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

No. 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,

Respondent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION TO REPLY

According to Respondent it is of no moment that the apartments it rents to families, which include small helpless children, contain steam radiators capable of inflicting second and third degree burns with relatively minimal contact. (Although there are two Respondents, for clarity, they shall be referred to in the singular or, as "the landlord"). Remarkably, the Respondent takes such a position, even though their own expert in his written report observed "it is my opinion occupant must use extreme caution when operating a steam radiator space heating system in order to avoid potential burn situations." (CP 37). According to Plaintiffs' plastic surgeon, the kind of burns suffered by S.F. are indicative that a steam radiator, such as at issue in this case, can cause full thickness third degree burns after only a minimum amount of physical contact. (CP 139). But according to Respondent, even though the common law of the State of Washington, and relevant statutory law, commands that residential tenancies be "safe", the presence of a steam radiator, capable of inflicting such damage, (in an apartment containing two toddlers), is perfectly fine under the law. As shown below, this rather extremist view not only defies common sense, but is

inconsistent with the legal duties placed upon a landlord within this State.

It is hard to imagine how Respondent can argue with a "straight face" that a steam radiator capable of frying the skin off of small children does not constitute a "dangerous condition." (CP 444-456). It is hard to imagine how the presence of such a highly hazardous instrumentality would not violate the common law implied warranty of habitability, when all that needs to be shown to establish a breach, is that a condition within the premises creates an "actual or potential safety hazard" to the occupants. See *Landis and Landis Construction Const., LLC v. Nation* 171 Wn. App. 157, 162, 289 P. 3d 979 (2012).

Predictably Respondent blithely ignores the fact that the Plaintiff father, Renato Figuracion, specifically asked apartment's management personnel whether he could construct, (at his own expense), a cover to place over the highly hazardous steam radiator, which ultimately caused devastating injury to his infant daughter. In response, he was misled by Rembrandt's personnel, who told him that a radiator cover would violate some amorphous "code". (CP 82,821). He was also falsely told the radiator never got hot enough to inflict injuries. Apparently, the Respondent believes that it is

unaccountable, and the law permits it to "create and maintain a trap to inflict personal injury upon its tenants." See *Thomas v. Housing Authority,* 71 Wn. 2d 69, 80, 429 P. 2d 836 (1967), quoting, *Housing Authority of Birmingham District v. Morris,* 114 So. 2d 527, 535 (1934). A reasonable jury likely would conclude this low income landlord was more concerned about its "bottom line", than its' tenants safety.

It is undisputed that following S.F. burns, the Figuracion household came under the watchful eye of CPS, which fully exonerated Joleen Figuracion finding that she was a good parent. (CP 142-156). The statements made by Respondent's on-site managers during the CPS investigation likely provides the true reasons why Rembrandt personnel misled the Figuracions regarding the dangerous qualities of the steam radiator, but also their ability to take protective measures by putting a cover around it. The CPS investigative materials provides in part:

> SW spoke with Destiny manager of apartments in person at Rembrandt Apartments. She states that she spoke with her owner who stated that they would find something to put around the heaters. She stated that it may take a few months due them now having to put protectors in all the units. **She states that if they do that for Joleen they have to do it for all the residents. ... (CP 151).** (Emphasis added).

A reasonable jury could conclude that the reason why Renato was misled was because, despite the clear safety benefit provided by such covers, the apartment management did not want other tenants demanding their own covers, once they installed one in the Figuracion apartment unit. It is respectfully suggested that given the severity of the hazard created by steam radiators, particularly to small children, such petty economic concerns on the part of this landlord should be viewed as being unreasonable and unacceptable.

Yet, as is evidenced by the fact that within its leases, an indemnification provision clearly outlawed by RCW 59.18.230(2)(d), this landlord is more concerned about evading practical safety than the health of his tenants. RCW 59.18.230(2)(d)(h) provides that: "[N]o rental agreement may provide that the tenant: (d) agrees to exculpation or a limitation of any liability to landlord arising under law or to indemnify the landlord for the liability or the cost connected therewith; ..." Such "indemnity provisions" not only are violative of this specific statutory provision but also offend basic notions of "public policy" as expressed by a number of opinions by our Appellate Courts. *Thomas v. Housing*

Authority, 71 Wn. 2d at 80; *McCutcheon v. United Homes Corp.*, 79 Wn. 2d 443, 486 P. 2d 1093 (1971).[1]

It is noted that Respondent argument that this matter is something akin to a child inserting "an object into an **uncovered outlet** while Joleen Figuracion left her unattended", is inapt. (See Respondent's Brief Page 1).[2] The reason why the Respondent's analogy is inapt is because assuming that a wall outlet is "covered," then its dangerous properties are otherwise being reasonably guarded against. The same would be true if the landlord in this case had

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[1] The Respondent's contention that the prohibition against such contractual provisions only applies to claims brought against the landlord's for violating its duties under RCW 59.18. et. seq., is unsupportable by the statutory language. (Respondent's Brief, P. 43). Such effort at indemnification still would run afoul of public policy because the Plaintiff parents in this case, are clearly entitled to parental immunity and it has long been established that parental immunity not only bars claims by a child against a parent, but also precludes a third party tortfeasor from seeking contribution from a parent as well. See *Baughn v. Honda Motor Corp. Co.* 105 Wn. 2d 1810, 712 P. 2d 293 (1986); *Talarico v. Foremost Insurance Ins. Co.*, 105 Wn. 2d 114, 295, 712 P. 2d 294 (1986). The *Baughn* opinion specifically indicates that in the absence of "willful and wanton misconduct," a third party **cannot seek contribution or indemnification from an otherwise immune parent.**

[2] As Respondent discusses "safety plugs on electrical outlets" in Footnote 1 at Page 2 of its brief, it is assumed that what Respondent actually meant was sticking an object into an otherwise covered outlet without safety plugs. In other words, an outlet which had its normal plastic covering around the plugs, as one would see in any residential or commercial structure. Otherwise, to the extent that the Respondent actually meant an "uncovered" outlet i.e., without having the plastic safety cover exposing the wiring, a landlord could be held liable under a variety of theories for such a condition. More than likely, the removal of the plastic cover leaving exposed wires would violate one municipal code or another, if not the electrical code. Further, in *Ball v. Smith* 87 Wn. 2d 717, 556 P. 2d 936 (1977) the Supreme Court had little difficulty in upholding a verdict against a landlord for injuries to a child from an inherently dangerous electrical outlet (plug) that was created by the landlord. Thus, if the landlord in this case had rented premises to the Figuracions that did not include electrical outlet wall covers, clearly it could be subject to liability.

complied with its statutory and common law duties of reasonable care by either providing a cover for the radiator, or by permitting the Plaintiff's parents to place a radiator cover over the steam radiator. If such a duty of reasonable care had been complied, and S.F. had somehow defeated such safety precautions, we would be talking about an entirely different case.

As it is, there is simply no question that the landlord in this case rented to the Figuracion family, which included two toddlers, an apartment that contained an inherently dangerous unguarded steam radiator. Our proper applications of the legal standards applicable to landlords, at a minimum, there is a jury question as to whether it should be held liable for such acts. The Plaintiffs are not asking the Court to act as a legislature, as suggested by the Respondent. (Respondents' Brief, P. 1-2). The Plaintiffs are only requesting that the Court perform its routine function by applying the well-established common and statutory law to the facts of this case.

II. COUNTER STATEMENT OF THE FACTS

The statement of facts set forth within Appellants' Opening Brief at Pages 9 through 20 are hereby incorporated by this reference as if fully set forth herein. Where necessary

in order to explain the argument set forth below, the facts will be discussed therein.

III. REPLY ARGUMENT

A. There Is Clearly A Question of Fact As To Whether Or Not Respondent Breached The Common Law "Implied Warranty of Habitability".

As discussed in *Landis and Landis Const. LLC v. Nation*, 171 Wn. App. at 162-63 the "implied warranty of habitability", first recognized in *Foisy v. Wyman*, 83 Wn. 2d 22, 515 P.2d 160 (1973), has not been superseded by a statute, and continues to be a common law theory available to a tenant. In order for a condition to violate the implied warranty of habitability, all that needs to be established is that an "actual or potential safety hazard" to the occupant. *Id.* citing to *Lian v. Stalick*, 106 Wn. App. 811, 818, 25 P.3d 467 (2001).

Respondent's position, at Page 29 of its Brief, is that a violation to the "implied warranty of habitability" can only occur if there is some kind of code or regulatory violation is unsupportable. Such an argument is contrary to the plain language of Restatement (Second) of Property § 17.6, which provides that tort liability can be imposed if there is a breach of "an implied warranty of habitability **or** a duty created by statute and administrative regulation." Again it is emphasized

that all that need be shown, to draw into question the implied warranty of habitability, is the presence of a condition which creates an "actual or potential safety hazard to the occupants".

It is respectfully suggested that the presence of a steam radiator capable of frying the skin off of a child meets such a definition.

B. There Was A Question Of Fact As To Whether Or Not The Respondent Landlord Breached Its Duty To The Tenants As "Invitees".

In *Lian v. Stalick*, 106 Wn. App., at 820, the Court rejected argument similar to Respondent's that a tenant's common law claims are limited to circumstances where injuries are caused by a latent defect known to the landlord. See generally, *Forbig v. Bird*, 124 Wn. 2d 732, 735, 881 P.2d 226 (1994).

Here, despite the misrepresentations made by Rembrandt personnel at the inception of the leasehold, the defect at issue, (a highly hazardous steam radiator), is not a "latent" defect in the normal sense. As such, as in *Lian,* the principles set forth within *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn. 2d 43, 50, 914 P.2d 728 (1996) control.

As explained in *Degel,* while normally the possessor of land is not liable to invitees for known or obvious dangers, liability can nevertheless attach if the possessor should have

anticipated the harm, despite the invitee's knowledge of the obvious danger. While the Respondent contends that it was not the "possessor" of the apartment, what is truly at issue is who had control over the dangerous instrumentality which caused injury in this case. The steam radiator is part of a central heating system, over which the Plaintiff tenants had very little control, (they could turn the heater on or off). There is no question the landlord had control over it.

The dangerous steam radiator of which the landlord maintained control, is analogous to a "common area," and there is little question that this is a situation where the landlord "should anticipate the harm despite such knowledge or obviousness" on the part of the tenant (invitee). See Restatement (Second) of Torts § 343A(1) (1965); *Mucsi v. Graoch and Associates, Ltd.*, 141 Wn. 2d 847, 38, 914 P.2d 728 (1996); see also *Sgogren v. Props. of Pac. MW, LLC*, 118 Wn. App. 114, 151, 75 P.3d 592 (2013) (finding an issue of fact as to whether or not landlords were liable for a danger that is otherwise open and obvious when it should have been anticipated that the tenant would act despite such dangerous conditions".

Here, the Respondent **had to have known** that the tenants who were residing in the apartment would have to

encounter the hazard created by the dangerously hot steam radiator on a daily basis. The only other alternative to the Figuracions would be to turn off the radiator, but that would deny them the basic heat which the landlord was otherwise obligated to provide. In other words any argument that the tenant had the obligation to turn the radiator completely off would be violative of public policy and is logically unsound.

Under the law applicable to invitees, it was the landlord's obligation to use reasonable care, which includes among other things, placement of appropriate safeguards. *Ticani v. Inland Empire Zoological Society*, 124 Wn. 2d 121, 139, 875 P.2d 621 (1994). Here, a reasonable safeguard would have been to permit Renato Figuarcion, (S.F.'s father), to build and place a cover over the radiator allowing him to protect his own children. A reasonable jury, based on such facts, could conclude that the landlord breached its duty of reasonable care by preventing Renato from erecting such a safeguard, or by failing to provide such safeguards for its tenants.

C. The Landlord Controlled the Temperature of the Steam Radiator Which Caused Injury In This Case And Even Though It Was Located In The Tenant's Apartment the Landlord Is Responsible For Injuries Caused By A Condition Over Which It Had Total Control.

The fact that the Respondent fails to discuss Restatement (Second) of Property § 17.3 and § 17.4 should be viewed as an admission that such provisions of the Restatement have application to this case.

It is initially noted that although there have been no Washington cases directly adopting § 17.3 and § 17.4, this Court had little difficulty in adopting Restatement (Second) of Property § 17.6 in the relatively recent case of *Martini v. Post*, 178 Wn. App. 153, 171, 313 P.3d 473 (2013). There is simply no reason for this Court not to adopt § 17.3 and §17.4 given that a common theme running throughout Washington law relating to premises liability and\or landlords' liability is a focus on who had "control" over what portion of the premises.

It is undisputed in this case that the landlord "retained control" as to what amount of heat the steam radiator would generate once it was turned on. The fact that the steam radiator in this case generated an excessively dangerous amount of heat is something which was entirely within the landlord's control and for which under either § 17.3 or § 17.4 or both the landlord can be held accountable.

Thus, the "steam radiator" must be viewed as akin to "common area" where the landlord would be subject to liability as "the possessor" of at least that aspect of the apartment which was injury producing. As a result cases such as *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005) is readily distinguishable, because it involved a portion of the rented property over which the tenant, and not the landlord had full control. Here the opposite is true.

D. The Respondent Has Liability Under The Terms Of Restatement (Second) Of Property § 17.6.

Restatement (Second) of Property § 17.6 was fully embraced by this Court in its *Martini* opinion. 178 Wn. App. at 168-71. Restatement (Second) of Properties § 17.6 provides that a landlord is subject to liability for physical harm to tenants or their guests by:

> "[a] dangerous condition existing before or rising after the tenant has taken possession, if they 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. (Emphasis added)."

Clearly by the structure of this rule in order to establish a breach or a violation of § 17.6 all that is necessary is to establish that there was a breach of "an implied

warranty" and there is simply no indication that such an implied warranty has to be a creature of statute as opposed to the common law.[3]

With respect to the hazardous nature of the conditions controlled by the landlord, in the Figuracion apartment, we respectfully suggested that the Respondent needs to do better than simply asserting "...past the Figuracions bare accusations, there is absolutely no evidence suggesting the existence of a steam radiator constitutes a "dangerous condition" in need of "repair." (Respondent's Brief, P. 32). The undisputed facts established in this case that S.F. suffered

[3] Respondent's assertion that "because the tenants claim based on the implied warranty of habitability or the Restatement (Second) of Properties § 17.6 (1997) are premised on a violation of the landlord's duty under the RLTA...", a statute or code violation must be shown is meritless. Under the plain language of Restatement one can have a claim under § 17.6 for violation of the common law warranty of habitability and it is unnecessary in order to establish liability to prove that there was also a violation of statute or administrative regulation. Such assertions by Respondent should be viewed as argument without authority that should be disregarded. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992) (appellate court should not consider issues that are unsupported by citation to authority). Nor is there any support for the Respondent's assertion at Page 29 of its brief that a Plaintiff cannot establish a violation of the implied warranty of habitability without a showing of a violation of the RLTA or applicable code of regulation. In fact the case law is to the exact contrary. While such violations may provide "evidence" of a breach of the implied warranty of habitability it is certainly not a prerequisite for a finding of such breach. See *Pinckney v. Smith*, 484 F. Supp. 2d 1177, 1184 (W.D. Wa. 2007) (code violations do not necessarily establish that a premises are uninhabitable but may be evidence of such uninhabitability); see also WPI 60.03; *Joyce v. State*, 155 Wn. 2d 306, 324, 119 P.3d 825 (2005), (violation of statutes, ordinance or administrative rules may be considered evidence of negligence). Further, simply because the case of *Lian* and *Martini* also included claims based on code violations does not change the fact under the plain language of § 17.6 a violation can be established either under the implied warranty of habitability, or based on statutory or regulatory violations. The fact that both *Lian* and *Martini* also involve issues regarding code violations is simply a matter of coincidence.

second degree and third degree burns after minimum contact with the steam radiator. Additionally, Plaintiffs below through their expert filed a substantial amount of literature from sources authoritative as the CDC establishing uncovered steam radiators pose a well-known severe burn hazard.

Thus, even assuming that the radiator was "code compliant", it is classic unrealistic denial to assert that a steam radiator is not dangerous. As it is, Appellate Courts in other context have recognized that a determination as whether or not something is "dangerous," must be determined based on the "totality of the circumstances" and in making such a determination, there is no requirement that alleged dangerous condition violates any statute, code or industry standard. See, *Xiao Ping Chen v. City of* Seattle, 153 Wn.App. 890, 223 P.3d 1230 (2009). In fact the defendants' own expert essentially concedes this point.

With respect to "code violations" it appears that the Respondent has a marked misunderstanding of the "catch all" safety provisions within most regulatory codes addressing building fire and the like. For example, in the case of *CarePartners, LLC v. Lashway*, 545 F.3d 867, 871 n.1 (9th Cir. 2008) it was recognized that the state fire marshal's office under the terms of the Uniform Fire Code, then contained in

WAC § 212-12-030(4) (2003), had the discretion of taking enforcement action against older buildings, which were otherwise "grandfathered" into prior codes, if there was a determination that such continuing use was "dangerous to life".[4]

Similarly, the Tacoma Municipal Code (TMC) § 2.01.030 allows older buildings, such as the Rembrandt Apartments, to exist even though they do not meet modern codes, but only when "the continued use is not dangerous to the health, safety or welfare of the occupants or the general public". The Uniform Mechanical Code permits grandfathering so long as "it is not a hazard to life health or property." (See Appellants' Opening Brief, P. 30-31).

This is significant because all that is required in order to establish a "code violation," under the terms of the RLTA is that the "condition" "could" (not that it would), be subject to regulation due to concerns that the "condition endangers or impairs the health or safety of the tenant". (RCW 59.18.060(1).

Subsection 8 of that same section provides that a heating system within residential tenancies must be "in

[4] In that case, although there were certainly questions about the motivations for fire officials to take regulatory action against the otherwise "grandfathered" building, there was no question that the state fire marshal's office had the authority to ensure that buildings coming under its jurisdiction were not "dangerous to life," even if otherwise subject to so-called grandfathering.

reasonably good working order". As explained by *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 not properly repaired. It is respectfully suggested that in the context of landlord\tenant law, the word "repair" should be viewed as being simply synonymous with "making safe".

Thus, under a proper analysis, Plaintiffs here can make a "*prima facia*" case of a regulatory violation under the RLTA, because under the terms of RCW 59.18.060(1) all that is necessary in order to establish such a violation is the fact that (1) the condition "could" come under regulatory enforcement, and (2) because the condition it "endangers or impairs the health or safety of the tenant". Nothing more is required. There is at least a question of fact as to whether or not this provision of the RLTA was violated, **even if** the steam radiator within the Figuracions' apartment was operating as designed, and did not violate any specific code provision, as opposed to the general code provisions which require that tenancies **be safe**. It is all but undisputed that an unguarded steam radiator located in the living room in an apartment, particularly where children and/or the disabled are housed, is by its very nature, patently **unsafe**. Clearly, should regulators

so desire, they **could** take enforcement action against the Rembrandt Apartments and require that it takes measures to ensure that such steam radiators are not something which "endangers or impairs the health or safety of the tenants," or to ensure that they are "not dangerous to the health, safety or welfare of the occupants..."; see RCW 59.18.060(1); and TMC § 2.01.03.030.

Further, although the Respondent has made meritless challenges to the qualifications of Plaintiff's expert, it is noted that her testimony alone in and of itself should have been sufficient to overcome Respondent's Motion for Summary Judgment. An expert opinion on an "ultimate issue of fact" is sufficient to defeat a motion summary judgment. See, *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 909, 223 P.3d 1230 (2009), citing to *Eriks v. Denver*, 118 Wn. 2d 451, 457, 824 P.2d 1207 (1992). As recently explored by the Supreme Court, all which is necessary for an expert to be qualified, and their testimony admissible, is that they meet the standards set forth within ER 702-705. See *Johnston-Forbes v. Matsunaga* – Wn. 2d – 333 P.3d 388 (2014). Plaintiff's expert Ashley Giesa, PE, declaration, submitted below, included a copy of her "resume" which outlined her professional training and experience which qualified her to provide an expert opinion in

this case. (CP 407-408). While the defense might quibble that their expert has more experience, such argument in and of itself do not render the opinions of Plaintiff's expert somehow invalid and it is for the jury to evaluate the conflicting opinions.

Apparently the Respondent failed to understand Plaintiff's argument and/or the way in which such codes actually can be enforced.

E. What Other Courts Have Held In Other Jurisdictions Should Be Viewed As Irrelevant and/or At A Minimum Unpersuasive.

What is at issue in this case is Washington law and the standards that have been developed over the years either by the legislature, or our Appellate Court addressing similar circumstances.

The out-of-state case law relied on by the defense (which is clearly not controlling) are nothing more than the perpetuation of archaic principles and a fiction that a steam radiator is not a highly dangerous instrumentality. The Plaintiffs' point of view with respect to such cases is the same as that articulated by Judge Saxe in his dissent as set forth at P. 4 of Appellants' Opening Brief.

Such out-of-state cases are at best "persuasive authority" that the Appellate Court in this instance should

reject when applying Washington law to this case. See *York v. Wahkiakum School District*, 163 Wn. 2d 297, 331, 178 P.3d 995 (2008) (precedent from federal courts and sister jurisdictions are not binding and are "persuasive authority").

It is respectfully suggested that any case and/or argument which suggests that a steam radiator, which is capable of causing second and third degree burns only after a minimum amount of contact, is not a "dangerous condition" should not be found persuasive or having as much credence. It is respectfully suggested that Plaintiff's claim is based on reality and not factual fictions perpetuated by unreasonable case law.

F. Respondents' Contention That The Actions Of The Parents And/Or the Figuracion Children Were An Intervening Superseding Cause Is Without Merit.

Respondent's arguments regarding intervening/ superseding cause is closely related to its contention that the Plaintiff parents are not entitled to "parental immunity". As the record reflects, Plaintiffs moved for summary judgment on the issue of parental immunity, which was denied by the Trial Court. Respondents' arguments with respect to both causation and/or parental immunity, are similar in that they are predicated on nothing more than argumentative assertions and conclusory allegations. Bare assertions and allegations should

have been deemed insufficient to overcome Plaintiffs' Motion for Partial Summary Judgment regarding immunity. *See, Grimwood v. University of Puget Sound, Inc.* 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

Under Washington law, even a criminal act by a third party is not a superseding cause if it was reasonably foreseeable. *See Johnson v. State*, 77 Wn.App. 934, 894 P.2d 1366 (1995). A court may determine if something is "unforeseeable as a matter of law" only if the occurrence is "so highly extraordinary or improbable as to be wholly beyond the range of expectability". *Johnson v. State*, 77 Wn.App. 942. If something is reasonably foreseeable then it is not an intervening superseding case. *See* WPI 15.5. Such a concept was best explained in *McLeod v. Grant County School Dist. No., 128* 42 Wn.2d 316, 321, 255 P.2d 360 (1953):

> Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was a particular kind which was expectable. Rather, the question is whether the actual harm fell within the general field of danger which should have been anticipated. This thought is further developed in the following statement by Professor Harper which we quoted with approval in the Berglund case [4 Wn.2d 309, 103 P.2d 361]: ... .

> The Courts appear to be accurate in declaring that there can be no liability whether the harm is unforeseeable, if foreseeability refers to the general type of harm sustained. It is literally true that there is no liability for damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. The sequence of events of course, need not be foreseeable. The manner in which the risk culminated in harm may be unusual, improbable and highly unexpectable, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provide other requisites of legal causation are present. (Citations omitted).

Here, it is alleged that the Respondent breached its duties by allowing within a residential dwelling a steam radiator emanating such heat that it could cause second and third degree burns only after a minimal amount of physical contact. The fact that the burns suffered in this case were a byproduct of two toddlers getting behind a steam radiator which dangerously jutted out from a wall leaving a space behind, it certainly is within the ambit of risk created by Respondent's alleged breach of duty, and certainly fell within the "general field of danger," which reasonably should have been anticipated. Just because the exact manner in which the injury occurred was not entirely predictable does not change the fact that what occurred here involved "the general type of

harm" or "threat of harm" which made Respondent's actions unreasonable.[5]

The case of *Cook v. Seidenverg* 36 Wn.2d 256, 217 P.2d 799 (1950), relied on by Respondent is readily distinguishable. In *Cook,* the Plaintiff was alleging that the landlord should be held liable as a result of its failure to provide heat in the apartment which resulted in the use of a portable heater that ultimately caused injury to a child. The Plaintiffs' theory in that case was that the landlords engaged in negligence *per se* due to its violation of an ordinance that required that a certain amount of minimum heat for the apartment. The Court determined that the particular statute involved was not designed to prevent the kind of accident injury that was involved and, any injury caused by use of a space heater, was too enuatted from statutory purpose. In

[5] In this case the Respondent has asserted a "red herring" defense predicated on the notion that the boxes which the parents had placed around the steam radiator to block access to the children, somehow was a "but for" cause of S.F.'s injuries. The undisputed facts presented below showed that the reason why S.F. received burns was because her little brother (who is also a toddler) came in behind her into the wedge-shaped space behind the radiator thus causing her to have physical contact with the radiator surface. (CP 398-99). There is simply no indication that the boxes surrounding the radiator in any way changed this result or would have in any way affected this result. The exact same injury could occur even if no boxes were surrounding the radiator because of the way in which the radiator jutted out from the wall creating wedge-shaped space behind it where the two toddlers easily could fit. The notion that the children were "trapped," and that somehow affected the outcome is nothing more than an argumentative assertion, which is factually illogical given that the children were able to get behind the boxes in the first place. (CP 398). If the children were able to get through the boxes and behind the radiator they certainly would have had an avenue for egress had they not been panicked by S.F.'s injury.

other words, the Supreme Court found that the injury which ultimately resulted was too attenuated to the alleged statutory violation to meet the standards of proximate cause.

Here, Plaintiff's theory suffers from no such attenuation. What is directly at issue is the presence of a steam radiator which caused S.F.'s injury. Thus, there is no basis from which to argue that there is anything but a jury question as to whether or not the defendant's breach of duty was "a proximate cause", "unbroken by an superseding cause" to the injury suffered. *See* WPI 15.01.

Additionally, at most, even if we assume arguendo that the parents can be held in any way responsible for the injury suffered by S.F., (as discussed below they cannot), what would be at issue would be a jury question regarding "concurrent" causation. *See* WI 15.04. "Concurrent negligence" occurs when two, (or more), individuals commit independent acts of negligence which concur to produce the proximate cause of an injury to a third person. *Mason v. Bitton* 85 Wn.2d 321, 326, 534 P.2d 1360 (1975). Thus, even if we assume that the parents can be held liable for supervision, (despite the fact that there is no such cause of action in the State of Washington), at most that can be said that such lack of supervision, in combination with

Respondent's provision of a dangerous steam radiator within the Plaintiffs' family dwelling, concurred and resulted in a single harm.

Beyond the above, it is simply fanciful for the defense to assert that this matter is so clear that as a matter of law a Trial Court, or this Court for that matter, could conclude that something other than the acts of Respondent was a "intervening superseding cause".

G. The Trial Court Erred In Failing To Grant Plaintiffs' Motion For Summary Judgment Regarding Parental Immunity And The Respondent's Contentions To The Contrary Are Erroneous.

The Respondent points only to the "willful and wanton misconduct" exception to the parental immunity doctrine. *See, Woods v. H.O. Sports Co. Inc.*, ___Wn.App.____, 333 P.3d 455 (8/19/14), (discussing exceptions to "to parental immunity doctrine). According to Respondent, (apparently), anything short of keeping children on a leash, or placing them in cages would constitute "willful and wanton misconduct". Neither is required under our law. *See Cox v. Hugo*, 52 Wn.2d 815, 820, 329 P.2d 467 (1958) (Even when child is outside of the home, parents are not required to place them under constant surveillance). *See Zellmer v. Zellmer,* 164 Wn.2d 147, 188 P.3d 497 (2008) (discussing continuing

vitality of parental immunity doctrine in Washington, and collecting cases where immunity was either granted or denied). Willful misconduct and wanton misconduct are defined in WPI 14.01 which provides:

> Willful misconduct is the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has a duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert injury or actually intends to cause harm.
>
> Wanton misconduct is the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has a duty to do, in reckless disregard of consequences and under such surrounding circumstances of conditions that a reasonable person would know, or should know that such conduct would, in a high degree of probability, result in substantial harm to another."

WPI 14.01 is in part based on *Adkisson v. City of Seattle*, 42 Wn.2d 676, 684-85, 258 P.2d 461 (1953). Adkisson provides further elaboration as to the true meaning of the above-referenced words:

> Willful misconduct is characterized by an 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 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.

Id. at 42 Wn.2d at 684.

Tested against such standards the undisputed facts in this case establish that the Figuracion parents' behavior in this case came nowhere close to meeting such standards.[6]

The action of Figuracion parents in no way showed the kind of "indifference" necessary in order to establish "willful or wanton misconduct". In fact their conduct is **the exact opposite**. Initially they made an inquiry as to whether or not they could place a cover around the dangerous steam radiator. and were provided misinformation. (CP 82; 821). Nevertheless, they took reasonable measures to prevent the children from having access to the radiator by stacking boxes around it, creating a physical barrier between the living room and the radiator. (CP 82-83). Such actions show a substantial amount of care as opposed to indifference.

Further, beyond argumentative assertion, there is **no evidence that the boxes around the radiator were a causative factor in the injury that was suffered**. (CP 398).

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[6] The case relied on by the defense *New Jersey Division of Youth Services v. A.R.* 17 A.3d 850 (2011) , is readily distinguishable. Joleen Figuarcion did not put an infant on a bed without side-rails next to a radiator. She and her husband took reasonable measures to try to make the radiator "safe" and she engaged in the non-negligent act of using a restroom, with the door open, while at the same time maintaining her children, (at all times), under auditory supervision.

The exact same injury could have been suffered by S.F. if there were no boxes around the radiator at all. The reason why the injury occurred and or was aggravated was the fact that the steam radiator jutted out of the wall creating a wedge-shaped space behind it accessible to the children. If anything, the fact that the injury did not occur earlier in the tenancy suggests that stacking the boxes, at least for a period of time, worked.[7]

Joleen Figuracion did absolutely nothing wrong by heeding the call of nature and using the restroom. Her actions in that regard were entirely reasonable and very consistent with the exercise of ordinary care. She left the bathroom door open. *Id.* Because of the physical configuration of the apartment, she could not see her children. When Joleen went to the bathroom, the children were occupied watching a television show. (CP 79). While she was in the restroom, she was able to hear them at all times, and was able to provide them verbal direction which they apparently responded to. It was only after the passage of time and she heard S.F.'s first

[7] There is absolutely no evidence that the boxes were even touching S.F.at anytime. Her brother, and not any box, would have been making contact with her given the order in which they entered the wedge-shaped space behind the radiator. Further, the defense's contention that "had S.F. been allowed to pull away from the radiator, she would have avoided injury" is unsupportable. Perhaps, the severity of the injury would have been less had her brother not been behind her, but she, more likely than not, would have been injured nonetheless. The Respondent's liability in this case is predicated on the fact of injury and not necessarily its severity.

truly distressed call that she immediately jumped from the toilet to provide aid to her children, despite the fact that she had diarrhea. (CP 149).

The Respondent's allegations of willful and wonton misconduct are simply factually unsupportable and there was no basis for the Trial Court to have denied Plaintiffs' Motion for Partial Summary Judgment regarding parental immunity. Frankly, it is not a closed question.

H. There Is No Actual Duty In The State Of Washington For A Negligent Parental Supervision.

The question raised by Appellants on this issue appears to be a matter of first impression. While the case cited by Respondent generally provides that "under the terms of R.C.W. 4.22.070 an immune party can be allocated fault are not dispositive of the issue raised. *See Anderson v. City of Seattle*, 123 Wn.2d 847, 873 P.2d 489 (1994). Similarly the case of *Romero v. West Valley School Dist.*, 123 Wn.App. 385, 98 P.3d 96 (2004) provides very little help. In that case, the parents for strategic reasons, waived parental immunity apparently in an effort to manipulate the preservation of joint and several liability. Ultimately, the Court in *Romero,* did not reach the propriety of such actions.

Plaintiffs' position with regard to this issue is very simple. In order for there to be negligence, or for that matter

comparative negligence, there first must be established that there was a breach of a duty. *See Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 613-14, 260 P.3d 857 (2011) (a claim of comparative negligence could not be based on a mother smoking while pregnant, absent a duty not to do so). In order for there to be allocation of fault under RCW 4.22.070 it first must be established that there is "fault". Under the terms of RCW 4.22.015 in order for someone to have "fault," it must be established that they engaged in an act or omission which was "in any measure negligent ...". If there is no negligence, someone cannot be at "fault" subject to allocation under the terms of RCW 4.22.070.

Whether the question is posed as "what is parental immunity" or what duty was breached, the ultimate outcome for RCW 4.22.070 purposes is the same. As discussed at Pages 44 through 47 of Appellants' Opening Brief, there is no cognizable cause of action in the State of Washington for negligent parental supervision. The Respondent has not pointed to a single case establishing that such a cause of action in Washington exists. To the contrary, in *Talarico*, 105 Wn.2d at 116, the Supreme Court expressly stated "In order for the conduct of parents in supervising their child **to be actionable in tort**, such conduct must rise to the level of

willful and wanton misconduct ..." In other words, if something is not "actionable in tort," it is reasonable to assume that is because it breaches no actionable duty. If there is no recognized duty, save instances involving willful and wanton misconduct, then there can be no negligence or "fault" within the meaning of RCW 4.22.015.

The Trial Court erred in refusing to grant Plaintiffs' Motion for Partial Summary Judgment.

I. The Respondent's Request for Fees is Meritless.

It is unfortunate that this Court does not have a provision within its rules that allows a party who is a victim of a frivolous fee request, made pursuant to RAP 18.9 the option of requesting fees for having to respond to the frivolous request. *See generally, Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992) (frivolous requests for CR 11 sanctions in and of itself subject to sanction). If such a provision were available the Court could avoid those numerous cases where not only are such fees rejected, but the party requesting them has lost on appeal.

In *Protect the Peninsula's v. City of Port Angeles*, 176 Wn.App. 210, 220, 304 P.3d 914 (2004), the Court provided the following synopsis of the standards applicable to an award of attorney's fees under the terms of RAP 18.9(a):

> In determining whether an appeal is frivolous, five considerations guide us: (1) a civil appellant has a right to appeal, (2) we resolve any doubt about whether an appeal is frivolous in the appellant's favor, (3) we consider the record as a whole, (4) an unsuccessful appeal is not necessarily frivolous, and (5) an appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and is so totally devoid of merit that no reasonable possibility of reversal exists." *Carrillo v. City of Ocean Shores*, 122 Wn.App. 592, 619, 914 P.3d 961 (2004) (citing *Streater v. White*, 26 Wn.App. 430, 434,-35, 613 P.2d 187 (1980)).

As it's likely that this case, the Appellate Court will reverse the Trial Court and remand this matter for trial, by definition this appeal is not frivolous. Even if the Court ultimately does not decide this matter in Appellants' favor, as should be self-evident, Appellants' counsel has made a good-faith argument as it relates to applying the particular facts of this case to existing law. Further to the extent that Appellants' counsel is asking the Court to extend existing law, there is nothing inappropriate about making such a request. Based on Appellants' Opening Brief and what is set forth above, this appeal raises "debatable issues," and hardly can be characterized as "devoid of merit". As such request for fees should be denied.

IV. CONCLUSION

For the reasons stated above, the Appellate Court should reverse the Trial Court and remand this matter for a full trial on one or more of Plaintiffs' liability theories. Additionally, the Appellate Court should reverse the Trial Court's denial of Plaintiffs' motion for summary judgment on parental immunity and the absence of any duty on the part of a parent, to be non-negligent in the supervision of their children. There is no duty requiring non-negligent supervision and the Court should hold accordingly. Defendant's motion for fees should be denied.

Dated this 10 day of October, 2014.

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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 10TH day of October, 2014, a true and correct copy of the Appellants' Reply 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

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

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DATED this 10TH day of October, 2014.

Heather Delin