discussion of a claim that maintaining the premises in a reasonably safe condition entailed providing a radiator cover. Indeed, radiator covers may not have been readily available when Bernstrof was being litigated. If they were not, the plaintiff in that case would have been unable to assert, as plaintiff asserts here, that the dangers presented to children by exposing bare radiators could easily be rendered safe by the landlord. Accordingly, the holding in Bernstroff should not have been relied upon to preclude plaintiffs. (Citations omitted).*

As explored below, both under common law and statutory duties, the defendant landlord in this case had an obligation to provide a safe premise for this family to reside in.

It should have been left to the jury to make a determination as to whether or not it complied with such obligations.

Even more puzzling under the facts of this case is the Trial Court's denial of the parents' Motion for Summary Judgment on their entitlement for parental immunity. The Trial Court should not have viewed this as even being a close question. There was simply no evidence presented before the Trial Court which in any way suggested the plaintiff parents, in any way, engaged in "wanton and/or willful misconduct" justifying a denial of parental immunity under Washington law. There is no "cause of action" for "negligent parental supervision". Further, even if there were such a claim, the evidence presented below was insufficient even to raise a colorable issue as to whether or not the parents' actions in this case were negligent, let alone a question of fact as to whether their actions rose to the level of wanton and/or willful misconduct.

Should the Court be inclined to reverse the Trial Court's determination that the defendants' breached no duty and/or caused no harm, the Court also should review and dispose of the Trial Court's rather incomprehensible denial of Plaintiffs' Motion for Summary Judgment regarding parental immunity.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred by granting defendants' Motion for Summary Judgment when there are issues of fact as to whether or not the defendant landlord breached one or more statutory and/or common-law duties to provide its tenants, including S.F., a safe place to live.

2. The Trial Court erred in failing to recognize that there was at least a genuine issue of material fact as to whether or not the defendant landlord breached the common law implied warranty of habitability, which requires that a landlord provides to a tenant premises which do not contain "actual or potential safety hazards," to the occupants.

3. The Trial Court erred by failing to recognize that there was at least a question of fact as to whether or not the defendant landlord violated its common-law duties to its' invitees by renting to the plaintiffs an apartment which contained a dangerous steam radiator, where it knew or should have known, that despite its dangerousness, the tenants would necessarily have to encounter such dangers by residing in the apartment.

4. The Trial Court erred in failing to find that there were at least questions of fact as to whether or not the landlord

in this case violated its duties under RCW 59.18.060(1), (2), (3), and (8).

5. The Trial Court erred in failing to find that the landlord could be subject to under the terms of Restatement (2^{nd}) of Property § 17.3 and § 17.4 for injuries suffered from a steam radiator within leased premises, when the landlord retained control over such "common facility", despite the fact it was within the four corners of the leasehold.

6. The Trial Court erred in failing to find that the defendants can be subject to liability under the Restatement (2^{nd}) of Property § 17.6 because it failed to repair the condition, or ameliorate it, (the dangerousness of the steam radiator), in order to comply with the implied warranty of habitability and in order to conform with a number of administrative duties imposed under the terms of the Tacoma Municipal Code.

7. The Trial Court erred to the extent that it may have rested its decision on the actions of the plaintiff's parents, as being the superseding intervening cause of S.F's injuries, despite the presence of the landlord's breach of various common law and/or statutory duties.

8. The Trial Court erred in failing to find as a matter of law that the plaintiff's parents were entitled to

"parental immunity" for any injuries or damages suffered to S.F., given the absence of any conduct on their part which would fall within any of the exceptions of the parental immunity doctrine, including the existence of "wanton and willful misconduct".

9. The Trial Court erred in failing to grant summary judgment on the plaintiff's parents' claim for parental immunity and in failing to rule as a matter of law that the parents breached no actionable duty which could result in an allocation of fault to them under the terms of RCW 4.22 et. seq.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court err in granting summary judgment on plaintiffs' claims when there was a minimum question of fact, as to whether or not the landlord breach of statutory and common-law duties was a proximate cause of the injury and/or damages suffered by the plaintiffs?

2. Did the Trial Court err as a matter of law in failing to grant Plaintiffs' Motion for Summary Judgment on the issue of parental immunity when the evidence presented below did not raise material questions of facts as to whether or not any of the exceptions to the parental immunity doctrine applied or even a colorable question as to whether the

plaintiff's parents engaged in "wanton and/or willful conduct"?

3. Did the Trial Court err by failing to grant Plaintiffs' Motion for Summary Judgment on parental immunity and by failing to determine, as a matter of law, the parents did not breach actionable duty for which fault can be allocated under the terms of RCW 4.22.070?

IV. STATEMENT OF THE CASE

A. Factual Background

In late May, early June 2008, Plaintiffs, Joleen and Renato Figuracion, entered into a rental agreement (one- year lease) to rent Unit 212 at the Rembrandt Apartments located at 219 St. Helens Avenue, Tacoma, Washington 98402. At the time the Plaintiffs entered into the rental agreement, it was understood that Joleen and Renato's two minor children "S.F." (female, DOB: 3/23/08) and C.F., (male, DOB: 8/14/06) would be residing within the home.[1] (CP 52).

Unit 12 is on the ground/basement level of the Rembrandt Apartments. It is a corner apartment and as you enter the apartment, directly in front of you is the restroom.

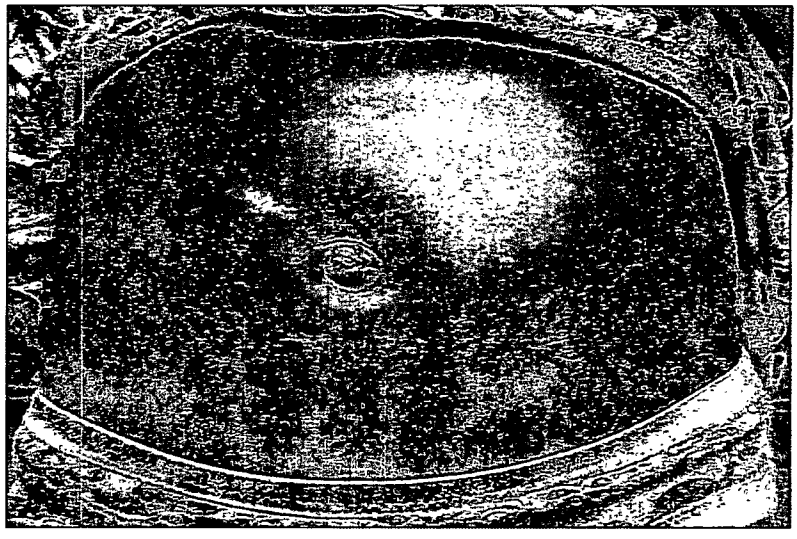
[1] Prior to moving to the Rembrandt, the Plaintiffs were living in a hotel that was also owned and operated by the Neiders Company. (CP 77, 100, 115). The hotel had a program in which its tenants, who either had credit issues or prior evictions, could qualify for an apartment at Rembrandt by paying an additional fee on top of rent for the hotel room in order to qualify. Plaintiff paid the extra money and "qualified" for an apartment.

To the left is a living room area and to the right is a kitchen area which had a bedroom situated behind it. (CP 73). It is undisputed that from the bathroom area, even with the door open, one would not be able to see into either the living room or the kitchen area, and all you would be able to see with the door fully open is the front door and a small hallway. The Rembrandt Apartments have a centralized steam-boiler heating system which has steam radiators in the individual apartments. (CP 71, 72, 74, 202) (Appendix "1"). Within the living room area of Unit 12 there is a three-tiered steam radiator which is angled away from the wall in such a manner as to provide a triangular-shaped space between the radiator and the wall. (*Id.*)

At the time of Joleen and Renato's initial walk-through with Rembrandt personnel, Renato asked whether or not he could put covers over the radiators out of a concern for the children getting behind them and could get burned. (CP 82). At that time the plaintiff parents were informed that the radiators never got that hot and that it would be "against code" to put covers upon them. (CP 82; CP 821). Renato, a carpenter, offered to build wooden covers for the radiators that would enclose the entire radiator. (CP 82). Previously the Figuracions had lived in an apartment that had covers over such radiators

which had been made out of wood. (*Id).* Wooden radiator covers are not unusual and are readily available for retail purchase. (CP 405). The Plaintiffs were told that they could not construct such covers. (*Id).* The Plaintiff parents attempted to stack boxes around the radiator to prevent the children from having access.[2] (CP 82-83).

Unfortunately, on April 27, 2009 at or around 11:00 a.m., minor, S.F. was severely burned, by the radiator located in the front room of Unit No. 12 in the Rembrandt Apartments.



(CP 126-131).

[2] Additionally, Plaintiffs prior to S.F.'s injury, had also lodged oral complaints regarding the unpredictability of when the heat would be on or off and the loud noises that the radiator system would make. Additionally, Plaintiffs orally complained about how the knob to the radiator was stuck and the knob was difficult to turn. (CP 83) (CP 822). The knob (valve) is not a true temperature control, but more akin to an off or on switch. (CP 404).

As Joleen Figuracion explained in her deposition, immediately prior to the event she went to the restroom. As she was using the restroom, the children were in the front room watching Sesame Street or some other programming on PBS. (CP 79). While Joleen was in the restroom (for approximately five minutes), she began to hear her daughter scream. (*Id).* Her initial assumption was that the two toddlers were roughhousing and she yelled out for her young son to "knock it off". For a moment the screaming stopped, but once again S.F. began to scream. (CP 79). As a result, Joleen jumped off the commode and ran out of the bathroom and found S.F. behind the radiator. C.F. was also behind the radiator. Joleen initially thought that S.F. was scared because she could not extricate herself from behind the radiator, (her exit was blocked by C.F.) (*Id).* However, as she picked her up, Joleen felt something hanging on her hand (which turned out to be a substantial amount of S.F.'s bodily skin from her stomach). (*Id).* Neither S.F. and C.F. were in direct contact with the boxes, and based on her on-the-scene observations, Joleen Figuracion has concluded that S. F. was pressed into the radiator by C.F. because both were occupying the small space behind the radiator. C.F. was uninjured. (CP 398).

Joleen immediately stripped off S.F.'s clothing, brought her into the bathroom, and put her in cold water and immediately called 911. (CP 79). EMTs arrived and S.F. was immediately transported to Mary Bridge Children's Hospital where she was treated for severe second and third-degree burns.[3] (CP 411-412).

As a by-product of contact with the steam radiator located in the front room of Unit 12 of the Rembrandt Apartments S.F. suffered:

> *Primarily second degree burns with some deeper areas of full thickness third-degree burns about the belly button, lower abdomen, and right flank. There is a small area deep second-degree burn in the mid thoracic region of the back which is manifest primarily a slight hyper pigmentation.*

(CP 412).

No doubt because of the significant nature of S.F.'s injuries, CPS conducted an investigation including visiting the Rembrandt Apartments to verify the parents' explanation of the event and to determine what happened. (CP 142-156).

While at the apartment complex the social worker made contact with the Defendant manager who was asked whether or not covers could be placed over the steam radiators to ensure child safety. Ultimately no actions were taken by the

[3] It is somewhat unknown as to how S.F. was able to find her way behind the radiator given the fact that the parents had tried to prevent access to the rear of the radiator by stacking boxes in and around the area. It is most likely that since C.F. was behind the radiator with S.F. wedged into the radiator by C.F. who would have been behind her and nearest the "exit". (CP 397-398).

Rembrandt Apartments and its attitude was that if radiator covers (or something else) were put around the heaters in Unit 12, then the owner would be obligated to do so for all of the residents. (CP 153-154). Ultimately, the Figuracions turned off the steam heaters, and until they moved out (upon expiration of their lease), used space heaters in lieu of the cast iron radiators over which they had very little ability to regulate.

It was undisputed that the heating system within the Rembrandt apartment was a centralized boiler system with individual radiators in each room. The landlord at all times retained control as to whether or not the heat system was turned on or off. (CP 822). The individual radiators had control valves which allowed them to turn the radiator on and off, but did not permit the individual tenant to regulate the amount of heat coming to their apartment. The control valve on the radiator at issue in this case within the Figuracion's apartment, was painted into a fixed open position. (CP 404).

During the course of proceedings, even the defendants own expert conceded that steam radiators like those present in Unit 12 at the Rembrandt Apartments can be hazardous to health and safety of the apartment's occupants. Within a report dated October 8, 2013, defendants own expert a

Mr. Chamberlain provided "anyone familiar with low pressure steam boiler and the application of steam radiators, (such as installed at the Rembrandt Apartments), notes a radiator service to be extremely hot to the touch ..." (CP 202). "Therefore it is my opinion this ASTM standard is not relevant to the complaint other than to confirm human body burns will occur when in contact with any low pressure steam radiator ...". (CP 202-03). "What happened to this child was unfortunate but the application, performance and use of cast-iron steam radiators was appropriate for the building at the time of its construction. It is my opinion that occupants must use extreme caution when operating a steam radiator space heating system to avoid potential burn situations ...". (CP 203).

Additional information was submitted to the Trial Court, including studies from authoritative sources such as the CDC verifying that steam radiators are inherently hazardous and in particular are burn hazards to children, elderly, and those who suffer from epilepsy. (CP 444-446). As suggested by a CDC study dated September 27, 1996, such burn injuries are most often suffered by children within low-income housing:

> *Unprotected radiators and their pipes were directly related to injury risk for the children in this report.*

Building Codes in Chicago require radiators be covered in public places (e.g., churches, daycare facilities and schools) but not in private or public housing. Steam radiator systems are found primarily in older buildings. The buildings served by steam radiators in the housing projects in this report were constructed during the late 1950s and the buildings served by hot water radiators were built during the 1960s. Temperature is a critical factor in thermal injury. Contact temperature in the range of steam radiators can cause an instantaneous full thickness burn of adult human skin. Children's skin is probably more susceptible than that of adults to thermal injury. In comparison, hot water radiators operate at a lower temperature than steam radiators and present a lower risk of thermal injury. Risk for burn from home radiators can be reduced by keeping the unit covered and the pipes insulated.

(CP 445).

Other studies were provided to the Trial Court through plaintiffs' expert. (CP 448, 451) (Appendix "2"). In each of these studies, it was recommended that in order to ameliorate the potential harm that can be caused by steam radiators to the young, elderly, or infirmed (and individuals with epilepsy), that covers and/or shelving be used to surround the steam radiator in order to lessen the opportunity for skin contact:

Prevention of radiator contact burns.

If preventative measures are to be implemented they need to be economical yet allow effective heat emission to occur. The method would incorporate:

1. Moving children's beds away from radiators.

*2. **The use of shelving or protective grills enclosing the radiator.***

3. Encasing exposed pipes by pipework (emphasis original).

As such, it is respectfully suggested that it is an established fact that steam radiators, located within an apartment, as Unit 12 at the Rembrandt Apartments, are a well-recognized burn hazard and unless remedial efforts are taken, are inherently unsafe.

B. Procedural History

The instant case was timely filed on April 19, 2012. Within the complaint, plaintiffs asserted a number of claims including violation of the Residential Landlord Tenant Act, RCW 59.18.060(1) including the implied warranty or the warranty of inhabitability. (CP 5). It was also asserted that the defendant landlord breached its duty to comply with all applicable codes and ordinances in order to prevent conditions from substantially endangering or impairing the health or safety of any tenant. (CP 6). In that regard, it was alleged that the landlord was obligated to pay for any repair and maintenance to remedy any potentially unsafe condition. (*Id*).

Plaintiffs also brought claims under the common law implied warranty of habitability, as well as under those duties applicable to property owners to public invitees. The plaintiff parents sought damages on their own behalf, as well as damages on behalf of S.F. their minor child. (*Id*).

On June 26, 2012, the defendants filed an Answer denying liability and asserting a number of Affirmative Defenses including, but not limited to, comparative fault and an allegation that the plaintiff's injuries were a byproduct of plaintiff's parents "willful or wanton misconduct." (CP 16). The defendants also asserted that the plaintiffs failed to exercise reasonable care for their own safety and the safety of the minor in their care. (*Id*).

On October 25, 2013 the plaintiffs moved for partial summary judgment regarding a number of the asserted affirmative defenses and regarding undisputed medical expenses. (CP 24-48). Plaintiffs sought summary judgment regarding the defendants' contention that S.F. could be found comparatively/contributory negligent and subject to allocation for fault purposes under the terms of RCW 4.22.070. As indicated above, at the time of the above-referenced event S.F. was 13 months old, and it was plaintiff's position that as she was below the age of 6, she could not be found comparatively and/or contributory negligent as a matter of law. See *Price v. Kitsap Transit*, 125 Wn. 2d 456, 461-62 866 P.2d 556 (1994). (CP 34). Plaintiff also sough summary judgment on the basis of the parents' "parental immunity," not only arguing that such parental immunity would bar any claims directly against such

parents by the child, but also precluded a determination that the parents engaged in any fault-producing conduct within the meaning of RCW 4.22.015, which could be allocated, (even if immunity was granted), under the terms of RCW 4.22.070.[4] (CP 35-38).

In response, the defendants filed a Cross-Motion for Summary Judgment arguing the Rembrandt Apartment breached no duties and/or that the actions of the plaintiff parents by stacking the boxes around the radiator to try to keep the children away from it somehow was the superseding intervening cause precluding a finding of liability in this case. (CP 354-365). Concerning such position, the defendants primarily avoided the application of Washington Statutory Common Law, but rather relied on cases from other jurisdictions wherein there had been a refusal to hold landlords responsible for the inherent dangers created by steam radiators particularly to children residing within apartment units. (CP 354-355).

On December 20, 2013 the Trial Court, the Honorable Susan Serko heard the parties' Cross-Motions for Summary

[4] Plaintiff also sought dismissal as a matter of law of defendant's affirmative defense of statute of limitations and/or based on estoppel. The Federal Court, in part, granted Plaintiffs' Motion on any claim that the children could comparatively or contributory be at fault and dismissed affirmative defenses of statute of limitations, laches, and "unclean hands". (CP 904-906).

Judgment. Following oral argument, the matter was taken under advisement. (RP 12/20/13 p. 29).

On January 7, 2014 the Trial Court issued an order denying Plaintiffs' Motion for Partial Summary Judgment and granting defendants' Cross-Motion for Summary Judgment. (CP 926-27). In entering such an order the Trial Court did not elaborate regarding its thought processes. (This is naturally problematic given the multiple theories and issues which were before the Trial Court).

On January 10, 2014, plaintiffs filed a timely notice of appeal.

V. ARGUMENT

A. Review of Summary Judgment Decisions

The standard of review for an Order Granting Summary Judgment is *de novo*, the Appellate Court performs the inquiry as the Trial Court. *Ruvalcaba V. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). The Supreme Court long ago on the case of *Balise v. Underwood*, 62 Wn.2d 195, 199, 381, P.2d 966 (1963) catalogued the rules applicable to motions for summary judgment, within the State of Washington:

> *(1) The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary, where there is a genuine issue as to any material fact.*

(2) Summary judgment shall be granted only if the pleadings, affidavits, depositions, or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

(3) A material fact is one upon which the outcome of litigation depends.

(4) In ruling on a motion for summary judgment, the Court function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue.

(5) The Court, in ruling upon a motion for summary judgment, is permitted to pierce the formal allegation of facts and pleadings and grant relief by summary judgment, when it clearly appears, from uncontroverted facts set forth in the affidavits, depositions, or admissions on file, that there are, as a matter of fact, no genuine issues.

(6) One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent, at trial, would have the burden of proof on the issue concerned.

(7) In ruling on a motion for summary judgment, the Court must consider the material facts and all reasonable inferences there from most favorable to the nonmoving party and, when so considered, if reasonable men might reach different conclusions, the motion should be denied.

(8) When at the hearing on a motion for summary judgment, there is contradictory evidence, or the movement's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is no too incredible to be believed by reasonable minds. The Court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied. (Citations omitted).

Under such standards, there is no question that there are questions of fact with respect to plaintiffs' claims. As recently recognized by Division II in the *Martini v. Post*, 178 Wn.App., 153, 164-65, 313 P.3d 473 (2013) case, generally, issues regarding cause and fact and proximate cause are questions for the trier of fact which generally are not susceptible to summary judgment. As discussed in *Martin* at 167, there are three distinct theories upon which a tenant may base a claim for personal injuries against a landlord. Such claims include the issues of whether or not the landlord breached a duty under: (1) The rental agreement; (2) the common law; or (3) under the terms of the RLTA.

In this case, there is simply no question that the plaintiffs have viable claims under a number of common law theories, as well as under the terms of the RLTA.

B. There Is At Minimum Questions of Fact As To Whether Or Not The Defendants Landlord Violated The Common Law Implied Warranty of Habitability.

The simplest issue in this case is whether or not there is a question of fact as to whether or not the landlord violated the implied warranty of habitability by having a steam radiator in the living room of the apartment rented to the plaintiffs which has a capacity of instantaneously causing full thickness burns. The implied warranty of habitability was most recently

explored by the Court of Appeals on *Landis and Landis Const., LLC v. Nation*, 171 Wn.App. 157, 162, 289 P.3d 979 (2012). In *Landis* the Appellate Court clarified the standards applicable to the implied warranty of habitability and rejected a "fit to be lived in" standard. *Id* at 165. Instead, in order to establish that the common law implied warranty of habitability has been breached all that needs to be shown is that the condition within the premises creates an "actual or potential safety hazard" to the occupants. *Id.*, citing *Lian v. Stalick*, 106 Wn.App. 811, 818, 25 P.3d 467 92001); *Atherton Condo. Apartment – Owners, Ass'n Bd. Of Dirs. v. Blum Dev. Co.*, 115 Wn. 2d 506, 519-22, 799 P.2d 250 (1990).

Given such a standard, it is hard to imagine that a reasonable jury could not conclude that a steam radiator present in a living room of a small apartment union, where two children are known to be residents, would not constitute an "actual or potential safety hazard to the occupants." It was all but conceded that the steam radiator at issue in this case was more than capable of causing extremely severe burns. Indeed, it is the "very nature of the beast."

C. Plaintiffs' Common Law Claims Given The Tenant Status Or Plaintiffs' Status As An Invitee.

The common law classification of persons entering upon real property determines the scope of the duty of care

owed by the owner/occupier of that property. See, *Mucsi v. Graoch and Associates*, Ltd., 144 Wn.2d 847, 854-55, 311 P.3d 684 (2001). Citing to, *Dagel v. Majestic Mobile Manor, Inc.*,129 Wn.2d 43, 48, 914 P.2d 728 (1996). As discussed in *Mucsi* a landlord has an affirmative duty to maintain common areas in a reasonable, safe condition. *Id.* Such duty is encompassed in Restatement (2^{nd}) of Torts § 343 (1965) which has been adopted within the State of Washington. Under § 343, a landowner is subject to liability for harm caused to his 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 the tenants; (b) should expect that they will not discovery or realize the danger, or will fail to protect themselves against it; and(c) fails to exercise reasonable care to protect the tenant against the danger. *Id.* Reasonable care requires the landowner to inspect for dangerous conditions, followed by such repairs, safeguards, or warnings as may be reasonably necessary for a tenant's protection under the circumstances. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994).

As noted in the Supreme Court opinion in *Mucsi*:

> *Multi-family dwelling complexes have become a major commercial enterprise, which directly affect the lives of literally thousands of people who must rely on this style of living for shelter...The landlord cannot passively refrain from negligent conduct...*

Notwithstanding this conclusion, the Court in *Geise* emphasized the landowner is not a guarantor of safety. *Id.* To prevail the plaintiff must prove:

> *(1) The landowner had actual constructive notice of the danger; and*
>
> *(2) The landowner failed within a reasonable time to exercise sensible care in alleviating the situation. Id.*

Further, simply because the tenant also has knowledge of the hazardous condition does not necessarily preclude liability on the part of the landlord. As observed by the Court in *Mucsi,* (and the cases cited therein):

> *A possessor of land is not liable to his [or her] for physical harm caused by them by an activity or condition on the land whose danger it is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.* (Emphasis added). (Citations omitted).

See, Restatement (2nd) of Torts § 343A(1)(1965), See also, *Sjogren v. Props. of Pac. NW.*, LLC, 118 Wn. App. 144, 151 75 P.3d 592 (2003) (finding an issue of fact as to whether or not landlord can be liable for a danger that was otherwise

open and obvious when it should have been anticipated that the tenant would act despite such dangerous conditions).

Under such standards, there is simply no question that there is, at minimum, a question of fact as to whether or not the defendant in this case breached its duties under Restatement (2nd) of Torts § 343 as modified by § 343A. Here even as admitted by defendants' own expert, the capacity for the steam radiator to burn is something that the landlord either knew, or should have been aware of, given its obligation to reasonably inspect and maintain the rented premises. Here, despite the fact that the plaintiffs asked permission to place a cover around the radiator, representatives of the defendants told the plaintiff's parents that they could not do so because it would be an alleged code violation (which is false), thus not only should the defendants have been aware that the plaintiffs would not protect themselves against such danger, but actually engaged in conduct which undermined the plaintiffs ability to do so.

Additionally, there is clearly a question of fact as to whether or not the defendants failed to exercise reasonable care to protect the tenants from such danger by erecting safeguards against the potential harm. Here, reasonable safeguards would include permitting the plaintiffs to

manufacture and put in place their own cover around the hazardous radiator. Alternatively, the defendants, at a minimum, had an obligation to warn the plaintiffs, particularly given the fact that they had children, of the potential hazards created by such a radiator. Here, instead of warning the plaintiffs, the defendants' employees allegedly did the exact opposite and told the plaintiffs that the radiators never got hot enough to do any harm.

Under the terms of § 343(A)(1), the landlord should have reasonably anticipated that despite the obvious danger that the tenant would nevertheless be subject to physical harm. This is because a reasonable person in the position of a tenant in this case, despite the known or obvious danger, would nevertheless as a reasonable person, be placed in the position of having to hazard the danger because of the advantages of doing so would outweigh the apparent risks.

In this case, plaintiffs prior to their involvement with the defendants and its' personnel, were essentially homeless living in a hotel. Unit 12 was the only home they could afford, and the defendants were well aware that the plaintiffs intended to live there with their two small toddler children. The plaintiffs had entered into a lease and could not readily breach such a lease in order to escape the

dangers posed by the steam radiator. Thus, a reasonable person in the plaintiffs' position (desperately in need of a home), would be compelled to reside on the premises where the steam radiator hazard existed. Under such circumstances, it was readily foreseeable to the defendants that the advantages of having a home for the plaintiffs would outweigh the apparent risk to their children posed by the steam radiator.

Defendants have attempted to avoid the consequences of the imposition of such law by trying to contend that the "steam radiator" was not a "common area." But as discussed in Section E, given the fact that the defendants retained control over the operation of the steam radiator, such a steam radiator should be viewed as akin to a "common area."

D. There are Questions of Fact As To Whether Or Not The Defendant Landlord Violated Its Duties Under the Terms of the Residential Landlord Tenant Act (RTLA).

The provisions of the RLTA applicable to this claim include RCW 59.18.060 and RCW 59.18.115. RCW 59.18.060 provides in its pertinent part:

> *The landlord will at all times during the tenancy keep the premises fit for human habitation and shall in particular:*
>
> *(1) Maintain the premises to substantially comply with all applicable codes, statutes, ordinances or regulations governing the maintenance or operation, which the legislative body enacting the applicable code, statute, or in its regulation could*

enforce as to the premises rented if ***such condition endangers or impairs the health or safety of the tenant****;*

(3) Keep any shared or common areas reasonably clean, sanitary and safe from defects increasing the hazards of fire or accident;

(8) Maintain all electrical, plumbing, heating or other facilities and appliances supplied by him or her in ***reasonably good working order****;*

(11) Provide facilities adequate to supply heat and water and hot water as reasonably required by the tenant;...

(Emphasis added).

Additionally, Section RCW 59.18.115 provides additional clarification as to what is exactly required under the terms of .060. Section 115 in its pertinent parts provides:

(1) The legislature finds that some tenants live in residences that are substandard and dangerous to their health and safety and the repair and deduct remedies of RCW 59.18.100 may not be adequate to remedy substandard and dangerous conditions. Therefore, an extraordinary remedy is necessary if the conditions substantially endanger or impair the health and safety of the tenant.

(2)(a) If the landlord fails to fulfill any substantial obligation imposed by RCW 59.18.060 that substantially endangers or impairs the health or safety of a tenant, including (V) heating or ventilation systems that are not functional ***or are hazardous***... (Emphasis added).

Under the terms of RCW 59.18.060(1) all that needs to be shown is that the premises **"<u>could</u>"** be subject to enforcement actions should responsible regulatory officials decide to do so.[5] As this structure is located within the City of

[5] It is curious to note that defendant through their expert attempted to submit hearsay from City of Tacoma officials indicating that they do not

Tacoma naturally what is implicated is the Tacoma Municipal Code (TMC). Further, the *Martini* opinion directs that the Court can look to such matters in making a determination as to whether or not a landlord has violated their duties to their tenants. Significantly TMC § 2.01.030 which is part of Tacoma's "minimal building and structure code" provides under the heading of "scope" the following:

> "The provisions of this chapter shall apply to all buildings and the properties on which they are located including, but not limited to, residential, commercial and industrial uses. Buildings in existence at the time of the adoption of this chapter may have their existing use or occupancy continued, if such use or occupancy was legal at the time of the adoption of this chapter, provided said use has not changed in intensity from its original purpose **and such continued use is not dangerous to the health, safety or welfare of the occupants or by the general public.**" (CP 434).

TMC 2.01.070(AA) provides: Under the heading of "Heating, Mechanical and Elevator Equipment":

> *Heat equipment shall be provided to heat every dwelling and guestroom, and shall have a capacity to heat all habitable rooms to 70 degrees Fahrenheit with an ambient outside temperature of 20 degrees Fahrenheit. Such equipment shall be incompliance with the mechanical code or the building code in effect at the time of the installation. Solid fuel burning appliances and portable heating devices*

---

enforce against steam radiators. (CP 694-95) Naturally such information is not particularly relevant given the fact that the standard under the terms of RCW 59.18.060(1) is not whether the enforcement officials actually did engage in enforcement conduct but rather whether or not they "could."

shall not be used to provide the primary heat for the dwelling or guestroom.[6] *Id.* (CP. 435).

It is not consistent with the Tacoma Municipal Code to have a highly dangerous heat source within an apartment within the City of Tacoma. Other relevant codes also preclude such hazards. For example the Uniform Mechanical Code at Section 104 under the heading of "Existing Equipment" provides:

Heating, ventilating, cooling or refrigeration systems, incinerators or other miscellaneous heat-producing appliances lawfully installed prior to the effective date of this Code may have their existing use, maintenance or repair continued ***if the use, maintenance or repair is in accordance with the original design and location and is not a hazard to life, health or property****. (Emphasis added). (CP 434-441).*

The maintenance of a hazardous steam radiator within an apartment occupied by among others two toddlers is violative of the terms of the RLTA because it **could** be subject to local enforcement action.

Similarly, the defendants in this case can be liable under the principles encapsulated in WPI 130.01 and 130.06. WPI

[6] It is noted that after S.F. suffered the third-degree burns at issue in this case, the parents ceased using the steam radiators within the apartment and started using portable space heaters instead. Thus, because of the dangerous nature of the steam radiator, it could not be used safely in an apartment with small children present. This resulted in a violation of TMC 2.0.070 (PA), which precludes the use of portable heaters as a heat source.

130.01 under the heading of "duty of landlord – latent or obscured defects – rented premises" provides:

> *a landlord who knew or should have known of a latent or obscured defect on the premises at the time of renting has a duty to notify the tenant of its existence if a tenant has no knowledge of the defect and is not likely to discover it by a reasonably careful inspection.*

See also, *Tucker v. Hayford*, 118 Wn. App. 246, 255, 75 P.3d 980 (2003) (applying a should-have-known standard). As indicated in the comments section to WPI 130.0110 although typically such a rule only applies to latent defects there is the exception to the rule set forth within Restatement (2nd) of Torts Section 343A which is discussed in detail above. See, *Sjorgren v. Properties of Pac. N.W.,* L.L.C., 118 Wn. App. 149 – 50.

Liability can be imposed under the "duty to repair" "codified" in WPI 130.06. As discussed above, not only did the defendants violate the express warranty of habitability set forth within RCW 59.18.060 but also failed to comply with Subsection (3) which requires that common areas be kept safe from defects increasing the hazard of fire or accident; (7) that the heating system be kept in "reasonably good working order" (10) that adequate facilities are provided "for the heat reasonably required of the tenant.

It is respectfully suggested that a notion of keeping something in "reasonably good repair" means that it is safe and

not capable of causing harm to small children. See, *Lincoln v. Farnkoff*, 26. Wn. App. 717, 720 – 21, 613 P.2d 1212 (1980) (something is not in "good repair" if it is capable of causing injury if it is not properly repaired). Here, the only options the plaintiff had was to disable the radiator system in its entirety by turning it completely off. If in fact the plaintiffs did so then they would be denied basic heat for their apartment unit which in and of itself would be violative of RCW 59.18.060(8) and the Tacoma Municipal Code.

Additionally, as suggested by RCW 59.18.115(2), it is the landlord's obligation to ensure that the facilities within a residential rental unit are safe and that the heating system is not hazardous.

Thus, the failure to repair (make safe) the steam radiator by permitting plaintiff to place a cover upon it, or by the landlord doing the same in order to comply with the statutory and common law obligations, is also a basis for liability for the severe injuries suffered by SF.

E. The Landlord Is Liable For Dangerous Conditions Within Or Pertinent To The Leased Premises Over Which It Maintains Control.

The defendants contend that the steam radiator within Unit 12 was not a "common area" over which it had a duty to make safe. It is undisputed that the steam radiator in Unit 12

that caused injury essentially had an on and off valve, but otherwise was totally controlled by the defendant landlord. In fact, the defendant landlord asserted such control that in the summer months the boiler heating system for apartments was completely off. Additionally, according to the plaintiffs, on weekends when maintenance people were not available, the boiler system would turn off and there would be no heat in the apartment until a maintenance person arrived to fix the problem. Under such circumstances, the plaintiffs or other apartment renters simply had no control over whether or not the steam radiators were or were not turned on.

Further, given the "retained control," the defendants' landlord in this case is subject to liability under the terms of Restatement (2^{nd}) of Property § 17.3 and § 17.4. Restatement (2^{nd}) of Property § 17.3 under the heading of "Parts of Leased Property Retained in Landlord's Control Which Tenant Is Entitled To Use" provides:

> *A landlord who leases a part of his property and retains in his own control any other part the tenant is entitled to use as a pertinent to the part leased to him, is subject to liability to his tenant and others lawfully upon the leased property with the consent of the tenant or a subtenant for physical harm caused by the dangerous condition upon that part of the leased property retained in the landlord's control, if the landlord by the exercise of reasonable care could have:*

(1) Discovered the condition and the unreasonable risk involved therein; and

(2) Made the condition safe.

See, *Levine v. Bochiaro*, 59 A.2d 224, NJ App. (1948) (heating system within the control of the landlord was a "common facility" and landlord subject to liability for its malfunction).

Similarly, Restatement (2nd) of Property § 17.4 provides under the heading of "Parts of Leased Property Retained in Landlord's Control Necessary To Safe Use of Part Lease" provides:

A landlord who leases a part of its property and retains in his own control any other part necessary to the safe use of the leased part, is subject to liability to his tenants and others lawfully upon the leased property with the consent of the tenant or a subtenant for physical harm caused by a dangerous condition upon which that part of the property retained in the landlord's control, if the landlord by the exercise of reasonable care could have:

(1) Discovered the condition and the risks involved; and

(2) Made the condition safe.

It is noted that Comment B to § 17.4 provides under the heading of "parts of the property covered by this rule" the following:

The rules stated in this section applies to the maintenance of walls, roofs and foundations of an apartment, house or office building. It applies also to any other part of the property the careful maintenance of ***which is essential to the safe use of the rooms or offices or portion of the property leased to the***

various tenants, such as the central heating, lighting or water system. (Emphasis added).

Whether the radiator is characterized as a "common area," "common facility," or a portion of the leased premises over which the landlord has retained control, is simply irrelevant. In this case, there is simply not a shred of doubt that the steam radiator in its uncovered and/or unprotected condition, was indisputably a dangerous condition, which could cause physical harm that reasonably could have been discovered, (which was actually known), by the landlord and which rather economically could have been made safe. What caused the injury in this case was the temperature of the radiator, a matter which was entirely in control of the landlord.

F. The Defendants are Subject To Liability Under The Terms of Restatement (2nd) of Property § 17.6.

Division II in the above-cited *Martini* case fully embraced and adopted Restatement (2nd) of Property § 17.6. This section of the restatement under the heading of "landlord under a legal duty to repair a dangerous condition" provides:

> *A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant 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.*

In order to establish liability under this section, it is not necessary that the plaintiffs establish an actual violation of any regulation, statute or administrative code. See, *Pinckney v. Smith*, 484 F.Supp.2d 1177, 1184 (W.D.Wa. 2007). As observed in *Pinckney*, the Washington State Supreme Court "has stated that although housing code violations do not establish a prima face case that premises are uninhabitable, they are evidence which aid in establishing that the premises are uninhabitable" citing to *Foisy v. Wyman*, 83 Wn.2d 22, 31, 515 P.2d 160 (1973).

As previously indicated, the common law implied warranty of habitability recognized in *Foisey* and still exists after the adoption of the RLTA and there is a question of fact as to whether it was violated. As also discussed above, there are also significant questions as to whether the radiator was consistent with regulations.

G. The Action of the Plaintiff Parents Was Not An Intervening Superseding Cause of SF's Injuries.

It is respectfully suggested that WPI 15.05 sets forth a reasonable basis from which to discuss intervening

superseding causes. WPI 15.05 under the heading of "proximate cause – superseding cause" provides:

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury. If you find that a defendant was negligent but the sole proximate cause of the injury was a later independent intervening cause [act of one of the other defendants in this case], [act of a person not a party to this action] that the defendant in the exercise of ordinary care could not have reasonably been anticipated, then any negligence of the defendant is superseding and such negligent was not a proximate cause of the injury. If, however, you find that the defendant was negligent and in the exercise of ordinary care, the defendant should have reasonably anticipated the later independent intervening cause that cause does not supersede defendant's original negligence and you may find that the defendant's negligent was a proximate cause of the injury. It is not necessary that the sequence of events or the particular resulting injury be foreseeable. It is only necessary that the resulting injury fall within the general field of danger which the defendant should have reasonably anticipated.

The question is whether or not the act of the defendants was within "the ambit of the hazards covered by the duty imposed on the defendants. See, *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 804 P.2d 659 (1991).

In this case, there is simply no question that the harm suffered by S.F. was "within the ambit of hazards" created by the defendants' negligence and breaches of its common law and statutory duties. Further, given the extreme nature of the hazard posed by the steam radiator, and defendants' knowledge that the plaintiff parents were living in the home with two toddlers, it was entirely foreseeable and should have

been anticipated that the plaintiff parents could not visually supervise or oversee the children during all waking moments.

The chain of causation is not broken when the defendant, in the exercise of ordinary care, should have reasonably anticipated that an independent intervening cause or act was likely to happen. See, *McLeod v. Grant County*, 42 Wn.2d 316, 255 P.2d 360 (1953). If an act is within the "gambit of hazards" covered by the duty imposed upon the defendant then they are foreseeable and do not supersede the defendant's negligence. See, *Cramer v. Department of Highways*, 73 Wn. App. 516, 870 P.2d 999 (1994). Indeed, even criminal acts by third parties are not superseding causes if in fact they are reasonably foreseeable. See, *Johnson v. State*, 77 Wn. App. 934, 894 P.2d 1366 (1995). The court can only determine an act as unforeseeable as a matter of law if the occurrence is "so highly extraordinary or improbable as to be wholly beyond the range of expect ability." Otherwise the foresee ability of an act is a question for the trier of fact. *Johnson v. State*, 77 Wn. App. 942.

In this case, it was highly foreseeable that SF, a toddler in a small apartment containing steam radiators, could receive a serious burn. The fact that the exact sequencing of events leading up to such an injury may not have foreseeable

simply is not dispositive. Clearly such an injury was within the "ambit of hazards" created by the defendant's negligence and a duty of which it had an obligation to prevent. It would be simply naïve and unrealistic for the defendants not to recognize that the plaintiff parents could not supervise their children every waking minute of the day. As such the fact that one of two toddlers could suffer a burn from the steam radiator is something that a reasonable person would have anticipated under the circumstances of this case and is not a superseding and/or intervening cause.

As it is, the plaintiff parents absolutely breached no duty and as such engaged in no acts which could be a "proximate cause" to SF's serious burn injuries.

H. The Parents Were And Are Entitled To Parental Immunity.

The most recent Washington State Supreme Court case on "parental immunity" is *Zellmer v. Zellmer*, 164 Wn.2d 147, 188 P.3d 497 (2008). As discussed in *Zellmer* at page 155, parental immunity has application to any claim that a parent was negligent in the supervision of their child, unless the parent wholly steps outside of his or her parental capacity, or engages in wanton or willful misconduct. See also, *DeWolf & Allen*, 16 WA PRAC § 11.4 (3rd Ed. 2012).

As explained in *Zellmer* at pages 155-56, (collecting cases), otherwise parental immunity applies to garden variety claims of negligent supervision.

In *Zellmer* the Supreme Court determined that parental immunity applied to a claim against a stepparent who was supposed to be watching a 3-year child but who fell asleep allowing the child to wander off and drown in a family pool. In *Zellmer* the Supreme Court reaffirmed its previous holdings in a variety of other cases which had found parents are immune from suit for negligent parental supervision but not for willful and wanton misconduct in supervising a child. See *Jenkins v. Snohomish County Public Utility District No. 1*, 105 Wn.2d 99, 713 P.2d 79 (1986). In order to establish "willful misconduct" something must be shown more than gross negligence, rather the parental actions must be either "deliberate, intentional," or "wanton conduct with knowledge or apprehension or knowledge or appreciation of the fact that danger is likely to result". See *Jenkins* 105 Wn.2d at 105, citing to *Stevens v. Murphy* 69 Wn.2d 939, 948, 421 P.2d 668 (1966). As catalogued in *Zellmer,* at Page 155-56, the Supreme Court has found parental actions far more egregious than what occurred herein as being "ordinary negligence" as a matter of law.

In this case, it is hard to imagine how even a factual issue could be made as to whether or not the plaintiff parents engaged in what could be characterized as "ordinary negligence" as it related to the injury producing event. At all times, Joleen Figuracion was within hearing range of where her children who were before this event quietly watching television. She simply was using the restroom. Unfortunately, the way the apartment was situated she simply could not keep an eye on her children while at the same time she used the toilet. Further, there is simply no requirement that a parent keep their children under "constant surveillance" nor are they required to even keep them restrained within doors. See *Cox v. Hugo*, 52 Wn.2d 815, 819 329 P.2d 467 (1958). Also, there is simply no indication that the children in the past had been able to get beyond the barriers the parents had reasonably placed around the steam heater or steam radiator, providing additional notice to Joleen that she needed to provide extraordinary supervision over her children.

Indeed, as shown in the *Cox* opinion, there is no requirement a parent put their children on a leash or in a kennel while they use the restroom. Joleen was simply using the restroom. She did nothing wrong.

Below the defense resisted plaintiff's parents' claim of parental immunity based on rather fanciful allegations that Jolene Figuracion engaged in "wanton and willful" misconduct by apparently using the restroom and not reacting quickly enough once there was a concern that one of her children may have been in danger. Additionally the defendant argued that by erecting a barrier around the steam radiator in the living room upon which S.F. was burned that somehow the parents had either created a new hazard and/or stepped outside of their parental role, thus were not entitled to parental immunity.

Both positions are not well taken. As indicated above there is simply no requirement that a parent keep children on leashes and certainly Mrs. Figuracion is entitled to use the restroom. As it is when she did so she had the door open and was maintaining surveillance over her children by being in a position where she could hear what they were doing.

Additionally the fact that the parents erected a barrier around the offensive steam radiator is the exact opposite of willful and wanton misconduct which was defined in the case of *Adkison v. City of Seattle* 42 Wn.2d 676, 258 P.2nd 461 (1953) in the following terms:

> "*Willful misconduct is characterized by intent to injure while wantonness implies indifference as to whether an act will injure another. Graphically expressed, the difference between willfulness and wantonness is that*

between casting a missile with an intent to strike another and casting a missile with reason to believe that it will strike another, but with indifference as to whether it does or not."

Adkison at 684; see also *WPI 14.01*; see also *Segura v. Cabrera*- __Wn.App.___, 319 P.3d 98 (2014).

Again it is noted in this case there is simply no evidence that either of the Figuracion parents engaged in any kind of exaggerated misconduct.

If anything what the plaintiff parents engaged in should be deemed laudable and appropriate parenting. The Trial Court as a matter of law should have found that the parents were entitled to parental immunity.

I. Because The Parents Are Entitled To "Parental Immunity" They Are Not Entities Subject to Fault Allocation Under The Terms of RCW 4.22.070.

RCW 4.22.070(1) provides that even immune entities can be allocated fault. The presence of such a provision in Washington law tends to beg the question as to what is an "immune" entity subject to allocation of fault under the terms of this statute. Secondarily would such immune entities include parents who are subject to the "parental immunity" doctrine? It is respectfully suggested that under reasoned analysis, parents who have an entitlement to parental immunity are not the kind of entities who have an "immunity" which can be subject to such allocation.

In the seminal *Zellmer* case, the Supreme Court explored the nature of "parental immunity" and in such exploration clearly suggested that parental immunity is not a true immunity at all, but

rather is recognition that a parent breaches no actionable duty by failing to supervise children. As observed by *Zellmer* 157, parental immunity can be justified as a limited form of immunity, parental privilege, or "lack of an actionable parental duty to supervise," citing to *Holodock v. Spencer*, 36 N.Y.2^{d} 35, 325 N.E.2nd 338, 364 N.Y.S.2^{d} 859 (1974) (declining to recognize cause of action for parental supervision claim following abrogation of parental immunity doctrine); see also 6 A.L.R.4th 1066, § 14 (1981) (collecting cases where negligent supervision claims are barred notwithstanding abolition of parental immunity doctrine). In *Zellmer* the Court was less than clear as to what Washington's view is with respect to the nature of "parental immunity," i.e., whether or not it is a true immunity, a privilege, or simply a recognition that a parent who negligently supervises their children does not breach any actionable duty.

However, in surveying its own prior case law, the Supreme Court observed that "this Court has consistently held a parent is **not liable for ordinary negligence in the perform of parental responsibilities**." (Emphasis added). *Id* at 155, citing to *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 104 Wn.2d 99, 713 P. 2nd 79 (1989); see also *Talarico v. Foremost Ins. Co.*, 104 Wn.2d 114, 712 P.2nd 294 (1986).

It is respectfully suggested that if one actually looks to the language of *Talarico,* it is rather clear that Washington is amongst those states were there exists no actionable duty on the part of the parent to engage in the non-negligent supervision of their children.

Talarico at Page 116 the Supreme Court clearly provided "in order for the conduct of parents in supervising their children **to be actionable in tort**, such conduct must rise to the level of willful and wanton misconduct; if it does not then the doctrine of parental immunity precludes liability." (Emphasis added). In other words, if parental immunity applies the parent engaged in no action which is "actionable in tort," (breached no duty), unless the parent's action rises to the level of willful and wanton misconduct.

This is a significant distinction. This is significant because under the terms of RCW 4.22.015 in order to be an entity towards whom "fault" can be allocated, you must have engaged in some kind of negligence or breach some form of duty. If it is recognized that a parent who is subject to "parental immunity" has breached no actionable duty, then as a matter of course they cannot be subject to a fault allocation under the statutory scheme set forth within RCW 4.22 et seq.

Additionally, such a construction is necessary in order to harmonize the terms of RCW 4.22.070, with prior common law and RCW 4.22.020, which despite not being a model of clarity, has been consistently interpreted to mean that the negligence of a parent cannot be imputed onto their children. See *WPI* 11.04; see also *Vioen v. Cluff*, 69 Wn.2d 305, 418 P.2nd 430 (1966).

It has long been recognized that statutes which are in derogation of the common law must be strictly construed. See *Topline Builders, Inc. v. Bovenkamp*___*W*n.App.___320 P.3d 130, (2014). Well-recognized rules of statutory construction provides that when interpreting statutes the court should read it in its entirety, and if possible each provision must be harmonized with other provisions, and statutes must be construed in a manner as to give effect to the entirety of the language, rendering none of it meaningless or superfluous. See *Coulter v. Asten Group, Inc.*, 155 Wn.App.1, 9, 230 P.3d 169 (2010). It is respectfully suggested that the only way to interpret RCW 4.22.070(1) is "immunity" language in a manner which is consistent with the common law, and which harmonizes with RCW 4.22.020, is to recognize that "immunity" under its terms, **does not include "parental immunity,"** which is nothing more than a shorthand method of stating that a parent violates no legally actionable duty by failing to supervise their children. Otherwise, it is respectfully suggested that the statute would be in conflict with not only the common law but also the provisions of RCW 4.22.020 which have not be abrogated and which appears to have continuing vitality. See *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d at 614-15.

The Trial Court should have not only granted plaintiff's Motion for Summary Judgment with regard to the plaintiff's parents' entitlement to immunity, but also should have gone further and recognized the implication of such immunity is that no actions on the part of the parents can be subject to allocation under the terms of RCW 4.22.070 because the parents breached no actionable duty.

VI. CONCLUSION

For the reasons stated above there is simply no question that the Trial Court erred in granted summary judgment in this case. The year is 2014. Landlords cannot maintain highly dangerous steam radiators in apartment units, particularly when they are renting such units to families with small children. It would simply be a denial of reality to not recognize that steam radiators are inherently dangerous, unless appropriate covered or subject to some kind of remediation efforts. By not engaging in such reasonable actions and/or by preventing the plaintiff parents from doing so themselves, the defendant landlord has subjected itself to liability.

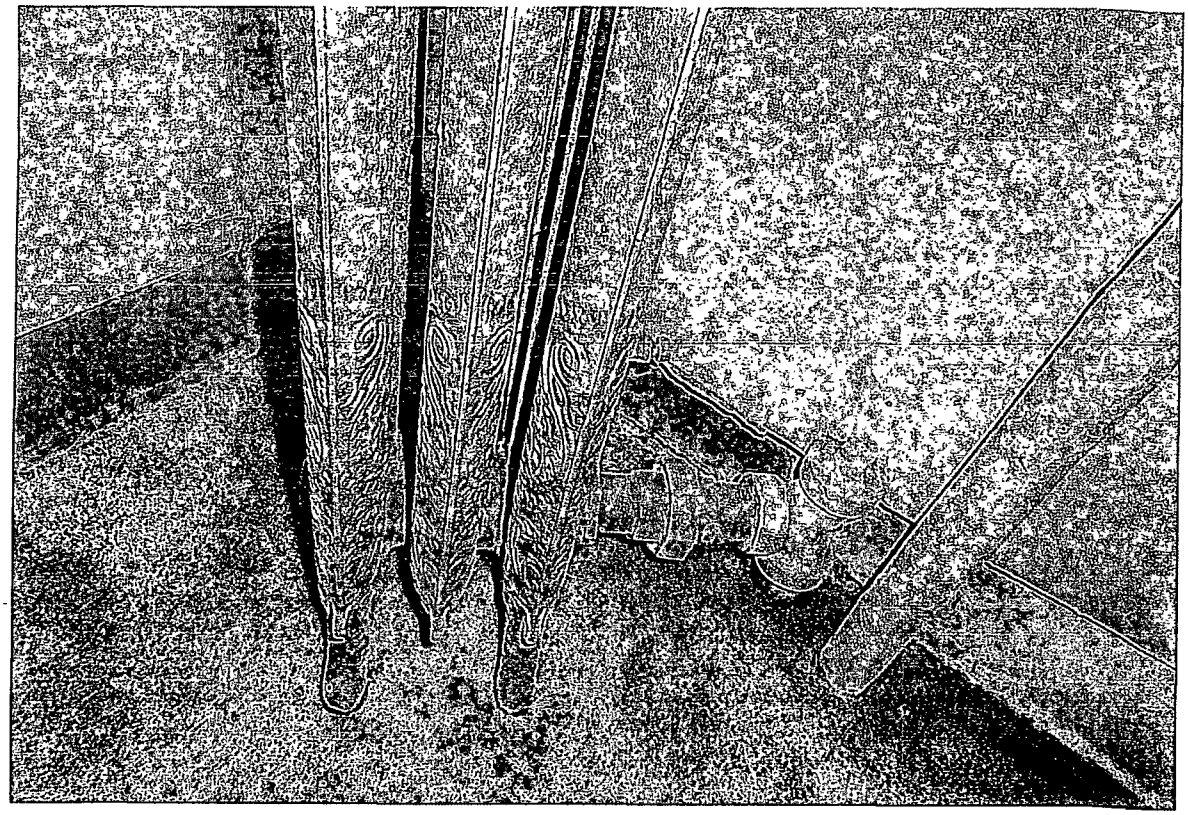
Additionally, the Trial Court's denial of these parents their entitlement to "parental immunity" is simply baffling and unsupportable. Further, the Trial Court's failure to reach the issue as to whether or not the grant of parental immunity results

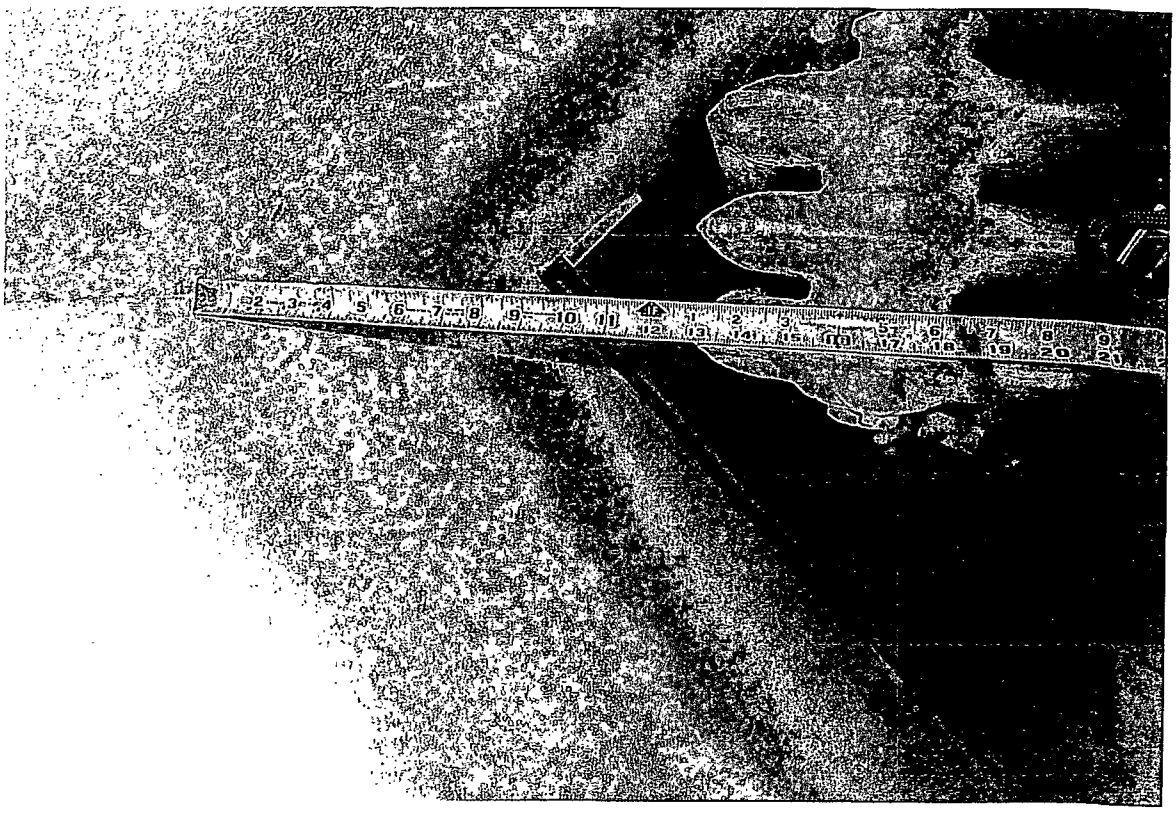
in a determination that the parents breached no actionable duty should be corrected by the Appellate Court who, in the wise exercise of its discretion, should reverse the Trial Court and remand this case for a full trial.

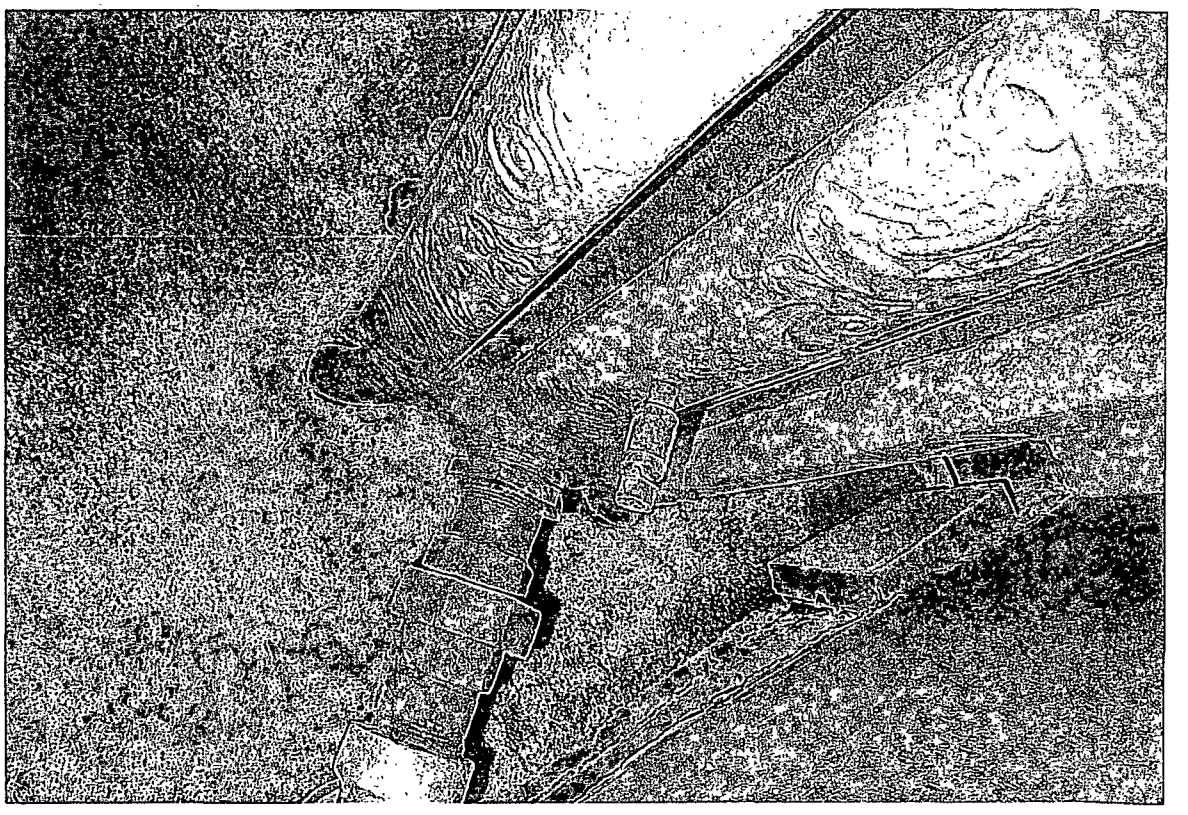
Dated this 13th day of June, 2014.

Paul A. Lindenmuth
WSBA #15817
Of Attorneys for Plaintiff
4303 Ruston Way
Tacoma, WA 98402
(253)752-4444/
Facsimile:(253)752-1035
paul@benbarcus.com

APPENDIX NO. 1







APPENDIX NO. 2

Annals of Burns and Fire Disasters - vol. XV - n. 1 - March 2002

Home heating injuries in an urban burn centre

Ugolini K.R.[1], Hughes W.B.[2]

[1] Department of Surgery, Albert Einstein Medical Center, Philadelphia PA, USA
[2] Director Burn Center, Temple University Hospital, Philadelphia

SUMMARY. This is a retrospective analysis of nine burn patients admitted to the Temple University Hospital Burn Center for home-heating radiator injuries between January 2000 and January 2001. There was a prevalence of elderly men in this population and an average TBSA burned of 4.6%. Two case reports are presented.

Introduction

In 1999, it was reported that there was an average of 4,500 fire and burn deaths per year.1 According to an annual survey of fire departments by the National Fire Protection Association and the Annual Vital and Health Statistics report, 3,750 of these deaths were from house fires. There surveys also reported that 750 of these deaths were from other sources, including but not limited to burns from residential radiators and space heaters. It has been reported that radiator injuries cause also a substantial morbidity in children.2 Our experience has portrayed a much older burn victim. It has been this burn centre's experience that the profiles of these patients are similar and that the circumstances of the injurious event can be predicted and thus prevented.

Methods

We performed a retrospective analysis of nine patients seen in an urban burn centre from January 2000 to January 2001. Seven patients were admitted directly to the burn intensive care unit and one died in the emergency department. One patient's burns were managed on an out-patient basis. To be included in the study, a patient had to sustain at least a second-degree burn from prolonged contact with a residential radiator or space heater. Specific criteria investigated were patient's age, living conditions, gender, injury location, %TBSA involved, injury severity, length of hospital stay, and the total cost of hospital care. Attention was also paid to disposition upon discharge.

Case report 1

JD was a 79-yr-old man who lived with his daughter and grandchildren. His past medical history was significant for mild dementia along with Shy-Drager syndrome. Prominent features of this Parkinsonian syndrome include vertigo and fainting spells with true loss of consciousness secondary to orthostatic hypotension and autonomic dysfunction. JD was in the bathroom one night and was found lying against the bathroom radiator by his daughter. He had sustained a 9%TBSA second- and third-degree burn over his back and left arm, which required skin grafting for closure. The aetiology of the fall was presumed to be related to his Shy-Drager syndrome. Length of stay and cost of stay were 39 days and $298,184. He was discharged to a rehabilitation facility with the plan to return home with his daughter when he was fully recovered. The daughter was assessed by staff to be competent and, after the incident, better educated as to her father's safety needs.

Case report 2

RP was a 77-yr-old man with a history of recurrent atrial fibrillation and hypertension. His medications included a antihypertensive but no medication for atrial fibrillation. He was found by his son at home, where he lived alone, lying against a radiator. Contact with the radiator had been long enough for the patient to sustain a 4% TBSA second- and third-degree burn over his flank, which was skin grafted (Fig. 1).

Upon arrival in the emergency department, an EKG showed the patient to be in atrial fibrillation, a rhythm the patient had not been in for some time by report of his son. Syncopal work-up showed no other potential causes for the episode and the arrhythmia was presumed to be the aetiology for the fall. Shortly after admission, the patient's rhythm converted back to normal sinus without intervention. The patient was not anticoagulated due to his risk of falling. Length of stay and cost of stay were 23 days and $175,213. He was discharged to a nursing home where he currently resides.

Fig. 1 - Full-thickness burn on patient's back after split-thickness skin graft

Results

Between the months of January 2000 and January 2001 nine patients were seen for burn injury secondary to prolonged contact with a home-heating device. Except for a 2-month-old infant and a 31-yr-old alcoholic, all subjects were between the ages of 62 and 86 yr (average age was 63 yr including the infant and young woman, and 76.6 yr excluding them). There was a preponderance of male victims (67%) over female (33%). Two of these elderly patients had fallen against a radiator and were unable to get up secondary to prior debilitating medical conditions. Four elderly were found unconscious against radiators and one woman unknowingly pressed against a space heater with her face while she slept (Fig. 2). The 2-month-old infant was left unattended next to a heating device and the 31-yr-old alcoholic was intoxicated when she passed out on one. Living conditions varied among victims. The infant was cared for by her single mother, while multiple family members lived with and cared for the alcoholic. Of the seven elderly patients, four lived alone and three lived with at least one other family member. Of those elderly that lived alone, each had a relative or friend checking up on him or her at least daily.

Almost all regions of the body were represented with injuries. Areas burned included head, face, neck, shoulders, upper extremities, hands, back, flank, and lower extremities. Most patients had multiple injured sites. TBSA ranged from 4 to 9% (mean TBSA, 4.6%) with both second- and third-degree burns in each case. All patients required split-thickness skin grafts for definitivive wound management.

Length of stay ranged from 0 days to 39 days with a mean of 12.3 days. Total cost of hospital care ranged from $48,467 to $298,184 with an average cost of $134,349.

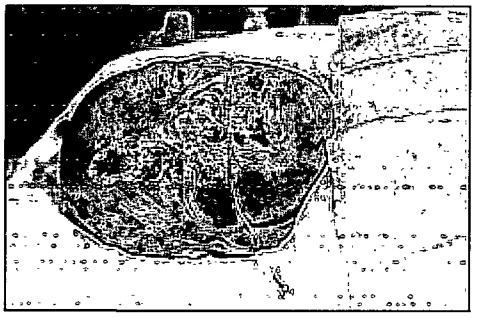


Fig. 2 - Full-thickness burn on the face after contact with a radiator

Discussion

Burn injuries from radiators and home heating devices are a significant cause of morbidity and mortality in the elderly population (77% of these types of admissions at Temple University Burn Center were above the age of 60). Profiles of the victims of prolonged radiator contact were extremely similar. Except for two, the patients' ages ranged from 62 to 86 years. All nine individuals were dependent on other people for activities of daily living; the infant, the alcoholic, and each elderly person were all at times disoriented and helpless. Even the elderly healthy enough to live alone had a family member visiting daily. The patient profile is so uniform that safety education and warnings should be targeted to those caring for both children and disabled dependents. In households that include members of these high-risk populations, measures should be taken to prevent these injuries. According to Harper et al.,3 the use of shelving or a protective grill to enclose the radiator can reduce the contact temperature of the radiator to 43 °C. The regenerative cell layer of the skin is destroyed at temperatures greater than 45 °C. Homeowners and landlords can install low surface temperature radiators for the same contact temperature reduction. Replacement of the bathroom radiator with a heated towel rack high on the bathroom wall and encasement of exposed pipes are two more ideas mentioned in this report.3

Each patient's living situation was thoroughly investigated prior to discharge. The patient was only discharged to an environment judged safe by the staff. The infant was discharged from the custody of her mother to that of her grandmother, with whom she now lives. Two of the seven elderly passed away before they could return home, a mortality of 22%. Three patients now reside in a nursing home and three returned to their pre-admission home under closer supervision by family members and with more assistance from outside sources. None lived alone after the burn.

The average TBSA burned was 4.6%. The average cost to care for this burn was $134,349. As issues of cost containment grow in the medical field, our attention should be shifted even more toward injury prevention. By alerting the elderly and their caretakers with information about burn and fire safety, awareness can be heightened, prevention can be initiated, and costs can be decreased.

RESUME. Les Auteurs ont effectue tine analyse retrospective de neuf patients brules traites dans le Temple University Hospital Burn Center atteints de britlures causèes par des appareils pour le chauffage domestique entre janvier 2000 et janvier 2001. Cette population presentait tine prevalence d'hommes ages et une surface totale corporelle brulè de 4,6%. Deux cas sont prèsentès.

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This paper was received on 6 June 2001.

Address correspondence to: Dr. K.R. Ugolini, Department of Surgery, Albert Einstein Medical Center, Philadelphia PA, USA.

DECLARATION OF SERVICE

I, **HEATHER DELIN,** hereby declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That I am over the age of 18 years of age, have personal knowledge of the facts herein, and am competent to testify thereto.

2. I am a paralegal working for the *The Law Offices of Ben F. Barcus & Associates, PLLC.*

3. On the 13th day of June, 2014, a true and correct copy of the Appellant's Opening Brief was e-filed as indicated to the Court of Appeals, Division II, at:

coa2filings@courts.wa.gov

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

In addition, a true and correct copy was sent via email and legal messenger to:

Mark Scheer
Scheer & Zehnder
701 Pike Street
Suite 2200
Seattle, WA 98101
mscheer@scherlaw.com

DATED this 13th day of June, 2014.

Heather Delin