No. 97325-3

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 77179-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KIMBERLY J. GERLACH, individually

Petitioner,

v.

THE COVE APARTMENTS, LLC, a Washington corporation; and WEIDNER PROPERTY MANAGEMENT LLC, a Washington corporation,

Respondents.

PETITION FOR REVIEW

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A. Introduction

A jury awarded petitioner Kim Gerlach damages for a life-altering traumatic brain injury suffered when the wood railing of the balcony of an apartment owned and managed by respondent Weidner Property Management LLC gave way because it was compromised by unexamined and uncorrected rot, and Gerlach fell to the concrete sidewalk two stories below. Gerlach admitted she was under the influence of alcohol when the railing failed, and the trial court exercised its discretion to exclude the results of a blood alcohol test that did not meet state toxicologist's standards. Weidner argued to the jury that Gerlach's voluntary intoxication was the primary cause of her injuries. After being instructed to consider Gerlach's intoxication, the jury assigned 7% comparative fault to her.

This Court should accept review of the Court of Appeals' published decision reversing the jury's verdict. The Court of Appeals erred in holding 1) that a blood alcohol test that lacked the statutory foundation for admissibility in court proceedings must as a matter of law be admitted into evidence, 2) that the trial court committed reversible error in excluding expert testimony that did no more than tell the jury that Gerlach's admitted intoxication likely impaired her judgment, and 3) that Gerlach lacked standing to assert the landlord's breach of its warranty of habitability under the Residential Landlord

Tenant Act as a basis for tort liability because, although she lived in the apartment, she had not signed the lease and was not a "tenant."

B. Court of Appeals Decision.

The Court of Appeals filed its published decision on March 18, 2019 (App. A), and entered its order changing the last paragraph of the opinion (but not the result) on May 13, 2019 (App. B). *Gerlach v. Cove Apartments, LLC*, ___ Wn. App. 2d ___, 437 P.3d 690 (2019) (cited herein as "Op."), *opinion withdrawn and superseded on reconsideration*, ___ Wn. App. 2d ___, ___ P.3d ___, 2019 WL 2083307 (May 13, 2019)

C. Issues Presented for Review.

1. In a civil case in which the defendant invokes RCW 5.40.060's intoxication defense and the plaintiff admits she was intoxicated when she was injured, does a trial court have the discretion to exclude the result of a hospital blood draw that did not comply with the State toxicologist's standards for a blood alcohol concentration test ("BAC") under RCW 46.61.506, as well as expert testimony based on that unverified result?

2. The defendant was able to and did argue that the plaintiff's admitted intoxication caused her injury when she fell over the rotten second-story balcony railing of defendant's apartment complex. The jury, which was instructed to consider plaintiff's

voluntary intoxication, necessarily did so in allocating fault to the plaintiff. Was the trial court's exclusion of the unverified results of a hospital blood draw so prejudicial that defendant is entitled to a new trial based on this claimed evidentiary error?

3. May a tenant's fiancé, who is injured due to an unsafe condition on the premises while living with the tenant who signed the lease, claim damages under *Restatement (Second) of Property: Landlord and Tenant* § 17.6 (1977) based on the landlord's breach of the Residential Landlord Tenant Act's statutory warranty of habitability?

D. Statement of the Case.

1. Gerlach suffered a traumatic brain injury when she fell from the Cove's second-story balcony because Weidner failed to replace a rotten wooden railing.

Petitioner Kim Gerlach lived with her fiancé in a second floor unit of respondent the Cove Apartments, a 32-unit, building complex constructed in 1987 and owned and maintained by respondent Weidner Property Management LLC. (RP 1231, 2309) Though Weidner's inspection when it purchased the Cove in 2010 revealed that every single building had areas of wood rot (RP 1241-42; Ex. 28), it discontinued its seller's practice of annually replacing a number of railings and balconies, and replaced wooden elements in the complex

only when their deteriorated condition became obvious. (RP 876-77) By autumn 2012, Weidner had repaired wood rot to the stairway and railing area immediately below Gerlach's apartment, but not to her unit's balcony or railing. (RP 958-60)

On October 27, 2012, after returning from dinner and drinks with friends, Ms. Gerlach fell from her balcony when its rotted railing gave way. (*See* RP 712-13, 716-18) Her companions, the investigating police officer, and the first responder all reported the railing failed to support her weight and "snapped" when Gerlach (age 28, and 125 pounds) leaned against it. (RP 716-18, 1439-41, 1458-59, 1487-88, 2542, 2551-52; Exs. 135, 138) An examination of the balcony railing showed that the screws attaching it to the badly rotted wooden bulkhead had rusted at the bottom of their metal supports. (Exs. 36, 54, App. C; RP 2084-85)

Gerlach suffered multiple skull fractures, brain hemorrhage, and brain swelling that required brain surgery and temporary removal of a portion of her skull. (RP 1381-90) She was unconscious and unresponsive when paramedics arrived and she was taken to Harborview Hospital. (RP 1420, 2452-53) While Gerlach was being treated, Harborview took a blood draw to test for various substances, including alcohol, that showed a blood alcohol level of .238. (*See* RP 1540-41) There was no evidence that Harborview's blood draw

conformed to the state toxicologist's standards for a blood alcohol concentration test ("BAC") admissible under RCW 46.61.506.

2. The Court of Appeals reversed the judgment on the jury's verdict, which was reduced for Gerlach's contributory fault based on her admission that she was intoxicated, holding the trial court abused its discretion in excluding the unverified results of a hospital blood draw.

Gerlach sued, alleging breach of Weidner's common law duty to invitees and its implied and statutory warranty of habitability under the Residential Landlord Tenant Act. (CP 1-8) Pursuant to RCW 5.40.060, Weidner alleged that Gerlach's voluntary intoxication was the proximate cause of her injuries, and that her comparative fault in excess of 50% should completely bar any recovery. (CP 312-14) The defense theory, supported by an accident reconstruction expert, was that Gerlach was trying to climb over the railing from outside the balcony when the railing failed. (Exs. 60-63; RP 2993-94, 3126-35) Weidner, however, did not contest and it was indisputable that the balcony railing gave way because of wood rot.

Because the hospital blood draw did not comply with statutory standards for admissibility of BAC tests and its admission could confuse or prejudice the jury with speculative evidence, the trial court exercised its discretion to exclude the results of the blood test under ER 403 after Gerlach admitted that she was intoxicated,

instructing the jury that "Gerlach was under the influence of intoxicating liquor at the time of the accident." (RP 1355-56, 1556-57, 1560-62, 2799-2800) The trial court also excluded Weidner's toxicologist from testifying that that "anyone" with Gerlach's blood alcohol level would be severely impaired, and limited Weidner's reconstruction expert's speculation about "how the plaintiff was acting immediately before she fell." (RP 1562-63)

The trial court instructed the jury that Weidner owed Gerlach the common law duty of care owed to an invitee by an owner and occupier of land and, separately, as a landlord under the Residential Landlord-Tenant Act ("RLTA"), including the duty to refrain from creating "an actual or potential safety hazard" and to use ordinary care to discover and repair a dangerous condition that violates health and safety regulations. (Instr. Nos. 10-15, CP 1870-75) The trial court also instructed the jury to consider Gerlach's intoxication in allocating fault. (Instr. No. 20, CP 1880)

In closing argument, Weidner relied on its expert's reconstruction to argue that Gerlach was trying to climb over the balcony railing (RP 3626-33), cited Gerlach's "admission to being intoxicated," told the jury that "you have been instructed that she was intoxicated that night," and that Gerlach's voluntary intoxication impaired her judgment and caused her to "climb[] over in a state when

she was . . . compromised." (RP 3639, 3641-43) Weidner argued that Gerlach "put herself at risk as a consequence of being intoxicated that night. . . . Ms. Gerlach was negligent. She was voluntarily intoxicated." (RP 3641-42) The jury's verdict, which did not distinguish between the two theories of liability, found Weidner 93% negligent and Gerlach 7% negligent. (CP 1890) After deducting for Gerlach's comparative fault, the trial court entered judgment against Weidner for $3,533,808.22. (CP 1906)

The Court of Appeals reversed, holding that the trial court abused its discretion by excluding evidence of Gerlach's blood alcohol level, excluding expert testimony that "a BAC of .238 make[s] it less likely that she could safely stand on a balcony or climb over a railing," and that the ruling deprived Weidner of "the opportunity to present evidence on a key factual issue: whether Gerlach was predominantly liable for her injuries due to her level of intoxication." (Op. ¶¶ 12, 13) The Court further held that the trial court erred in "instructing the jury that Cove could be liable to Gerlach for a violation of the RLTA" because "Gerlach was not a tenant." (Op. ¶ 45) On reconsideration, the Court of Appeals limited its remand and new trial to the issue of liability and allocation of fault. (App. B)

E. Argument Why Review Should be Granted.

The Court of Appeals' published decision conflicts with this Court's cases limiting appellate review of discretionary evidentiary decisions, is contrary to RCW 46.61.502 and .506, and raises an issue of substantial public interest under the RLTA.

1. The Court of Appeals erred in holding that the trial court lacked the discretion to exclude the results of a hospital blood draw that did not comply with statutory standards for a BAC.

The Court of Appeals erred in reversing the jury's verdict and granting a new trial based on the trial court's discretionary evidentiary rulings, holding that the results of an unverified hospital blood draw and "expert" testimony on the effects of alcohol on "anyone" were both admissible as a matter of law and that the trial court had no discretion to exclude the evidence. The Court of Appeals' published decision not only contravenes RCW 46.61.506, but eliminates entirely the deference given trial courts in deciding the admissibility of evidence. RAP 13.4(b)(1), (4).

The trial court has broad discretion in ruling on the admissibility of opinion evidence and in balancing the probative value of evidence against its potential to unfairly prejudice the jury. *Hill v. C. & E. Const. Co.*, 59 Wn.2d 743, 746, 370 P.2d 255 (1962); *Industrial Indemnity Co. v. Kallevig*, 114 Wn.2d 907, 926, 792 P.2d

520 (1990). This Court will reverse the appellate court's grant of a new trial based on evidentiary rulings when the Court of Appeals fails to recognize that "[a] reviewing court may not find abuse of discretion simply because it would have decided the case differently — it must be convinced that '*no reasonable person* would take the view adopted by the trial court.'" *Gilmore v. Jefferson Cty. Pub. Transportation Benefit Area*, 190 Wn.2d 483, 494, ¶ 17, 415 P.3d 212 (2018) (emphasis added).

Different "courts can reasonably reach different conclusions" concerning the admissibility of evidence without manifestly abusing a court's discretion. *LM by and through Dussault v. Hamilton,* 193 Wn.2d 113, 136, ¶ 49, 436 P.3d 803 (2019). The appellate court must affirm the trial court's discretionary exclusion of evidence "on any proper basis within the record . . . [; it] will not be reversed simply because the trial court gave a wrong or insufficient reason for its determination." *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). The Court of Appeals' refusal here to recognize and respect the trial court's authority to weigh the probative value of the results of an unverified blood alcohol test against its potential for confusing the jury conflicts with this established precedent.

Gerlach's admission she was intoxicated satisfied the first prong of Weidner's intoxication defense under RCW 5.40.060(1):

that Gerlach "was [1] under the influence of intoxicating liquor . . . at the time of the occurrence causing the injury." In addition, Weidner had to prove "[2] that such condition was a proximate cause of the injury . . . and . . . [3] . . . [plaintiff was] more than fifty percent at fault." The Court of Appeals erred in holding that the trial court lacked discretion under ER 403 to exclude the unverified blood alcohol test result and related expert testimony after weighing the relevance of a hospital blood draw that did not comply with the state toxicologist's standards against its prejudicial impact with respect to these second and third elements.

The statute defines "intoxication" by incorporating the standards "established for criminal convictions [for driving while intoxicated] under RCW 46.61.502." RCW 5.40.060(1); *see State v. Peralta*, 191 Wn. App. 931, 945-46, ¶¶ 27-28, 366 P.3d 45 (2015) (proof of intoxication under RCW 5.40.060 requires proof that the plaintiff was under the influence under the standard established by RCW 46.61.502), *reversed on other grounds*, 187 Wn.2d 888, 389 P.3d 596 (2017). RCW 46.61.502, in turn, provides two means of proving intoxication. The first, RCW 46.61.502(1)(a), provides that a BAC of .08 "as shown by analysis of the person's breath or blood made under RCW 46.61.506" pursuant to standards approved by the

state toxicologist is evidence of intoxication.[1] RCW 46.61.502(1)(c) alternatively provides (in somewhat circular fashion) that a person is guilty of driving while under the influence "[w]hile the person is under the influence of or affected by intoxicating liquor . . .".

The Court of Appeals referred to these two alternative means as the "per se" standard for intoxication (because a BAC that complies with the statutory standard is per se admissible), and the "non-per-se method." (Op. ¶ 17, citing *State v. Donahue,* 105 Wn. App. 67, 76-77, 18 P.3d 608, *rev. denied,* 144 Wn.2d 1010 (2001)) However, the Court of Appeals then erroneously failed to distinguish between the methods, holding as a matter of law that the result of an unverified hospital blood draw is *always* admissible in a civil case in which the defense alleges the plaintiff's intoxication as a complete defense to liability. Its analysis fails to give effect to each and every provision of

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[1] RCW 46.61.506(3) provides:

> Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose.

In addition to setting forth the qualifications for individuals to obtain a BAC permit, WAC 448-14-030, the state toxicologist has established rigorous "analytic procedure" in order to obtain a valid BAC, including a "control test," a "blank test," and a "duplicate analysis that agrees within plus or minus 10 percent of their mean." WAC 448-14-020(1). The hospital blood draw at issue in this case was not performed by a BAC-permitted individual, and did not meet these procedures.

the statute, rendering the requirement of compliance with state toxicology standards in RCW 46.61.502(1)(a) superfluous. *Svendsen v. Stock,* 143 Wn.2d 546, 555, 23 P.3d 455 (2001) (court must give effect to all portions of the statute and to render no portion meaningless or superfluous).

Nor do the cases cited by the Court of Appeals support its decision that the trial court had no discretion to exclude the results of a blood hospital draw that could not establish intoxication "per se" under RCW 46.61.502(1)(a), on the grounds that after Gerlach stipulated to intoxication "the evidence was still relevant to prove the extent to which her intoxication proximately caused her injuries." (Op. ¶ 12) In *State v. Peralta*, 187 Wn.2d 888, 389 P.3d 596 (2017) (Op. ¶ 11), this Court affirmed the trial court's discretion to instruct the jury to consider the plaintiff's admission under CR 36 that she was intoxicated, where a hospital blood draw showed a .167 blood alcohol level. 187 Wn.2d at 900-01, ¶ 22; *See Peralta*, 191 Wn. App. at 939, ¶ 11.

Donahue, which the Court of Appeals cites for the proposition "that evidence of intoxication from an Oregon hospital blood alcohol test that did not comply with RCW 46.61.506 standards was admissible to prove a non-per-se offense under RCW 46.61.502," (Op. ¶ 17), affirmed admission of a BAC based on foundational testimony by the Washington State Toxicologist that Oregon's test was no less reliable

than Washington's. *Donahue,* 105 Wn. App. at 70. Division Two held that although the results were not admissible under the per se standard of RCW 46.61.502(1)(a), the results of such a "medical draw" could be admitted under the non-per se standard, subject to the defendant's right to "attack the accuracy and reliability of the technique or method used in analyzing the blood alcohol level and whether it meets the standards of ER 702 and ER 703." 105 Wn. App. at 74.

Given that the test here was not admissible per se, the trial court was entitled to weigh the marginal relevance of the numerical result and Weidner's expert testimony that the unverified result of the hospital blood draw would result in "severe psychomotor impairment" under ER 403. The trial court could reasonably conclude that the resulting diversion during this 15-day trial into a mini-trial on the reliability of the hospital blood draw results under RCW 46.61.502(1)(c) was unnecessary once Gerlach stipulated to her intoxication when she was injured. *See* RP 1537-40 (voir dire of expert on science of blood testing and alcohol metabolism). *See State v. Donald,* 178 Wn. App. 250, 271, ¶ 42, 316 P.3d 1081 (2013) ("reasonable concern about the confusion of issues and possible delay" a valid basis for trial court's discretion to exclude expert testimony on victim's alleged mental illness under ER 403), *rev. denied,* 180 Wn.2d 1010 (2014).

The trial court was also justifiably concerned that the probative value of the result of the hospital blood draw on the issue of causation was outweighed by its potential for prejudice. (RP 1561-63) Given that intoxication "in and of itself would not constitute negligence," *Lubliner v. Ruge*, 21 Wn. 2d 881, 884, 153 P.2d 694, 696 (1944), Weidner had no basis to argue that an increased level of intoxication, or a particular "number" from an unverified hospital blood draw, could increase the amount of Gerlach's negligence. Instead, Weidner sought to admit the unverified test result for the jury to pass moral judgment on Gerlach by giving undue weight to a number that, standing alone, had minimal relevance to whether Gerlach's admitted intoxication actually caused the railing to fail. (*See* RP 1562-63)

As the trial court recognized, if Gerlach made a "bad decision to climb over the railing, the fact that she was intoxicated may explain the bad decision" (RP 50-51), but the *degree* of Gerlach's intoxication based on an unverified test result had little relevance to the question of what would cause the railing to fail under the weight of a 125-pound woman – be she drunk or sober, and whether she was leaning, standing, or climbing on the rotten railing. (RP 1562) The average juror understands as a matter of common knowledge that alcohol impairs a person's judgment and coordination. *State v.*

Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647, *rev. denied*, 104 Wn.2d 1026 (1985) (affirming exclusion of expert testimony on effects of alcohol as within common understanding). The trial court was thus fully justified in excluding speculative expert testimony "equating what Ms. Gerlach did based on the amount of alcohol she consumed," while allowing Weidner to repeatedly argue to the jury that Gerlach's voluntary intoxication was a proximate cause of her fall. (RP 1332-33)

Rather than deferring to the trial court's exercise of discretion to weigh the relevance of evidence against its prejudicial impact, the Court of Appeals established a rule that requires the result of an unverified hospital blood draw to be admitted, irrespective of the circumstances, whenever a defendant raises an intoxication defense. Its decision conflicts with this Court's precedent and presents a matter of substantial public interest. RAP 13.4(b)(1), (4).

2. The Court of Appeals erred in disregarding the jury's allocation of fault when it held that Weidner was prejudiced as a matter of law by the trial court's evidentiary ruling.

Only error that prejudicially affected the jury's verdict justifies a new trial. *Blaney v. Int'l Ass'n of Machinists*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004); *Hizey v. Carpenter*, 119 Wn.2d 251, 269-70, 830 P.2d 646 (1992). A trial court's erroneous exclusion of evidence is

not grounds for a new trial if the evidence is cumulative of other evidence or has speculative value. *Miller v. Arctic Alaska Fisheries, Corp.*, 133 Wn.2d 250, 261, 844 P.2d 250 (1997) (reinstating verdict), citing *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994). The Court of Appeals' decision remanding for a new trial on the grounds that Weidner was prejudiced by the trial court's exclusion of the unverified result of the hospital blood draw and its expert's testimony concerning her degree of intoxication also is in conflict with this Court's precedent. RAP 13.4(b)(1).

In closing argument, Weidner reminded the jury that Gerlach admitted she was intoxicated (RP 3639), and argued that Gerlach "put herself at risk as a consequence of being intoxicated that night" (RP 3641), and that her intoxication impaired her judgment, her balance and inhibition against engaging in risk-taking behavior. (RP 3639) The trial court then instructed the jury to consider Gerlach's voluntary intoxication in allocating fault:

> A person who becomes voluntarily intoxicated is held to the same standard of care as one who is not so affected. The intoxication of the plaintiff at the time of the occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.

(Instr. No. 20, CP 1880)[2] The jury necessarily credited Weidner's intoxication theory when it found that Gerlach was 7% responsible for her injuries (CP 1890), an allocation that fairly reflects the undisputed dangerousness of the Cove's balcony railing and Gerlach's "judgment" and alleged "risk taking." (RP 3639) The Court of Appeals erred in holding that the exclusion of unverified blood alcohol evidence was prejudicial error without considering the instructions, Weidner's arguments to the jury, its verdict, and this Court's precedent deferring to the trial court's judgment in evidentiary rulings. RAP 13.4(b)(1).

3. Whether a non-tenant may sue for personal injuries sustained due to a landlord's breach of the RLTA's warranty of habitability is an issue of substantial public importance.

The Court of Appeals also held that Gerlach, because she was not a signator on the Cove lease, could not maintain a civil action for personal injuries for breach of the landlord's common law or statutory duty to maintain the premises in a habitable and safe condition. (Op. ¶ 45) Division One's refusal to fully adopt *Restatement (Second) of Property: Landlord & Tenant* § 17.6 (1977), which allows a tort action

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[2] The Court of Appeals correctly held that the instructions allowed Weidner "to argue that Gerlach's intoxication was a proximate cause of her accident and that she was more than 50 percent at fault." (Op. ¶ 41) It suggested that the trial court use WPI 16.03 as a more appropriate instruction on remand. (Op. ¶ 41) As the Court of Appeals found no instructional error, Gerlach does not further address this portion of the decision.

based on the landlord's breach of its warranty of habitability by both a tenant and "others upon the leased property with the consent of the tenant," conflicts with this Court's precedent and perpetuates confusion regarding the scope of a landlord's responsibility under the warranty of habitability that this Court should definitively resolve as a matter of substantial public interest. RAP 13.4(b)(1), (4).

In this case, Division One relied on its recent decision in *Phillips v. Greco,* 7 Wn. App.2d 1, 6-7, ¶ 15, 433 P.3d 509 (2019), to hold that "Washington has only adopted Section 17.6 in cases where a landlord's negligence is alleged by a tenant." (Op. ¶ 43) The other two divisions have found different reasons not to apply the *Restatement* to nontenants under the facts of the particular case.[3] This Court should definitively hold that a tenant's guest, as well as a tenant, may enforce the statutory warranty of habitability in a tort action for injuries arising from the landlord's failure to use "ordinary

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[3] *See Lian v. Stalick*, 106 Wn. App. 811, 822, 25 P.3d 467 (2001) (Division Three adopts *Restatement* § 17.6 in action by tenant); *Pruitt v. Savage,* 128 Wn. App. 327, 332, ¶ 18, 115 P.3d 1000 (2005) (Division Two declines to adopt Restatement § 17.6 in action by non-tenant who failed to provide adequate support and policy considerations) ; *Martini v. Post*, 178 Wn. App. 153, 170-72, ¶¶ 42, 43, 313 P.3d 473 (2013) (following Division Three, Division Two adopts *Restatement* § 17.6 in action by tenant)); *Sjogren v. Props. of the Pac. Nw., LLC,* 118 Wn. App. 144, 151, 75 P.3d 592 (2003) (Divison Two declines to adopt *Restatement* § 17.6 in action by non-tenant when the dangerous condition was located in a common area and non-tenant was able to pursue a claim under a premises liability theory).

care" to repair a "condition that endangers the health or safety of tenant," as the jury was instructed here. (Instr. 13, CP 1873)

Division One's refusal to allow a nontenant to enforce a landlord's duty to maintain its premises in habitable condition conflicts with this Court's test for determining whether a statute creates an implied cause of action: "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 675, ¶ 21, 398 P.3d 1108 (2017), quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). Gerlach meets that test here because the RLTA's warranty of habitability, RCW 59.18.060, protects all persons on the premises from dangerous conditions, including family members and guests as well as the lease's signator. Tort liability for injuries caused by its breach "tends to increase the likelihood that the will of the legislature as expressed in the statute or regulation will be effectuated." *Restatement (Second) of Property* § 17.6.

As other states have recognized (Resp. Br. 41, n.8), a remedy in tort is consistent with the remedial purposes of the statutory warranty of habitability to ensure that tenants have a safe and

habitable place to live. *See Foisy v. Wyman*, 83 Wn.2d 22, 25-26, 515 P.2d 160 (1973). The Court of Appeals' holding in a published decision that only a tenant, but not a tenant's guest, may sue in tort for the landlord's failure to maintain the premises in a condition fit for human habitation substantially undermines the purpose of the RLTA's warranty of habitability in residential housing. Its decision conflicts with this Court's precedent and presents an issue that this Court should definitively resolve.

F. Conclusion.

This Court should grant review and reinstate the jury's verdict.

Dated this 12th day of June, 2019.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 12, 2019, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 12th day of June, 2019.

Sarah N. Eaton

437 P.3d 690
Court of Appeals of Washington, Division 1.

Kimberly J. GERLACH, Respondent,
v.
The COVE APARTMENTS, LLC, a Washington corporation; and Weidner Property Management, LLC, a Washington corporation, Appellants,
and
Weidner Apartment Homes, a Washington business entity, dba The Cove Apartments, and Weidner Asset Management LLC, a Washington corporation, Defendants.

No. 77179-5-I
|
FILED: March 18, 2019

Synopsis
Background: Plaintiff, who suffered life threatening head injuries in fall from boyfriend's apartment's balcony, brought negligence action against landlord and management company. The Superior Court, King County, Richard F. McDermott, J., entered judgment on jury verdict in favor of plaintiff, and defendants appealed.

Holdings: The Court of Appeals, Smith, J., held that:

[1] blood alcohol evidence could not be excluded as being more prejudicial than probative;

[2] trial court's error in excluding blood alcohol evidence was not harmless;

[3] blood alcohol evidence could not be excluded on basis that test used did not comply with the requirements for evidence in civil or criminal cases arising out of acts alleged to have been committed by a person when driving or in actual physical control of a vehicle while under the influence;

[4] opinion testimony of expert qualified as to the effects of alcohol upon the human body could not be excluded on basis that plaintiff had already admitted to being intoxicated;

[5] trial court did not err in limiting testimony of expert on human injury and accident reconstruction;

[6] trial court did not err in limiting testimony of defense expert witness, a health economist, as to the reasonableness of plaintiff's medical expenses; and

[7] landlord could not be held liable on theory it breached its implied and statutory warranty of habitability to plaintiff.

Reversed and remanded.

West Headnotes (30)

[1] Appeal and Error
Evidence and Witnesses in General

An appellate court will reverse a trial court's evidentiary rulings only upon a showing of abuse of discretion.

Cases that cite this headnote

[2] Appeal and Error
Abuse of discretion

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.

Cases that cite this headnote

[3] Appeal and Error
Prejudice;Prejudicial Error

Appeal and Error
Relation Between Error and Final Outcome or Result

An error does not require reversal unless it is prejudicial, and error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial.

Cases that cite this headnote

[4] Evidence
Relevancy in general

All relevant evidence is admissible unless its admissibility is otherwise limited. Wash. R. Evid. 402.

Cases that cite this headnote

[5] **Evidence**
Tendency to mislead or confuse

When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. Wash. R. Evid. 403.

Cases that cite this headnote

[6] **Evidence**
Tendency to mislead or confuse

Where evidence is undeniably probative of a central issue in the case, the ability of the danger of unfair prejudice to substantially outweigh the probative value of the evidence is quite slim. Wash. R. Evid. 403.

Cases that cite this headnote

[7] **Evidence**
Tendency to mislead or confuse

In negligence action brought by plaintiff, who had fallen from boyfriend's apartment's balcony and suffered life-threatening head injuries, against landlord and management company, blood alcohol evidence could not be excluded as being more prejudicial than probative, even though plaintiff admitted that she was intoxicated at the time of her fall; defendants asserted a voluntary intoxication defense, which would have provided a complete defense if she was intoxicated, the intoxication was a proximate cause of her injuries, and she was more than 50% at fault, and even if her blood alcohol level was irrelevant to establish intoxication given her admission, it was still relevant to prove the extent to which her intoxication proximately caused her injuries. Wash. Rev. Code Ann. § 5.40.060(1); Wash. R. Evid. 402, 403.

Cases that cite this headnote

[8] **Appeal and Error**
Negligence and torts in general

Trial court's error in excluding blood alcohol evidence in negligence action brought by plaintiff who fell from boyfriend's apartment balcony and suffered life-threatening head injuries against landlord and management company, on basis that its admission would have been more prejudicial than probative because plaintiff had already admitted she was intoxicated, was not harmless; because of the error, defendants did not have the opportunity to present evidence on a key factual issue, whether plaintiff was predominantly liable for her injuries due to her level of intoxication, which may have provided a complete defense to plaintiff's action. Wash. Rev. Code Ann. § 5.40.060(1); Wash. R. Evid. 403.

Cases that cite this headnote

[9] **Evidence**
Results of experiments

Blood alcohol evidence could not be excluded in negligence action brought by plaintiff who fell from boyfriend's apartment's balcony and suffered life-threatening head injuries, against landlord and management company, on basis that test used did not comply with the requirements for evidence in civil or criminal cases arising out of acts alleged to have been committed by a person when driving or in actual physical control of a vehicle while under the influence, when the blood alcohol evidence could have been evidence of intoxication under the non-per-se method of testing, which did not set forth a specific testing standard. Wash. Rev. Code Ann. §§ 46.61.502, 46.61.506.

Cases that cite this headnote

[10] **Evidence**
Grounds for admission

Generally, expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific

community, and (3) the testimony would be helpful to the trier of fact. Wash. R. Evid. 702.

Cases that cite this headnote

[11] **Appeal and Error**
Expert Evidence and Witnesses
Evidence
Determination of question of competency

In determining whether expert testimony is admissible, trial courts are afforded wide discretion, and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion. Wash. R. Evid. 702.

Cases that cite this headnote

[12] **Evidence**
Knowledge, experience, and skill in general

If a witness does not have the specialized training or experience necessary to draw the inference offered, the opinion lacks a proper foundation and is inadmissible under rule governing testimony by experts. Wash. R. Evid. 702.

Cases that cite this headnote

[13] **Evidence**
Necessity of qualification

Even if an expert witness is qualified, testimony from that witness is not admissible if the issue lies outside the witness's area of expertise. Wash. R. Evid. 702.

Cases that cite this headnote

[14] **Evidence**
Speculation, guess, or conjecture

Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded. Wash. R. Evid. 702.

Cases that cite this headnote

[15] **Evidence**
Tendency to mislead or confuse

In negligence action brought by plaintiff, who had fallen from boyfriend's apartment's balcony and suffered life-threatening head injuries, against landlord and management company, opinion testimony of expert qualified as to the effects of alcohol upon the human body, that a person with a blood alcohol content (BAC) of .200 or higher would experience severe psychomotor impairment, could not be excluded on basis that plaintiff had already admitted to being intoxicated, and thus, that BAC evidence would be more prejudicial than probative; defendants asserted a voluntary intoxication defense, which would have provided a complete defense if plaintiff was intoxicated, the intoxication was a proximate cause of her injuries, and she was more than 50% at fault, and even if her blood alcohol level was irrelevant to establish intoxication given her admission, it was still relevant to prove the extent to which her intoxication proximately caused her injuries. Wash. Rev. Code Ann. § 5.40.060(1); Wash. R. Evid. 402, 403, 702.

Cases that cite this headnote

[16] **Alcoholic Beverages**
As to intoxicated or alcoholic consumers

To find an establishment liable for over-serving alcohol under a dramshop theory, a plaintiff must prove that a server furnished intoxicating beverages to an obviously intoxicated person.

Cases that cite this headnote

[17] **Evidence**
Cause and effect
Evidence
Medical testimony

In negligence action brought by plaintiff, who had fallen from boyfriend's apartment's balcony and suffered life-threatening head injuries, against landlord and management

company, trial court did not err in limiting testimony of expert on human injury and accident reconstruction, who was prepared to testify that plaintiff's intoxication would have diminished stability, psychomotor functioning, reaction time performance, and ability to manage complex motor tasks, such as trying to maneuver over a railing, when he was not an expert on how alcohol affects the human body, and his testimony on the issue would have been speculative. Wash. R. Evid. 702.

Cases that cite this headnote

[18] Damages

Medical treatment and care of person injured

A plaintiff in a negligence case may recover only the reasonable value of medical services received, not the total of all bills paid.

Cases that cite this headnote

[19] Damages

Medical treatment and care of person injured

Damages

Expenses

To recover for medical costs in negligence action, the plaintiff must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills.

Cases that cite this headnote

[20] Damages

Expenses

Medical records and bills are relevant to prove past medical expenses in a negligence action only if supported by additional evidence that the treatment and the bills were both necessary and reasonable.

Cases that cite this headnote

[21] Evidence

Value

In negligence action brought by plaintiff, who had fallen from boyfriend's apartment's balcony and suffered life-threatening head injuries, against landlord and management company, trial court did not err in limiting testimony of defense expert witness, a health economist, as to the reasonableness of plaintiff's medical expenses; the defense expert estimated the reasonable value of plaintiff's physician charges by applying the physician's agreed Medicare reimbursement rate to each physician charge, but the fact plaintiff's physicians accepted less in payment than charged did not indicate the charges were unreasonable.

Cases that cite this headnote

[22] Trial

Construction and Effect of Charge as a Whole

Jury instructions are sufficient when they allow a party to argue their theory of the case, are not misleading and, when read as a whole, properly inform the jury of the applicable law, and as long as these conditions are met, the trial court may refuse to give augmenting instructions or instructions that are cumulative, collateral, or repetitive.

Cases that cite this headnote

[23] Trial

Form and arrangement

The pattern jury instructions are not authoritative primary sources of the law and are not binding on trial courts.

Cases that cite this headnote

[24] Appeal and Error

Instructions

Whether a jury instruction reflects an accurate statement of law is reviewed de novo.

Cases that cite this headnote

[25] **Trial**
Language
Trial
Limiting number of instructions

The number and specific language of the jury instructions are matters left to the trial court's discretion.

Cases that cite this headnote

[26] **Negligence**
Particular cases
Negligence
Intoxication
Negligence
Effect of determination on recovery; methods of apportionment

To establish a voluntary intoxication defense, a defendant is required to prove that (1) the plaintiff was under the influence of intoxicating liquor, (2) her condition was a proximate cause of her injury, and (3) she was more than 50% at fault. Wash. Rev. Code Ann. § 5.40.060(1).

Cases that cite this headnote

[27] **Landlord and Tenant**
Warranty of habitability
Landlord and Tenant
Decks, balconies, and patios

Landlord could not be held liable for injuries to plaintiff who fell from balcony in boyfriend's apartment on theory landlord breached its implied and statutory warranty of habitability to plaintiff by failing to repair the rotted railing, when, under the Residential Landlord-Tenant Act of 1973, the warranty of habitability only applied to tenants, and plaintiff was not a tenant. Wash. Rev. Code Ann. § 59.18.060.

Cases that cite this headnote

[28] **Negligence**
Elements in general

In a negligence case, the plaintiff must prove duty, breach, causation, and damages.

Cases that cite this headnote

[29] **Appeal and Error**
Negligence in general
Negligence
Necessity and Existence of Duty

Whether an actionable duty was owed to a plaintiff is a threshold determination and a question of law that is reviewed de novo.

Cases that cite this headnote

[30] **Landlord and Tenant**
Duty Based on Statute or Other Regulation

The duty to keep the premises in habitable condition under the Residential Landlord-Tenant Act of 1973 provides tenants with a negligence cause of action against landlords who fail to do so. Wash. Rev. Code Ann. § 59.18.060.

Cases that cite this headnote

***693** Appeal from King County Superior Court, 15-2-25974-1, Honorable Richard F. McDermott, J.

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PUBLISHED OPINION

Smith, J.

¶1 Kimberly Gerlach sued The Cove Apartments LLC and Weidner Property Management LLC (collectively Cove) after she fell from a second story apartment balcony with a rotted railing and suffered life threatening injuries. Gerlach was extremely intoxicated at the time of the fall. At trial, Cove sought to limit its liability by proving that Gerlach's intoxication was the proximate cause of her damages and that she was more than 50 percent at fault, in accordance with the affirmative defense of voluntary intoxication under RCW 5.40.060(1). Because the trial court abused its discretion by excluding evidence of Gerlach's blood alcohol level at the time of the accident and that exclusion prejudiced Cove's ability to prove Gerlach's intoxication proximately caused her injuries, we reverse and remand for a new trial.

FACTS

¶2 On October 26, 2012, Gerlach and her boyfriend Nathan Miller, along with Colin and Brodie Liddell, [1] went to a birthday party and then to a bar within walking distance of Miller's apartment. Miller lived in a second story unit at The Cove Apartments in Federal Way, which were owned by The Cove Apartments LLC and managed by Weidner Property Management LLC. After the bar closed in the early hours of October 27, Miller ***694** and Colin stopped by a convenience store to buy beer, while Gerlach and Brodie returned to Miller's apartment. Brodie stopped to smoke a cigarette before going inside. While he was smoking, he heard a snap and turned in time to see Gerlach in midair, just before she landed head-first on a concrete step on the ground floor. A rotted railing from Miller's balcony also fell near Gerlach. Gerlach suffered a life threatening head injury as a result of the fall.

¶3 Gerlach sued Cove, alleging breach of contract, violations of the Residential Landlord-Tenant Act of 1973 (RLTA), chapter 59.18 RCW, and negligence. The breach of contract claim was dismissed on summary judgment because Gerlach was not a tenant and had no contractual relationship with Cove.

¶4 Although no one witnessed how Gerlach fell and Gerlach does not remember the events of that night, her theory at trial was that the severely rotted railing on Miller's balcony gave way while she was leaning on it, causing her to fall to the ground. Relying on testimony from a biomechanical expert, Cove proffered an alternative theory: that Gerlach did not have a key to the front door, tried to enter the apartment via the balcony, and fell while trying to climb over the balcony railing from the outside. This theory supported Cove's affirmative defense under RCW 5.40.060(1) that Gerlach was intoxicated at the time of the accident, her intoxication was a proximate cause of her injuries, and she was more than 50 percent at fault. To this end, Cove attempted to introduce evidence that Gerlach's blood alcohol concentration (BAC) at the time of the accident was .238 and expert testimony on how a BAC of that level would affect a person's judgment, psychomotor functions, and cognitive abilities. The trial court excluded this evidence and testimony because it found they were more prejudicial than probative. Instead, the trial court instructed the jury that Gerlach "was under the influence of intoxicating liquor at the time of the accident."

¶5 The jury found that Cove was negligent and that its negligence proximately caused Gerlach's injuries. It also found that Gerlach was contributorily negligent and seven percent at fault. The jury verdict was $3,799,793.78, and the net award to Gerlach was $3,533,808.23.

¶6 Cove appeals.

ANALYSIS

Exclusion of Gerlach's Blood Alcohol Level

¶7 Cove argues that the trial court abused its discretion by excluding evidence of Gerlach's blood alcohol level and that the exclusion was prejudicial. We agree.

[1] [2] [3] ¶8 We reverse a trial court's evidentiary rulings only upon a showing of abuse of discretion. Subia v. Riveland, 104 Wash. App. 105, 113-14, 15 P.3d 658 (2001). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). But an error does not require reversal unless it is prejudicial, and

"[e]rror will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wash.2d 188, 196, 668 P.2d 571 (1983).

[4] [5] [6] ¶9 "All relevant evidence is admissible unless its admissibility is otherwise limited." Salas v. Hi-Tech Erectors, 168 Wash.2d 664, 669, 230 P.3d 583 (2010); ER 402. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " Salas, 168 Wash.2d at 669, 230 P.3d 583 (quoting ER 401). ER 403 allows a trial court to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice ...." "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." Salas, 168 Wash.2d at 671, 230 P.3d 583. Where evidence is undeniably probative of a central issue in the case, the ability of the danger of unfair prejudice to substantially outweigh the probative value of the evidence is " 'quite slim.' " Sisley v. Seattle Sch. Dist. No. 1, 171 Wash. App. 227, 232, 286 P.3d 974 (2012) (internal quotation ***695** marks omitted) (quoting Carson v. Fine, 123 Wash.2d 206, 224, 867 P.2d 610 (1994)).

[7] ¶10 Here, Cove asserted a voluntary intoxication defense against Gerlach. This defense, codified as RCW 5.40.060(1), provides a complete defense to Gerlach's action for personal injury if she was intoxicated, her intoxication was a proximate cause of her injury, and she was more than 50 percent at fault. RCW 5.40.060(1) states:

> [I]t is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault.

¶11 Before trial, Gerlach moved in limine to exclude evidence of a blood test taken by the hospital less than an hour after the accident. The test showed that her serum alcohol measurement was 252 mg/dL, which roughly translates to a BAC of .238. After several hearings, the trial court granted Gerlach's motion because Gerlach offered to stipulate to the jury that she was intoxicated at the time of the accident. The court determined that if Gerlach admitted she was intoxicated, evidence of her blood alcohol level was not necessary to establish a defense under RCW 5.40.060(1). The trial court explained that, under Peralta v. State, 187 Wash.2d 888, 389 P.3d 596 (2017), an admission of intoxication was sufficient to establish intoxication under RCW 5.40.060(1) and the admission of Gerlach's blood alcohol level would have been more prejudicial than probative under ER 403. Because the trial court misapplied Peralta and ER 403, its exclusion of the blood alcohol evidence was an abuse of discretion.

¶12 ER 403 does not support the exclusion of the blood alcohol evidence. Although evidence of Gerlach's blood alcohol level was irrelevant to establish intoxication once she admitted that she was intoxicated, that evidence was still relevant to prove the extent to which her intoxication proximately caused her injuries. To that end, Cove was prepared to offer expert testimony that a person's physical and cognitive limitations at a BAC of .238 make it less likely that she could safely stand on a balcony or climb over a railing. Although Gerlach's high blood alcohol level could stimulate an emotional response in a jury, it is not so prejudicial that its probative value is outweighed. Because Gerlach's percentage of fault was reserved for the jury, the jury should have been able to consider Gerlach's level of intoxication and how it may have affected her physical and cognitive abilities. Geschwind v. Flanagan, 121 Wash.2d 833, 837-38, 854 P.2d 1061 (1993) (the determination of the percentage of total fault attributable to each party is specifically reserved for the trier of fact).

[8] ¶13 Furthermore, the trial court's error in excluding the blood alcohol evidence affected the outcome of the trial. Because of the error, Cove did not have the opportunity to present evidence on a key factual issue: whether Gerlach was predominantly liable for her injuries due to her level of intoxication. See Geschwind, 121 Wash.2d at 839, 854 P.2d 1061 ("[W]hen a person has voluntarily engaged in behavior which increases the risk

of injury, he or she may be held to be predominantly liable for the injuries occurring as a result thereof."). Therefore, the error was not harmless.

¶14 Additionally, the trial court's reliance on Peralta was misplaced. In Peralta, a Washington State Patrol car hit Deborah Peralta after she walked directly into the street and in front of the car. Peralta, 187 Wash.2d at 892, 389 P.3d 596. Peralta sued the State for damages, and the State raised the voluntary intoxication defense in Its answer. Peralta, 187 Wash.2d at 892, 389 P.3d 596. During discovery, the State sent Peralta a request to admit or deny that at the time of the collision, she " 'was under the Influence of intoxicating liquors.' " Peralta, 187 Wash.2d at 893, 389 P.3d 596. Peralta admitted without qualification that she was. Peralta, 187 Wash.2d at 893, 389 P.3d 596. Based on this admission, the trial court concluded as a matter of law that the first element of RCW 5.40.060(1) was met and it excluded Peralta's evidence that she did not appear intoxicated before the accident. ***696** Peralta, 187 Wash.2d at 893-94, 389 P.3d 596. The Supreme Court held that Peralta's admission was clearly an admission of intoxication under RCW 5.40.060(1). Peralta, 187 Wash.2d at 899, 389 P.3d 596. It also held that if she did not intend to admit "intoxication" as that term is statutorily defined (i.e., having a BAC greater than .08 or being unable to drive a motor vehicle), Peralta was required to clarify her admission to reflect that distinction. Peralta, 187 Wash.2d at 904-05, 389 P.3d 596. Because it was not relevant to the issues on appeal, the court did not address whether Peralta's level of intoxication contributed to the jury's finding that her intoxication was a proximate cause of her injuries or its finding that she was more than 50 percent at fault. But the Supreme Court did note that there was ample evidence to support the State's voluntary intoxication defense, meaning there was evidence, other than Peralta's admission, of her intoxication presented at trial. Peralta, 187 Wash.2d at 900 n.6, 389 P.3d 596. Here, by contrast, the exclusion of Gerlach's blood alcohol evidence resulted in a complete absence of evidence as to the extent of her intoxication. For this reason, Peralta does not support the trial court's decision to exclude Gerlach's blood alcohol level.

¶15 Gerlach argues that even if the trial court erred in excluding the blood alcohol evidence, the error did not prejudice Cove because Cove "extensively examined Gerlach's companions concerning the extent and degree of their alcohol consumption before returning to the Cove." The record does not support this contention. None of Gerlach's companions testified as to how many drinks Gerlach consumed that night or that she was extremely intoxicated. For example, Brodie testified that Gerlach was drinking that night but that he could not remember what she had to drink. Colin testified that they all "had a drink" at the birthday party and shared a pitcher of beer at the bar and that based on his own observations, he had no reason to believe Gerlach was impaired that night. Finally, Miller testified that he couldn't remember Gerlach drinking but "would guess that she was." The lack of evidence of Gerlach's degree of intoxication prejudiced Cove's ability to prove its affirmative defense.

[9] ¶16 Alternatively, Gerlach argues that evidence of her blood alcohol level was properly excluded because there was no evidence that the required standards were met. This argument is not persuasive.

¶17 RCW 5.40.060(1) provides that for purposes of the voluntary intoxication defense,

> [t]he standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

RCW 46.61.502 states:

> (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
>
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
>
> ....

(c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

Notably, only subsection (1)(a) of RCW 46.61.502, which sets forth the standard for "per se" intoxication, refers to specific testing standards that must be met for a person's measured level of intoxication to be used against him or her at trial. These testing standards, which are set forth in RCW 46.61.506, need not be met to show that someone is intoxicated under a non-per-se method such as that described in subsection (1)(c) of RCW 46.61.502. State v. Donahue, 105 Wash. App. 67, 76-77, 18 P.3d 608 (2001) (holding that evidence of intoxication from an Oregon hospital blood alcohol test that did ***697** not comply with RCW 46.61.506 standards was admissible to prove a non-per-se offense under RCW 46.61.502).

¶18 At trial, Cove specifically argued that Gerlach's blood alcohol evidence could be proved using the non-per-se method under RCW 46.61.502(1)(c). Because the blood alcohol evidence in this case could be evidence of intoxication under that non-per-se method, the test used need not comply with the requirements of RCW 46.61.506 to be admissible. This was not a proper basis for excluding the evidence.

¶19 Because the trial court abused its discretion in excluding the evidence of Gerlach's blood alcohol level at the time of the accident and the exclusion prejudiced Cove's ability to prove its affirmative defense of voluntary intoxication, reversal is required. We address the following issues, also raised on appeal, because they are likely to arise again on remand.

Expert Testimony

¶20 Cove argues that the trial court abused its discretion by limiting the testimony of Cove's experts, Dr. Frank Vincenzi, Dr. Michael Carhart, and Dr. Thomas Wickizer. We agree that the trial court erred in limiting Dr. Vincenzi's testimony but disagree as to the testimony of Dr. Carhart and Dr. Wickizer.

[10] **[11]** ¶21 "Generally, expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact." Johnston-Forbes v. Matsunaga, 181 Wash.2d 346, 352, 333 P.3d 388 (2014). "When applying this test, trial courts are afforded wide discretion, and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion." Johnston-Forbes, 181 Wash.2d at 355, 333 P.3d 388.

[12] **[13]** **[14]** ¶22 If a witness does not have the specialized training or experience necessary to draw the inference offered, the opinion lacks a proper foundation and is inadmissible under ER 702. Simmons v. City of Othello, 199 Wash. App. 384, 392-93, 399 P.3d 546 (2017). Accordingly, even if an expert witness is qualified, testimony from that witness is not admissible if the issue lies outside the witness's area of expertise. Simmons, 199 Wash. App. at 392, 399 P.3d 546. " 'Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.' " Simmons, 199 Wash. App. at 393, 399 P.3d 546 (quoting Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wash.2d 50, 103, 891 P.2d 718 (1995)).

Dr. Vincenzi

[15] ¶23 On appeal, the parties do not dispute that Dr. Vincenzi was a qualified expert as to the effects of alcohol upon the human body. Dr. Vincenzi completed an analysis that included a conversion of Gerlach's serum alcohol measurement of 252 mg/dL at the hospital to the more commonly used BAC number of .238 at the time of the accident. He also testified in an offer of proof as to the effect of the consumption of alcohol on a person based on his or her blood alcohol level. He opined that a person with a BAC of .200 or higher would experience severe psychomotor impairment.

¶24 The trial court excluded Dr. Vincenzi's testimony at the same time that it erroneously excluded the evidence of Gerlach's blood alcohol level. Dr. Vincenzi's testimony would have been helpful to the jury in understanding the effects of intoxication on a person with a high blood alcohol level. To the extent that the trial court excluded Dr. Vincenzi's testimony based on its erroneous ruling on Gerlach's blood alcohol level, that exclusion was in error.

¶25 Gerlach argues that Dr. Vincenzi's testimony was speculative and without foundation because it was based on the hospital blood test that did not comply with the testing standards of RCW 46.61.506. As explained in the previous section, those testing standards do not bar admission. Therefore, this argument is not persuasive.

[16] ¶26 Gerlach also argues that Dr. Vincenzi's testimony was properly excluded based on Purchase v. Meyer, 108 Wash.2d 220, 737 P.2d 661 (1987), because evidence of ***698** how alcohol affected a person's behavior cannot be based on a blood alcohol test alone. But Purchase was a dramshop liability case and is distinguishable. To find an establishment liable for over-serving alcohol under a dramshop theory, a plaintiff must prove that a server furnished intoxicating beverages to an obviously intoxicated person. Purchase, 108 Wash.2d at 225, 737 P.2d 661. In Purchase, the relevant issue was whether or not it was obvious to a server that the person being served was intoxicated. Purchase, 108 Wash.2d at 227, 737 P.2d 661. The court held that evidence of a person's blood alcohol level alone could not support a finding that a person was "obviously intoxicated" because people can exhibit the effects of intoxication differently. Purchase, 108 Wash.2d at 225-27, 737 P.2d 661.

¶27 This is not a dramshop liability case, and here, there is no requirement that Cove prove Gerlach's intoxication was obvious to others. Rather, the issue in this case is the extent to which Gerlach's extreme intoxication contributed to her injuries. Therefore, Purchase does not control.

¶28 Finally, Gerlach argues that Dr. Vincenzi's testimony was properly excluded because testimony explaining that alcohol Impairs a person's judgment is a matter of common knowledge understood by the average juror and, therefore, not helpful. But, Dr. Vincenzi's testimony was not limited to this basic fact. He explained that a person with a blood alcohol level of .200 or above will have a decrease in inhibitions, psychomotor impairment, and cognitive impairment. He also opined that "[p]sychomotor impairment really starts at levels of .05 (unintelligible), about .05 to .06 or thereabouts and gets worse and worse, more and more impairment, and severe impairment in essentially everyone at levels of [.]200 or above." Dr. Vincenzi's opinion on how a person's physical and cognitive abilities are affected by his or her BAC would have been helpful to the jury and should have been admitted.

Dr. Carhart

[17] ¶29 The trial court did not err in limiting Dr. Carhart's testimony. Dr. Carhart is an expert "in the biomechanics of human injury and accident reconstruction, specializing in the areas of musculoskeletal dynamics, occupant dynamics, human injury tolerance, vehicular rollover, and occupant-to-glazing interaction." Dr. Carhart was prepared to testify that Gerlach's intoxication would have caused her to have "diminished stability, psychomotor functioning, reaction time performance, and ability to manage complex motor tasks, such as trying to maneuver over a railing." He based this opinion on two studies that he cited as authoritative sources. But Dr. Carhart is not an expert in how alcohol affects the human body, and his testimony on this issue would have been speculative. Therefore, the trial court properly excluded Dr. Carhart's testimony on this issue.

Dr. Wickizer

¶30 The trial court also did not abuse its discretion by excluding Dr. Wickizer's expert testimony on the reasonable value of Gerlach's medical expenses.

[18] **[19]** **[20]** ¶31 A plaintiff "may recover only the reasonable value of medical services received, not the total of all bills paid." Patterson v. Horton, 84 Wash. App. 531, 543, 929 P.2d 1125 (1997). "Thus, the plaintiff must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills." Patterson, 84 Wash. App. at 543, 929 P.2d 1125. "In other words, medical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and the bills were both necessary and reasonable." Patterson, 84 Wash. App. at 543, 929 P.2d 1125.

[21] ¶32 Here, Cove intended to call Dr. Wickizer, a health economist, as an expert witness to testify about the medical billing process and provide a comparative analysis of the cost of medical services. Specifically, Dr. Wickizer authored an analysis on the reasonableness of Gerlach's medical expenses, in which he explained that billing for the

same procedures can vary greatly from hospital to hospital and the billed amount is not necessarily reasonable. In the analysis, he recalculated the "reasonable value" of all of Gerlach's medical expenses by applying a ***699** cost-to-charge ratio from the hospital's Federal Cost Report to each hospital inpatient charge. The Federal Cost Reports are compiled by the federal government and include cost and revenue information for all patients receiving care at that hospital. Additionally, Dr. Wickizer estimated the reasonable value of Gerlach's physician charges by applying the physician's agreed Medicare reimbursement rate to each physician charge. Cove intended this testimony to assist the jury in evaluating the reasonableness of Gerlach's medical bills.

¶33 The trial court properly excluded Dr. Wickizer's testimony. Evidence of what Gerlach's physicians accept from Medicaid and how the inpatient charges are affected by Dr. Wickizer's cost-to-charge ratio is not proof that Gerlach's medical expenses were unreasonable. In Hayes v. Wieber Enterprises, Inc., 105 Wash. App. 611, 616, 20 P.3d 496 (2001), the Court of Appeals held that the trial court did not abuse its discretion in refusing to admit evidence of the amount a plaintiff's doctor actually accepted as payment from the insurance company to refute the reasonableness of the billed medical expenses. It reasoned that "[t]he fact that the doctor accepted the first party insurance carrier's limit for his services does not tend to prove his charge for these services was unreasonable." Hayes, 105 Wash. App. at 616, 20 P.3d 496.

¶34 The same is true here. Evidence that, on average, a procedure costs less than the amount charged or that Gerlach's physicians accept a lesser payment for services from Medicare is not helpful to the jury in determining whether her medical expenses were reasonable. Furthermore, Gerlach met her burden to prove the reasonableness of her medical expenses under Patterson because she presented expert testimony other than the medical records and bills themselves. Dr. Lowell Finkleman testified that the medical treatment Gerlach received and the resulting charges were reasonable and customary for this community and consistent with charges he had seen over the years. Therefore, the trial court did not abuse its discretion by refusing to allow Dr. Wickizer to testify.

¶35 Cove argues that Hayes is distinguishable because Dr. Wickizer was not testifying on what was charged versus what was paid. We disagree. Although it is not clear from Dr. Wickizer's analysis whether the revenue figure used in the cost-to-charge ratios reflects the amounts billed or the amounts ultimately received for inpatient services, Dr. Wickizer's analysis of Gerlach's physician charges was based on the physicians' agreed Medicare reimbursement rate. Therefore, the court did not abuse its discretion in refusing to allow Dr. Wickizer to testify as to his analysis.

Instruction on Voluntary Intoxication

¶36 Cove argues that the trial court erred by failing to give Cove's proposed jury instruction on its voluntary intoxication defense, which closely followed the pattern instruction. We disagree.

[22] **[23]** ¶37 Jury instructions are sufficient when they allow a party to argue their theory of the case, are not misleading and, when read as a whole, properly inform the jury of the applicable law. Bodin v. City of Stanwood, 130 Wash.2d 726, 732, 927 P.2d 240 (1996). As long as these conditions are met, the trial court may refuse to give augmenting instructions or instructions that are cumulative, collateral, or repetitive. Bodin, 130 Wash.2d at 732, 927 P.2d 240; Havens v. C&D Plastics, Inc., 124 Wash.2d 158, 165-66, 876 P.2d 435 (1994). " 'The pattern [jury] instructions are not authoritative primary sources of the law' and are not binding on trial courts." Univ. of Wash. v. Gov't Emps. Ins. Co., 200 Wash. App. 455, 475, 404 P.3d 559 (2017) (alteration in original) (quoting 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 0.10, at 3 (6th ed. 2012)).

[24] **[25]** ¶38 Whether a jury instruction reflects an accurate statement of law is reviewed de novo. Joyce v. Dep't of Corrs., 155 Wash.2d 306, 323, 119 P.3d 825 (2005). But " '[t]he number and specific language of the instructions are matters left to the trial court's discretion.' " Leeper v. Dep't of Labor & Indus., 123 Wash.2d 803, 809, 872 P.2d 507 (1994) (quoting Douglas v. Freeman, 117 Wash.2d 242, 256, 814 P.2d 1160 (1991)).

***700** ¶39 The pattern instruction for the voluntary intoxication defense under RCW 5.40.060(1) states:

> It is a defense to an action for damages for [personal injuries] [wrongful death] that the [person injured] [person killed] was then under the influence of [alcohol] [or] [any drug], that this condition was a proximate cause of the [injury] [death], and that the [person injured] [person killed] was more than fifty percent at fault.

6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 16.03, at 213 (6th ed. 2012) (WPI). This instruction is an accurate statement of the law.

¶40 Here, the trial court instructed the jury that

> [a] person who becomes voluntarily intoxicated is held to the same standard of care as one who is not so affected. The intoxication of the plaintiff at the time of the occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.

The court also instructed on contributory negligence:

> If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Cove did not object to either of these instructions. But Cove did object to the trial court's failure to give its proposed instruction on the voluntary intoxication defense, which closely followed WPI 16.03.

[26] ¶41 Although the instructions given by the trial court were not an inaccurate statement of the law, they were not particularly clear. To establish its voluntary intoxication defense, Cove was required to prove that (1) Gerlach was under the influence of intoxicating liquor, (2) her condition was a proximate cause of her injury, and (3) she was more than 50 percent at fault. RCW 5.40.060(1). Instructions 20 and 21, as given, allowed Cove to argue its voluntary intoxication defense. The jury was already instructed that Gerlach was "under the influence of intoxicating liquor at the time of the accident," satisfying the first requirement. Instruction 20 instructed the jury to consider whether Gerlach was negligent as a result of that intoxication, satisfying the second requirement of the defense. And, instruction 21 instructed the jury to determine the percentage of fault attributable to Gerlach, satisfying the third requirement. Given these instructions, Cove was able to argue that Gerlach's intoxication was a proximate cause of her accident and that she was more than 50 percent at fault. But, WPI 16.03 contains a more succinct statement of the elements of the voluntary intoxication defense, and while the trial court did not abuse its discretion by giving instructions 20 and 21, WPI 16.03 is a more appropriate instruction and should be used on remand.

Cove's Duty to Gerlach under the RLTA

[27] ¶42 Cove argues that because Gerlach was not Cove's tenant, the trial court erred in instructing the jury that Cove owed a duty to Gerlach based on the RLTA. We agree.

[28] **[29]** ¶43 In a negligence case, the plaintiff must prove duty, breach, causation, and damages. Nivens v. 7-11 Hoagy's Corner, 133 Wash.2d 192, 198, 943 P.2d 286 (1997). Whether an actionable duty was owed to a plaintiff is a threshold determination and a question of law that this court reviews de novo. Munich v. Skagit Emergency Commc'n Ctr., 175 Wash.2d 871, 877, 288 P.3d 328 (2012).

[30] ¶44 Under the RLTA, landlords have an implied warranty of habitability to tenants. See RCW 59.18.060; Foisy v. Wyman, 83 Wash.2d 22, 28, 515 P.2d 160 (1973). This duty to keep the premises in habitable condition provides tenants with a negligence cause of action against landlords who fail to do so. See Lian v. Stalick, 106 Wash. App. 811, 818, 25 P.3d 467 (2001). But *Restatement (Second) of Property* § 17.6 (1977) states:

> A landlord is subject to liability for physical harm caused to the *tenant and* ***701** *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.

(Emphasis added.) Arguably, the language of section 17.6 permits a tenant's guest to recover from a landlord directly for breach of an implied warranty of habitability, a statute, or a regulation. But, we recently held that Washington has only adopted section 17.6 in cases where a landlord's negligence is alleged by a tenant and that the section has not been adopted in the context of claims by nontenants. Phillips v. Greco, —— Wash. App. 2d ——, 433 P.3d 509, 511 (2019). Therefore, Gerlach cannot base any duty owed by Cove upon section 17.6.

¶45 Here, Gerlach sued Cove for negligence, claiming it breached its implied and statutory warranty of habitability to Gerlach by failing to repair the rotted railing. Cove moved for partial summary judgment, arguing that Gerlach's negligence claim could not proceed because Gerlach was not a tenant and the implied and statutory warranty of habitability only applies to tenants under the RLTA. The trial court denied Cove's motion for summary judgment and instructed the jury on a landlord's duties under the RLTA. Because no Washington law has extended section 17.6 to apply to nontenants, the trial court erred by denying Cove's motion for summary judgment on this cause of action and instructing the jury that Cove could be liable to Gerlach for a violation of the RLTA. We hold that this cause of action cannot go forward on remand.

¶46 We reverse the jury verdict in favor of Gerlach and remand for retrial of Gerlach's negligence action against Cove.

WE CONCUR:

Andrus, J.

Schindler, J.

All Citations

437 P.3d 690

Footnotes

1 Because Colin and Brodie Liddell have the same last name, this opinion refers to each by his first name.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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May 13, 2019

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CASE #: 77179-5-I
Kimberly Gerlach, Respondent v. The Cove Apartments, et al, Appellants
King County, Cause No. 15-2-25974-1 KNT

Counsel:

Enclosed is a copy of the order and opinion filed in the above-referenced appeal which states in part:

> "We reverse the jury verdict in favor of Gerlach and remand for retrial of the issues of liability and allocation of fault in Gerlach's negligence action against Cove."

App. B

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Richard McDermott
Reporter of Decisions

FILED
5/13/2019
Court of Appeals
Division I
State of Washington

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

KIMBERLY J. GERLACH, Respondent, v. THE COVE APARTMENTS, LLC, a Washington corporation; and WEIDNER PROPERTY MANAGEMENT, LLC, a Washington corporation, Appellants, and WEIDNER APARTMENT HOMES, a Washington business entity, dba The Cove Apartments, and WEIDNER ASSET MANAGEMENT LLC, a Washington corporation, Defendants.	No. 77179-5-I ORDER GRANTING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

Respondent, Kimberly J. Gerlach, has filed a motion for reconsideration of the opinion filed in the above matter on March 18, 2019. Appellants, The Cove Apartments LLC and Weidner Property Management LLC, have filed a response to respondent's motion. The court has determined that respondent's motion for reconsideration should be granted, the opinion should be withdrawn and a substitute opinion be filed. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is granted. It is further

ORDERED that the opinion filed on March 18, 2019, is withdrawn and a substitute opinion be filed.

2019 WL 2083307
Only the Westlaw citation is currently available.
Court of Appeals of Washington, Division 1.

KIMBERLY J. GERLACH, Respondent,
v.
THE COVE APARTMENTS, LLC, a Washington corporation; and WEIDNER PROPERTY MANAGEMENT, LLC, a Washington corporation, Appellants,
and
WEIDNER APARTMENT HOMES, a Washington business entity, dba The Cove Apartments, and WEIDNER ASSET MANAGEMENT LLC, a Washington corporation, Defendants.

No. 77179-5-I
|
FILED: May 13, 2019

ORDER GRANTING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

***1** Respondent, Kimberly J. Gerlach, has filed a motion for reconsideration of the opinion filed in the above matter on March 18, 2019. Appellants, The Cove Apartments LLC and Weidner Property Management LLC, have filed a response to respondent's motion. The court has determined that respondent's motion for reconsideration should be granted, the opinion should be withdrawn and a substitute opinion be filed. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is granted. It is further

ORDERED that the opinion filed on March 18, 2019, is withdrawn and a substitute opinion be filed.

WE CONCUR:

SMITH, J.

Kimberly Gerlach sued The Cove Apartments LLC and Weidner Property Management LLC (collectively Cove) after she fell from a second story apartment balcony with a rotted railing and suffered life threatening injuries. Gerlach was extremely intoxicated at the time of the fall. At trial, Cove sought to limit its liability by proving that Gerlach's intoxication was the proximate cause of her damages and that she was more than 50 percent at fault, in accordance with the affirmative defense of voluntary intoxication under RCW 5.40.060(1). Because the trial court abused its discretion by excluding evidence of Gerlach's blood alcohol level at the time of the accident and that exclusion prejudiced Cove's ability to prove Gerlach's intoxication proximately caused her injuries, we reverse and remand for a new trial.

FACTS

On October 26, 2012, Gerlach and her boyfriend Nathan Miller, along with Colin and Brodie Liddell, [1] went to a birthday party and then to a bar within walking distance of Miller's apartment. Miller lived in a second story unit at The Cove Apartments in Federal Way, which were owned by The Cove Apartments LLC and managed by Weider Property Management LLC. After the bar closed in the early hours of October 27, Miller and Colin stopped by a convenience store to buy beer, while Gerlach and Brodie returned to Miller's apartment. Brodie stopped to smoke a cigarette before going inside. While he was smoking, he heard a snap and turned in time to see Gerlach in midair, just before she landed head-first on a concrete step on the ground floor. A rotted railing from Miller's balcony also fell near Gerlach. Gerlach suffered a life threatening head injury as a result of the fall.

Gerlach sued Cove, alleging breach of contract, violations of the Residential Landlord-Tenant Act of 1973 (RLTA), chapter 59.18 RCW, and negligence. The breach of contract claim was dismissed on summary judgment because Gerlach was not a tenant and had no contractual relationship with Cove.

Although no one witnessed how Gerlach fell and Gerlach does not remember the events of that night, her theory at trial was that the severely rotted railing on Miller's balcony gave way while she was leaning on it, causing her to fall to the ground. Relying on testimony from a biomechanical expert, Cove proffered an alternative theory: that Gerlach did not have a key to the front door, tried to enter the apartment via the balcony, and fell while trying to climb over the balcony railing from the outside.

This theory supported Cove's affirmative defense under RCW 5.40.060(1) that Gerlach was intoxicated at the time of the accident, her intoxication was a proximate cause of her injuries, and she was more than 50 percent at fault. To this end, Cove attempted to introduce evidence that Gerlach's blood alcohol concentration (BAC) at the time of the accident was .238 and expert testimony on how a BAC of that level would affect a person's judgment, psychomotor functions, and cognitive abilities. The trial court excluded this evidence and testimony because it found they were more prejudicial than probative. Instead, the trial court instructed the jury that Gerlach "was under the influence of intoxicating liquor at the time of the accident."

***2** The jury found that Cove was negligent and that its negligence proximately caused Gerlach's injuries. It also found that Gerlach was contributorily negligent and seven percent at fault. The jury verdict was $3,799,793.78, and the net award to Gerlach was $3,533,808.23.

Cove appeals.

ANALYSIS

Exclusion of Gerlach's Blood Alcohol Level

Cove argues that the trial court abused its discretion by excluding evidence of Gerlach's blood alcohol level and that the exclusion was prejudicial. We agree.

We reverse a trial court's evidentiary rulings only upon a showing of abuse of discretion. Subia v. Riveland, 104 Wn. App. 105, 113-14, 15 P.3d 658 (2001). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). But an error does not require reversal unless it is prejudicial, and "[e]rror will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

"All relevant evidence is admissible unless its admissibility is otherwise limited." Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 669, 230 P.3d 583 (2010); ER 402. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " Salas, 168 Wn.2d at 669 (quoting ER 401). ER 403 allows a trial court to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice ...." "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." Salas, 168 Wn.2d at 671. Where evidence is undeniably probative of a central issue in the case, the ability of the danger of unfair prejudice to substantially outweigh the probative value of the evidence is " 'quite slim.' " Sisley v. Seattle Sch. Dist. No. 1, 171 Wn. App. 227, 232, 286 P.3d 974 (2012) (internal quotation marks omitted) (quoting Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994)).

Here, Cove asserted a voluntary intoxication defense against Gerlach. This defense, codified as RCW 5.40.060(1), provides a complete defense to Gerlach's action for personal injury if she was intoxicated, her intoxication was a proximate cause of her injury, and she was more than 50 percent at fault. RCW 5.40.060(1) states:

> [I]t is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault.

Before trial, Gerlach moved in limine to exclude evidence of a blood test taken by the hospital less than an hour after the accident. The test showed that her serum alcohol measurement was 252 mg/dL, which roughly translates to a BAC of .238. After several hearings, the trial court granted Gerlach's motion because Gerlach offered to stipulate to the jury that she was intoxicated at the time of the accident. The court determined that if Gerlach admitted she was intoxicated, evidence of her blood alcohol level was not necessary to establish a defense

under RCW 5.40.060(1). The trial court explained that, under Peralta v. State, 187 Wn.2d 888, 389 P.3d 596 (2017), an admission of intoxication was sufficient to establish intoxication under RCW 5.40.060(1) and the admission of Gerlach's blood alcohol level would have been more prejudicial than probative under ER 403. Because the trial court misapplied Peralta and ER 403, its exclusion of the blood alcohol evidence was an abuse of discretion.

*3 ER 403 does not support the exclusion of the blood alcohol evidence. Although evidence of Gerlach's blood alcohol level was irrelevant to establish intoxication once she admitted that she was intoxicated, that evidence was still relevant to prove the extent to which her intoxication proximately caused her injuries. To that end, Cove was prepared to offer expert testimony that a person's physical and cognitive limitations at a BAC of .238 make it less likely that she could safely stand on a balcony or climb over a railing. Although Gerlach's high blood alcohol level could stimulate an emotional response in a jury, it is not so prejudicial that its probative value is outweighed. Because Gerlach's percentage of fault was reserved for the jury, the jury should have been able to consider Gerlach's level of intoxication and how it may have affected her physical and cognitive abilities. Geschwind v. Flanagan, 121 Wn.2d 833, 837-38, 854 P.2d 1061 (1993) (the determination of the percentage of total fault attributable to each party is specifically reserved for the trier of fact).

Furthermore, the trial court's error in excluding the blood alcohol evidence affected the outcome of the trial. Because of the error, Cove did not have the opportunity to present evidence on a key factual issue: whether Gerlach was predominantly liable for her injuries due to her level of intoxication. See Geschwind, 121 Wn.2d at 839 ("[W]hen a person has voluntarily engaged in behavior which increases the risk of injury, he or she may be held to be predominantly liable for the injuries occurring as a result thereof."). Therefore, the error was not harmless.

Additionally, the trial court's reliance on Peralta was misplaced. In Peralta, a Washington State Patrol car hit Deborah Peralta after she walked directly into the street and in front of the car. Peralta, 187 Wn.2d at 892. Peralta sued the State for damages, and the State raised the voluntary intoxication defense in its answer. Peralta, 187 Wn.2d at 892. During discovery, the State sent Peralta a request to admit or deny that at the time of the collision, she ' "was under the influence of intoxicating liquors.' " Peralta, 187 Wn.2d at 893. Peralta admitted without qualification that she was. Peralta, 187 Wn.2d at 893. Based on this admission, the trial court concluded as a matter of law that the first element of RCW 5.40.060(1) was met and it excluded Peralta's evidence that she did not appear intoxicated before the accident. Peralta, 187 Wn.2d at 893-94. The Supreme Court held that Peralta's admission was clearly an admission of intoxication under RCW 5.40.060(1). Peralta, 187 Wn.2d at 899. It also held that if she did not intend to admit "intoxication" as that term is statutorily defined (i.e., having a BAC greater than .08 or being unable to drive a motor vehicle), Peralta was required to clarify her admission to reflect that distinction. Peralta, 187 Wn.2d at 904-05. Because it was not relevant to the issues on appeal, the court did not address whether Peralta's level of intoxication contributed to the jury's finding that her intoxication was a proximate cause of her injuries or its finding that she was more than 50 percent at fault. But the Supreme Court did note that there was ample evidence to support the State's voluntary intoxication defense, meaning there was evidence, other than Peralta's admission, of her intoxication presented at trial. Peralta, 187 Wn.2d at 900 n.6. Here, by contrast, the exclusion of Gerlach's blood alcohol evidence resulted in a complete absence of evidence as to the extent of her intoxication. For this reason, Peralta does not support the trial court's decision to exclude Gerlach's blood alcohol level.

Gerlach argues that even if the trial court erred in excluding the blood alcohol evidence, the error did not prejudice Cove because Cove "extensively examined Gerlach's companions concerning the extent and degree of their alcohol consumption before returning to the Cove." The record does not support this contention. None of Gerlach's companions testified as to how many drinks Gerlach consumed that night or that she was extremely intoxicated. For example, Brodie testified that Gerlach was drinking that night but that he could not remember what she had to drink. Colin testified that they all "had a drink" at the birthday party and shared a pitcher of beer at the bar and that based on his own observations, he had no reason to believe Gerlach was impaired that night. Finally, Miller testified that he couldn't remember Gerlach drinking but "would guess that she was." The lack of evidence of Gerlach's degree of intoxication prejudiced Cove's ability to prove its affirmative defense.

*4 Alternatively, Gerlach argues that evidence of her blood alcohol level was properly excluded because there was no evidence that the required standards were met. This argument is not persuasive.

RCW 5.40.060(1) provides that for purposes of the voluntary intoxication defense,

> [t]he standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

RCW 46.61.502 states:

> (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
>
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
>
> ....
>
> (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
>
> (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

Notably, only subsection (1)(a) of RCW 46.61.502, which sets forth the standard for "per se" intoxication, refers to specific testing standards that must be met for a person's measured level of intoxication to be used against him or her at trial. These testing standards, which are set forth in RCW 46.61.506, need not be met to show that someone is intoxicated under a non-per-se method such as that described in subsection (1)(c) of RCW 46.61.502. State v. Donahue, 105 Wn. App. 67, 76-77, 18 P.3d 608 (2001) (holding that evidence of intoxication from an Oregon hospital blood alcohol test that did not comply with RCW 46.61.506 standards was admissible to prove a non-per-se offense under RCW 46.61.502).

At trial, Cove specifically argued that Gerlach's blood alcohol evidence could be proved using the non-per-se method under RCW 46.61.502(1)(c). Because the blood alcohol evidence in this case could be evidence of intoxication under that non-per-se method, the test used need not comply with the requirements of RCW 46.61.506 to be admissible. This was not a proper basis for excluding the evidence.

Because the trial court abused its discretion in excluding the evidence of Gerlach's blood alcohol level at the time of the accident and the exclusion prejudiced Cove's ability to prove its affirmative defense of voluntary intoxication, reversal is required. We address the following issues, also raised on appeal, because they are likely to arise again on remand.

Expert Testimony

Cove argues that the trial court abused its discretion by limiting the testimony of Cove's experts, Dr. Frank Vincenzi, Dr. Michael Carhart, and Dr. Thomas Wickizer. We agree that the trial court erred in limiting Dr. Vincenzi's testimony but disagree as to the testimony of Dr. Carhart and Dr. Wickizer.

"Generally, expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact." Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 352, 333 P.3d 388 (2014). "When applying this test, trial courts are afforded wide discretion, and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion." Johnston-Forbes, 181 Wn.2d at 355.

*5 If a witness does not have the specialized training or experience necessary to draw the inference offered, the opinion lacks a proper foundation and is inadmissible under ER 702. Simmons v. City of Othello, 199 Wn. App. 384, 392-93, 399 P.3d 546 (2017). Accordingly, even if an

expert witness is qualified, testimony from that witness is not admissible if the issue lies outside the witness's area of expertise. Simmons, 199 Wn. App. at 392. '"Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.' " Simmons, 199 Wn. App. at 393 (quoting Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 103, 891 P.2d 718 (1995)).

Dr. Vincenzi

On appeal, the parties do not dispute that Dr. Vincenzi was a qualified expert as to the effects of alcohol upon the human body. Dr. Vincenzi completed an analysis that included a conversion of Gerlach's serum alcohol measurement of 252 mg/dL at the hospital to the more commonly used BAC number of .238 at the time of the accident. He also testified in an offer of proof as to the effect of the consumption of alcohol on a person based on his or her blood alcohol level. He opined that a person with a BAC of .200 or higher would experience severe psychomotor impairment.

The trial court excluded Dr. Vincenzi's testimony at the same time that it erroneously excluded the evidence of Gerlach's blood alcohol level. Dr. Vincenzi's testimony would have been helpful to the jury in understanding the effects of intoxication on a person with a high blood alcohol level. To the extent that the trial court excluded Dr. Vincenzi's testimony based on its erroneous ruling on Gerlach's blood alcohol level, that exclusion was in error.

Gerlach argues that Dr. Vincenzi's testimony was speculative and without foundation because it was based on the hospital blood test that did not comply with the testing standards of RCW 46.61.506. As explained in the previous section, those testing standards do not bar admission. Therefore, this argument is not persuasive.

Gerlach also argues that Dr. Vincenzi's testimony was properly excluded based on Purchase v. Meyer, 108 Wn.2d 220, 737 P.2d 661 (1987), because evidence of how alcohol affected a person's behavior cannot be based on a blood alcohol test alone. But Purchase was a dramshop liability case and is distinguishable. To find an establishment liable for over-serving alcohol under a dramshop theory, a plaintiff must prove that a server furnished intoxicating beverages to an obviously intoxicated person. Purchase, 108 Wn.2d at 225. In Purchase, the relevant issue was whether or not it was obvious to a server that the person being served was intoxicated. Purchase, 108 Wn.2d at 227. The court held that evidence of a person's blood alcohol level alone could not support a finding that a person was "obviously intoxicated" because people can exhibit the effects of intoxication differently. Purchase, 108 Wn.2d at 225-27.

This is not a dramshop liability case, and here, there is no requirement that Cove prove Gerlach's intoxication was obvious to others. Rather, the issue in this case is the extent to which Gerlach's extreme intoxication contributed to her injuries. Therefore, Purchase does not control.

Finally, Gerlach argues that Dr. Vincenzi's testimony was properly excluded because testimony explaining that alcohol impairs a person's judgment is a matter of common knowledge understood by the average juror and, therefore, not helpful. But, Dr. Vincenzi's testimony was not limited to this basic fact. He explained that a person with a blood alcohol level of .200 or above will have a decrease in inhibitions, psychomotor impairment, and cognitive impairment. He also opined that "[p]sychomotor impairment really starts at levels of .05 (unintelligible), about .05 to .06 or thereabouts and gets worse and worse, more and more impairment, and severe impairment in essentially everyone at levels of [.]200 or above." Dr. Vincenzi's opinion on how a person's physical and cognitive abilities are affected by his or her BAC would have been helpful to the jury and should have been admitted.

Dr. Carhart

***6** The trial court did not err in limiting Dr. Carhart's testimony. Dr. Carhart is an expert "in the biomechanics of human injury and accident reconstruction, specializing in the areas of musculoskeletal dynamics, occupant dynamics, human injury tolerance, vehicular rollover, and occupant-to-glazing interaction." Dr. Carhart was prepared to testify that Gerlach's intoxication would have caused her to have "diminished stability, psychomotor functioning, reaction time performance, and ability to manage complex motor tasks, such as trying to maneuver over a railing." He based this opinion on two studies that he cited as authoritative sources. But Dr. Carhart is not

an expert in how alcohol affects the human body, and his testimony on this issue would have been speculative. Therefore, the trial court properly excluded Dr. Carhart's testimony on this issue.

Dr. Wickizer

The trial court also did not abuse its discretion by excluding Dr. Wickizer's expert testimony on the reasonable value of Gerlach's medical expenses.

A plaintiff "may recover only the reasonable value of medical services received, not the total of all bills paid." Patterson v. Horton, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997). "Thus, the plaintiff must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills." Patterson, 84 Wn. App. at 543. "In other words, medical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and the bills were both necessary and reasonable." Patterson, 84 Wn. App. at 543.

Here, Cove intended to call Dr. Wickizer, a health economist, as an expert witness to testify about the medical billing process and provide a comparative analysis of the cost of medical services. Specifically, Dr. Wickizer authored an analysis on the reasonableness of Gerlach's medical expenses, in which he explained that billing for the same procedures can vary greatly from hospital to hospital and the billed amount is not necessarily reasonable. In the analysis, he recalculated the "reasonable value" of all of Gerlach's medical expenses by applying a cost-to-charge ratio from the hospital's Federal Cost Report to each hospital inpatient charge. The Federal Cost Reports are compiled by the federal government and include cost and revenue information for all patients receiving care at that hospital. Additionally, Dr. Wickizer estimated the reasonable value of Gerlach's physician charges by applying the physician's agreed Medicare reimbursement rate to each physician charge. Cove intended this testimony to assist the jury in evaluating the reasonableness of Gerlach's medical bills.

The trial court properly excluded Dr. Wickizer's testimony. Evidence of what Gerlach's physicians accept from Medicaid and how the inpatient charges are affected by Dr. Wickizer's cost-to-charge ratio is not proof that Gerlach's medical expenses were unreasonable. In Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 616, 20 P.3d 496 (2001), the Court of Appeals held that the trial court did not abuse its discretion in refusing to admit evidence of the amount a plaintiff's doctor actually accepted as payment from the insurance company to refute the reasonableness of the billed medical expenses. It reasoned that "[t]he fact that the doctor accepted the first party insurance carrier's limit for his services does not tend to prove his charge for these services was unreasonable." Hayes, 105 Wn. App. at 616.

The same is true here. Evidence that, on average, a procedure costs less than the amount charged or that Gerlach's physicians accept a lesser payment for services from Medicare is not helpful to the jury in determining whether her medical expenses were reasonable. Furthermore, Gerlach met her burden to prove the reasonableness of her medical expenses under Patterson because she presented expert testimony other than the medical records and bills themselves. Dr. Lowell Finkleman testified that the medical treatment Gerlach received and the resulting charges were reasonable and customary for this community and consistent with charges he had seen over the years. Therefore, the trial court did not abuse its discretion by refusing to allow Dr. Wickizer to testify.

*7 Cove argues that Hayes is distinguishable because Dr. Wickizer was not testifying on what was charged versus what was paid. We disagree. Although it is not clear from Dr. Wickizer's analysis whether the revenue figure used in the cost-to-charge ratios reflects the amounts billed or the amounts ultimately received for inpatient services, Dr. Wickizer's analysis of Gerlach's physician charges was based on the physicians' agreed Medicare reimbursement rate. Therefore, the court did not abuse its discretion in refusing to allow Dr. Wickizer to testify as to his analysis.

Instruction on Voluntary Intoxication

Cove argues that the trial court erred by failing to give Cove's proposed jury instruction on its voluntary intoxication defense, which closely followed the pattern instruction. We disagree.

Jury instructions are sufficient when they allow a party to argue their theory of the case, are not misleading and,

when read as a whole, properly inform the jury of the applicable law. Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). As long as these conditions are met, the trial court may refuse to give augmenting instructions or instructions that are cumulative, collateral, or repetitive. Bodin, 130 Wn.2d at 732; Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 165-66, 876 P.2d 435 (1994). "The pattern [jury] instructions are not authoritative primary sources of the law' and are not binding on trial courts." Univ. of Wash. v. Gov't Emps. Ins. Co., 200 Wn. App. 455, 475, 404 P.3d 559 (2017) (alteration in original) (quoting 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 0.10, at 3 (6th ed. 2012)).

Whether a jury instruction reflects an accurate statement of law is reviewed de novo. Joyce v. Dep't of Corrs., 155 Wn.2d 306, 323, 119 P.3d 825 (2005). But "'[t]he number and specific language of the instructions are matters left to the trial court's discretion.' " Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 809, 872 P.2d 507 (1994) (quoting Douglas v. Freeman, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991)).

The pattern instruction for the voluntary intoxication defense under RCW 5.40.060(1) states:

> It is a defense to an action for damages for [personal injuries] [wrongful death] that the [person injured] [person killed] was then under the influence of [alcohol] [or] [any drug], that this condition was a proximate cause of the [injury] [death], and that the [person injured] [person killed] was more than fifty percent at fault.

6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 16.03, at 213 (6th ed. 2012) (WPI). This instruction is an accurate statement of the law.

Here, the trial court instructed the jury that

> [a] person who becomes voluntarily intoxicated is held to the same standard of care as one who is not so affected. The intoxication of the plaintiff at the time of the occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.

The court also instructed on contributory negligence:

> If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Cove did not object to either of these instructions. But Cove did object to the trial court's failure to give its proposed instruction on the voluntary intoxication defense, which closely followed WPI 16.03.

***8** Although the instructions given by the trial court were not an inaccurate statement of the law, they were not particularly clear. To establish its voluntary intoxication defense, Cove was required to prove that (1) Gerlach was under the influence of intoxicating liquor, (2) her condition was a proximate cause of her injury, and (3) she was more than 50 percent at fault. RCW 5.40.060(1). Instructions 20 and 21, as given, allowed Cove to argue its voluntary intoxication defense. The jury was already instructed that Gerlach was "under the influence of intoxicating liquor at the time of the accident," satisfying the first requirement. Instruction 20 instructed the jury to consider whether Gerlach was negligent as a result of that intoxication, satisfying the second requirement of the defense. And, instruction 21 instructed the jury to

determine the percentage of fault attributable to Gerlach, satisfying the third requirement. Given these instructions, Cove was able to argue that Gerlach's intoxication was a proximate cause of her accident and that she was more than 50 percent at fault. But, WPI 16.03 contains a more succinct statement of the elements of the voluntary intoxication defense, and while the trial court did not abuse its discretion by giving instructions 20 and 21, WPI 16.03 is a more appropriate instruction and should be used on remand.

Cove's *Duty to Gerlach under the RLTA*

Cove argues that because Gerlach was not Cove's tenant, the trial court erred in instructing the jury that Cove owed a duty to Gerlach based on the RLTA. We agree.

In a negligence case, the plaintiff must prove duty, breach, causation, and damages. Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 198, 943 P.2d 286 (1997). Whether an actionable duty was owed to a plaintiff is a threshold determination and a question of law that this court reviews de novo. Munich v. Skagit Emergency Commc'n Ctr., 175 Wn.2d 871, 877, 288 P.3d 328 (2012).

Under the RLTA, landlords have an implied warranty of habitability to tenants. See RCW 59.18.060; Foisv v. Wyman, 83 Wn.2d 22, 28, 515 P.2d 160 (1973). This duty to keep the premises in habitable condition provides tenants with a negligence cause of action against landlords who fail to do so. See Lian v. Stalick, 106 Wn. App. 811, 818, 25 P.3d 467 (2001). But *Restatement (Second) of Property §* 17.6 (1977) states:

> 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.

(Emphasis added.) Arguably, the language of section 17.6 permits a tenant's guest to recover from a landlord directly for breach of an implied warranty of habitability, a statute, or a regulation. But, we recently held that Washington has only adopted section 17.6 in cases where a landlord's negligence is alleged by a tenant and that the section has not been adopted in the context of claims by nontenants. Phillips v. Greco, __ Wn. App. 2d __, 433 P.3d 509, 511 (2019). Therefore, Gerlach cannot base any duty owed by Cove upon section 17.6.

Here, Gerlach sued Cove for negligence, claiming it breached its implied and statutory warranty of habitability to Gerlach by failing to repair the rotted railing. Cove moved for partial summary judgment, arguing that Gerlach's negligence claim could not proceed because Gerlach was not a tenant and the implied and statutory warranty of habitability only applies to tenants under the RLTA. The trial court denied Cove's motion for summary judgment and instructed the jury on a landlord's duties under the RLTA. Because no Washington law has extended section 17.6 to apply to nontenants, the trial court erred by denying Cove's motion for summary judgment on this cause of action and instructing the jury that Cove could be liable to Gerlach for a violation of the RLTA. We hold that this cause of action cannot go forward on remand.

We reverse the jury verdict in favor of Gerlach and remand for retrial of the issues of liability and allocation of fault in Gerlach's negligence action against Cove.

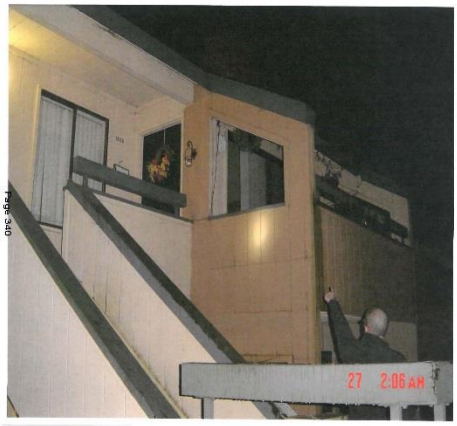
All Citations

--- P.3d ----, 2019 WL 2083307

Footnotes

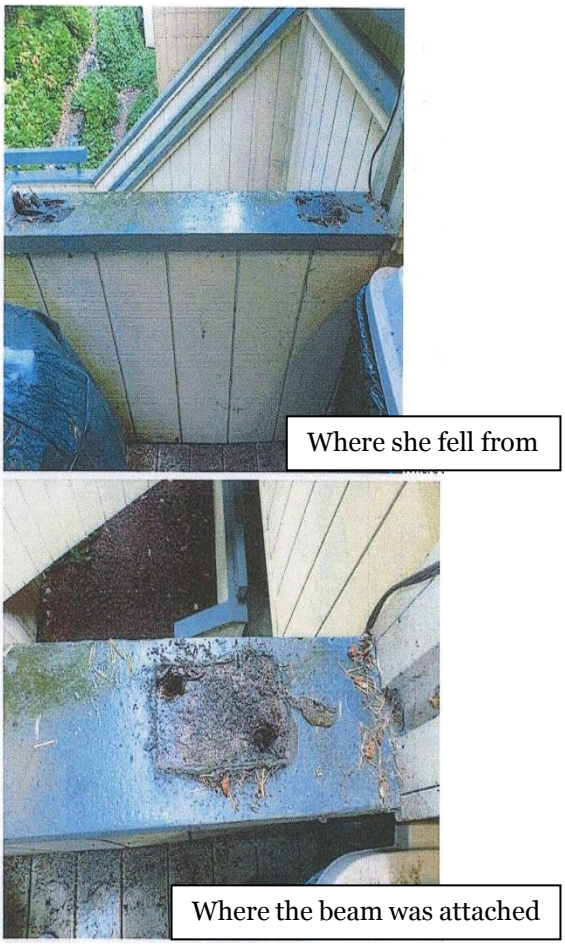
1 Because Colin and Brodie Liddell have the same last name, this opinion refers to each by his first name.

Appendix C



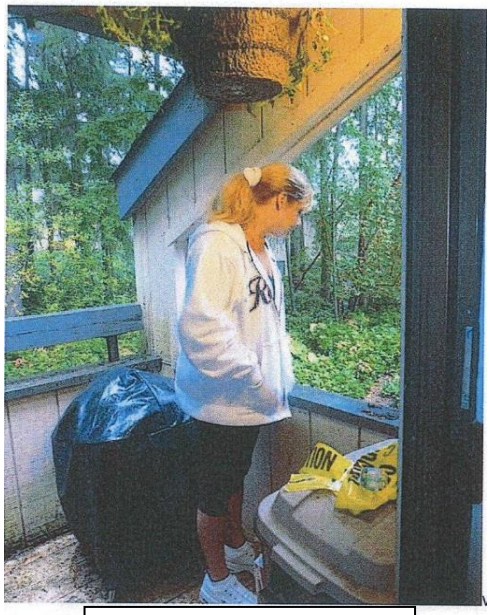
(CP 340)

(CP 256)



(CP 638, Ex. 36) [1]

[1]Weidner's manager Johnson conducted an investigation and took photographs, which she captioned, the day after Gerlach's injury. (Ex. 36; CP 626, 628, 638, 640 and 644; RP 835) Johnsons captions, depicted here, are verbatim, but have been enlarged for legibility.



Where she was standing

(CP 644; Ex. 36)[2]

The Beam that was detached from fall

(CP 628; Ex. 36)

[2] The left photo depicts Johnson's determination where Gerlach had been standing before the balcony gave way and the direction she fell, a conclusion Johnson maintained for the duration of her employment with Weidner. (RP 838-40)

SMITH GOODFRIEND, PS

June 12, 2019 - 3:44 PM

Filing Petition for Review

Transmittal Information

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Kimberly Gerlach, Respondent v. The Cove Apartments, et al, Appellants (771795)

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