

No. 75141-7 – I

COURT OF APPEALS  
DIVISION 1  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2016 OCT 29 PM 3:18

---

CHRISTINE A. TOLMAN,

Plaintiff/Appellant,

v.

KEITH S. JOHNSON, COLONIAL PARK, LLC,

Defendants/Respondents.

---

APPEAL FROM THE SUPERIOR COURT  
FOR SKAGIT COUNTY  
THE HONORABLE BRIAN L. STILES

---

*CORRECTED* REPLY BRIEF OF APPELLANT TOLMAN

---

LUVERA LAW FIRM

David Beninger, WSBA 18432  
Andrew Hoyal, WSBA 21349  
Patricia Anderson, WSBA 17620

701 Fifth Avenue, Suite 6700  
Seattle, WA 98104  
(206) 467-6090  
Attorneys for Plaintiff/Appellant

## TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ARGUMENT .....	3
A. Plaintiff Pled, Pursued and Prevailed on her Statutory MHLTA Action, Entitling her to Statutory Attorney Fees. ....	3
B. The MHLTA Allows Remedies for Both Attorney Fees and Personal Injury Damages; They are Not Mutually Exclusive.....	6
C. A Separate Common Law Action is Irrelevant to the MHLTA’s Express Attorney Fee Remedy; Common Law Supplements and Does Not Supplant, Supersede or Limit MHLTA Remedies.....	9
D. Defendants’ “Alternative” Concession That Plaintiff is Entitled to a Fee, at Least Through Summary Judgment, Proves the Trial Court Committed Reversible Error in Denying Any Fees. ....	17
E. Plaintiff is Entitled to Reasonable Attorney Fees under Defendants’ Rental Contract Provision for Attorney Fees and Costs for “Any Legal Action Arising out of this Agreement.”.....	17
F. The Trial Court Determines the Reasonableness of Fees. ....	21
G. Plaintiff is the Prevailing Party; Comparing Non-Comparables Does Not Defeat Her Statutory and Contract Right to Fees. ....	23
APPENDIX.....	25

## TABLE OF AUTHORITIES

### State Cases

<i>Magnussen v. Tawney</i> , 109 Wn. App. 272, 34 P.3d 899 (2001) .....	24
<i>Aspon v. Loomis</i> , 62 Wn. App. 818, 816 P.2d 751 (1991) .....	12
<i>Birchler v. Castello Land Co.</i> , 133 Wn.2d 106, 942 P.2d 968 (1997) .....	6
<i>Coleman v. Hoffman</i> , 115 Wn. App. 853, 64 P.3d 65 (2003) .....	11
<i>Cook v. Vennigerholz</i> , 44 Wn.2d 612, 269 P.2d 824 (1954) .....	5
<i>Degel v. Majestic Mobile Manor, Inc.</i> , 129 Wn.2d 43, 914 P.2d 728 (1996) .....	9, 10, 11
<i>Geise v. Lee</i> , 84 Wash.2d 866, 529 P.2d 1054 (1975) .....	10
<i>Hughes v. Chehalis Sch. Dist. No. 302</i> , 61 Wn.2d 222, 377 P.2d 642 (1963) .....	11
<i>Landis &amp; Landis Const. LLC v. Nation</i> , 171 Wn. App. 157, 286 P.3d 979 (2012) .....	9
<i>Lian v. Stalick</i> , 106 Wn. App. 811, 25 P.3d 467 (2001) .....	7
<i>Martini v. Post</i> , 178 Wn. App. 153, 313 P.3d 473 (2013) .....	6, 7, 11
<i>McCutcheon v. United Homes Corp.</i> , 79 Wn.2d 443, 486 P.2d 1093 (1971) .....	10
<i>Mike's Painting, Inc. v. Carter Welsh, Inc.</i> , 95 Wn. App. 64, 975 P.2d 532 (1999) .....	17

<i>National Sur. Corp. v. Immunex Corp.</i> , 162 Wn. App. 762, 256 P.3d 439 (2011) .....	19, 20
<i>Wilkerson v. United Inv., Inc.</i> , 62 Wn. App. 712, 815 P.2d 293 (1991) .....	24
<i>Pruitt v. Savage</i> , 128 Wn. App. 327, 115 P.3d 1000 (2005) .....	11
<i>Riordan v. Commercial Travelers Mut. Ins. Co.</i> , 11 Wn. App. 707, 525 P.2d 804 (1974) .....	5
<i>Seashore Villa Ass'n v. Hugglund Family</i> , 163 Wn. App. 531, 260 P.3d 906 (2011) .....	8, 23
<i>Stott v. Cervantes</i> , 23 Wn. App. 346, 595 P.2d 563 (1979) .....	23
<i>W. Plaza, LLC v. Tison</i> , 184 Wn.2d 702, 364 P.3d 76 (2015) .....	21
 State Statutes	
RCW 4.84.030.....	23
RCW 59.20.020.....	8
RCW 59.20.030(9).....	14
RCW 59.20.040.....	20, 21
RCW 59.20.100.....	23
RCW 59.20.110.....	3, 9
RCW 59.20.130(4).....	10
RCW 59.20.135.....	passim
RCW 59.20.135(1).....	8, 12

State Rules

CR 2A ..... 5

CR 68 ..... 24

Other Authorities

Restatement (Second) of Property §17.6 (1977)..... 7

## **I. INTRODUCTION**

It is undisputed that the sole issue on appeal is whether plaintiff is entitled to attorney fees pursuant to statute or contract, a question of law reviewed de novo. It is undisputed that plaintiff prevailed on summary judgment in establishing defendants' statutory "non-delegable duty to maintain the deck and other permanent structures pursuant to the Mobile Home Landlord Tenant Act (MHLTA)", and in dismissing their contractual attempt to shift that duty to the tenant-plaintiff as "unenforceable, unlawful and in violation of the MHLTA". It is undisputed that the remedies under the MHLTA and rental contract provide, at a minimum, attorney fees to the prevailing party. It is also undisputed that upon entry of summary judgment, defendants broadly admitted liability, including under the MHLTA (the only duty expressly mentioned in the order), with remedies including plaintiff's personal injury damages of over \$58,000 in conceded past medical bills and wage loss, and \$51,000 in additional non-economic damages established at trial.

Now defendants seek to limit their liability and bar plaintiff's entitlement to the additional statutory and contractual remedies for attorney fees, or alternatively to arbitrarily limit that remedy to fees incurred through summary judgment. They cite no supporting authority, as generally the various legal theories supplement rather than supersede

the allowable remedies. Here, the MHLTA specifically provides for attorney fees as a remedy, in addition to other remedies such as personal injury damages. As with cases construing the analogous Residential Landlord Tenant Act (RLTA), plaintiff may recover personal injury damages under statute, contract or common law, in addition to other remedies. Unlike the RLTA, the MHLTA also contains an express stand-alone remedy for attorney fees to the prevailing party for actions arising out of the Act. Defendants provide no authority for the proposition that where the MHLTA specifies the duty and establishes the cause of action, the recovery of personal injury damages precludes operation of the MHLTA's attorney fee remedy. Remedies under the MHLTA are not mutually exclusive, nor are the amounts arbitrarily limited.

As a result, defendants incorrectly recast plaintiff's claims as brought solely for "traditional premise liability" under the common law, and misstate their broad liability "stipulation" as only a concession that they "owed a common law duty to maintain the deck, but these concessions did not 'arise out of the rental agreement' or MHLTA." Resp. Br. at 21, 23. They cite *Degel v. Majestic Manor, infra*, as "controlling on the issue." *Id.* Yet *Degel* did not involve attorney fees under statute or contract. Instead, it involved a landlord's general duty to protect against obvious, natural dangers in common areas, not the specific and non-

delegable statutory duty to maintain structures in non-common areas as here. Although defendants broadly admitted liability, they cannot identify any common law duty which could have been established as a matter of law. But even if they could, plaintiff established a statutory duty, and proceeded under that statutory cause of action to establish her remedy for personal injury damages at trial, with the amount of the mandatory statutory and contractual remedy for the fees incurred in prevailing up to the trial court.

Absent the MHLTA, plaintiff's claim for any damages would have been barred because she assumed the duty to maintain the defective deck in the lease agreement. Solely applying "traditional premises liability standards," Christine Tolman would have been out of court. That is why she pursued the statutory remedies, which include attorney fees.

## **II. ARGUMENT**

### **A. Plaintiff Pled, Pursued and Prevailed on her Statutory MHLTA Action, Entitling her to Statutory Attorney Fees.**

Plaintiff specifically pled a cause of action under the MHLTA, including remedies for personal injuries and the express statutory mandate of attorney fees for any action arising from that Act. CP 39-41 (Complaint, ¶¶3.2, 5.1, 7 (RCW 59.20.110)).

She pursued her statutory rights as her primary cause of action. In the only summary judgment motion in the case, plaintiff moved to

specifically establish a non-delegable duty upon the defendants under the MHLTA to maintain the defective deck at issue. Her motion was entitled: “Plaintiff’s Motion for Partial Summary Judgment Establishing Defendants’ *Statutory and Non-Delegable Duty* to Maintain Deck.” CP 340 (emphasis added). The motion asked the Court to establish that “[a]s a matter of law, defendants owed plaintiff a statutory, non-delegable duty to maintain the deck pursuant to the Mobile Home Landlord Tenant Act (MHLTA), RCW 59.20.135.” *Id.* Plaintiff’s motion recognized that “statutes governing landlord-tenant duties are of three distinct bases, along with the common law and contract, on which a mobile home park tenant may base a claim for personal injury damages.” CP 344. But the motion only asked the trial court to establish the statutory duty.

Plaintiff prevailed on her MHTLA cause of action. The order entered by the Court specifically stated: “Defendants owed plaintiff a *non-delegable duty* to maintain the deck and other permanent structures *pursuant to the Mobile Home Landlord Tenant Act (MHLTA).*” CP 325 (Order of October 16, 2015, para. 2). (emphasis added).<sup>1</sup> Common law duties were never mentioned in the order. The only duty expressly

---

<sup>1</sup> Defendants note that plaintiff once referred to her claim as a “personal injury premises liability” claim. Resp. Br. at 5. Plaintiff did suffer “personal injuries” on a mobile home “premises” which defendants had a statutory duty to maintain. Defendants’ “liability” for breach of that statutory duty included remedies for

established was the statutory duty to maintain the deck “pursuant to the MHLTA”. The order dismissed the primary contract defense to the MHLTA. The defendants then agreed they were liable, without further defense or proof of the other elements under the MHLTA, contract or common law causes of action. This was not a one-sided “concession”, but an agreed stipulation then confirmed, as it must be under CR 2A, in an order.<sup>2</sup> As a result, the summary judgment order also stated that defendants “stipulated to liability and has withdrawn affirmative defenses.” CP 325.

Contrary to defendants’ argument first raised on appeal, the stipulation did not limit itself only to common law duties or claims; nor did defendants stipulate only to a specific theory of liability. The stipulation did not mention the common law, or any duty imposed under the common law. The stipulation was in the context of the summary judgment brought exclusively pursuant to the MHLTA. Defendants stipulated to that statutory liability, and all other theories of liability. Defendants did not challenge this order either at the time or on appeal.

---

personal injury damages and fees. The phrase used is not limited to “common law” which is not mentioned.

<sup>2</sup> Where a stipulation is made and recorded in a manner recognized by court rule, it is binding on the parties and the court. *Cook v. Vennigerholz*, 44 Wn.2d 612, 615, 269 P.2d 824 (1954); *Riordan v. Commercial Travelers Mut. Ins. Co.*, 11 Wn. App. 707, 715, 525 P.2d 804 (1974).

Defendants' argument now seems to be that once the trial court found that the lease provision was invalid in para. 3 of the order, the MHLTA dropped out of the case completely, leaving only the common law. Resp. Br. at 21-23. This argument completely ignores paragraph 2 establishing the landlord's statutory duty to maintain the deck under the MHLTA. Defendants' brief fails to explain why the stipulated agreement and confirming order does not mean exactly what it says, that plaintiff established as a matter of law that defendants owed a statutory non-delegable duty to maintain the permanent structures, that defendants' contract defense to that statutory cause of action was unlawful and unenforceable, and that defendants are liable for all remedies available under that statute and contract, including attorney fees.

**B. The MHLTA Allows Remedies for Both Attorney Fees and Personal Injury Damages; They are Not Mutually Exclusive.**

Courts applying other statutes permit the recovery under those statutes for both attorney fees and personal injury damages. *See Martini v. Post*, 178 Wn. App. 153, 167, 313 P.3d 473 (2013) (RTLTA allows express and personal injury remedies); *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 112-13, 942 P.2d 968 (1997) (timber trespass statute allows express and emotional distress remedies).

In the related Residential Landlord Tenant Act (RLTA), the Court in *Martini* held: "There are three distinct theories on which a tenant may

base a claim for personal injuries: the landlord's breach of a duty under (1) the rental agreement, (2) the common law, or (3) the RLTA.” 178 Wn. App. at 167. While plaintiff’s complaint alleged claims under the MHLTA and common law, plaintiff only moved to establish the statutory duty. The trial court’s order unequivocally identifies the statutory duty under the MHLTA, which was violated. Defendants’ attempt to thereafter read the MHLTA out of the case, after plaintiff prevailed on summary judgment, should be rejected.

In *Martini*, 178 Wn. App. at 171, Division II joined Division III in adopting the Restatement (Second) of Property §17.6 (1977) to provide tenants with a personal injury remedy under the RLTA based upon a landlord’s failure to repair a dangerous condition that constituted a “breach of a duty specified by statute or regulation.” *See also Lian v. Stalick*, 106 Wn. App. 811, 822, 25 P.3d 467 (2001) (Div. III adopting §17.6 to allow personal injury remedy under RLTA).

At the point where Ms. Tolman established that the duty under the MHLTA controlled as a matter of law, she did not need to further establish or pursue other common law duties. Defendants chose for their own reasons to broadly stipulate to liability across the board, thus establishing as a matter of law that plaintiff was entitled to all statutory remedies – the express attorney fees and the incorporated claim for personal injury

damages.<sup>3</sup> Ironically, defendants do not challenge the personal injury remedy that has been subject to much litigation under the RLTA, only the attorney fee remedy that is a stand-alone and broader remedy under the MHLTA than it is under the RLTA.

*Seashore Villa Ass'n v. Hugglund Family*, 163 Wn. App. 531, 260 P.3d 906 (2011) confirms the existence of an independent and non-delegable duty to maintain created by the MHLTA statute. The Court quoted RCW 59.20.135(1) in its entirety. *Id.* at 539. The only “duty” referenced in section (1) is the duty to maintain permanent structures. The Court then stated with regard to this duty, “[e]very *duty under the MHLTA* ‘imposes an obligation of good faith in its performance....’ RCW 59.20.020.” (emphasis added). The Court thereby recognized that the duty to maintain was a “duty under the MHLTA.” *Id.* at 540.

The establishment of the statutory duty, and the stipulation that defendants breached the statutory duty, is sufficient to establish that the claim arose out of the statute. The issue then became what are the statutory remedies? Yet defendants rendered those arguments moot by broadly stipulating to liability, and conceding the remedies included personal injury damages sought under the MHLTA cause of action. This is the law of our case. It is also consistent with the trend in the law as

---

<sup>3</sup> Plaintiff’s motion did not request an order that the statutory duty was breached

recognized in *Martini* and *Lian*. The only remaining issue now is the legal entitlement to the MHLTA's additional remedy of attorney fees under the express, stand-alone provision of RCW 59.20.110.

C. **A Separate Common Law Action is Irrelevant to the MHLTA's Express Attorney Fee Remedy; Common Law Supplements and Does Not Supplant, Supersede or Limit MHLTA Remedies.**

Rather than address the dual remedies of fees and personal injury damages allowed under the MHLTA cause of action pursued by plaintiff, defendants argue there was also a viable common law action. Defendants' argument is not only incorrect, but as set out above, it is irrelevant to the MHLTA's express statutory remedy for attorney fees owed to plaintiff as the prevailing party. The common law does not preempt or supersede the statutory remedies (although the reverse is sometimes argued). See *Landis & Landis Const. LLC v. Nation*, 171 Wn. App. 157, 286 P.3d 979 (2012).

Defendants' brief not only fails to identify the legal basis for their claim that the statutory remedies are limited by the common law, but also fails to identify the applicable common law duty which they violated. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996), which defendants claim is controlling (Resp. Br. at 21-23), does not involve a claim for attorney fees, and does not even establish a common law duty applicable to this case. *Degel* was limited to a  

---

by defendants, but only asked the Court to establish the duty.

landlord's duties to maintain *common areas*. It held that at common law,

“a landlord has an affirmative obligation to maintain the *common areas* of the premises in a reasonably safe condition for the tenants' use.” *Geise v. Lee*, 84 Wash.2d 866, 529 P.2d 1054 (1975) (mobile home park owner who has actual or constructive notice of hazard has a duty to remove dangerous accumulations of ice and snow from *common areas*).

*Id.* at 49 (emphasis added); *see also McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 447, 486 P.2d 1093 (1971) (landlord has “affirmative obligation or duty to keep or maintain the ‘common areas’ in a reasonably safe condition for the tenant's use.”).

In *Degel*, a tenant's child was unquestionably injured in a common area of the mobile home park, on the perimeter where a creek was located, and the landlord accordingly was subject to a landlord's liability under common law.<sup>4</sup> *Degel* specifically held that the landlord was not excused from this duty owed to invitees in common areas for protection from the risks posed by natural bodies of water.

*Degel* does not hold, however, that a landlord has a common law duty to maintain non-common areas. At common law, a landlord must be

---

<sup>4</sup> There is no indication in the opinion that the plaintiff in *Degel* ever claimed the MHLTA established a duty, let alone a remedy for fees. The Court made a single passing reference to the Act when it stated “See also RCW 59.20.130(4).” *Degel*, 129 Wn.2d at 49. No language in the Court's decision precluded reliance upon the MHLTA pursuant to Sec. 17.6 of the Restatement, as well as the common law. Further, the injury in *Degel* occurred in 1992, before the 1994 passage of RCW 59.20.135. *Id.* at 47. Even if the statute had been in effect, it

in possession of the particular premises at issue before a duty of care attaches. “[T]he common law duty of care existing in premises liability law is incumbent on the *possessor* of land.” *Coleman v. Hoffman*, 115 Wn. App. 853, 859, 64 P.3d 65 (2003) (emphasis in original). In *Pruitt v. Savage*, 128 Wn. App. 327, 331, 115 P.3d 1000 (2005), this Court held that landlords/owners were not subject to a premises liability claim in non-common areas, because they were not a “possessor of land” in those areas.

The parties debate whether, in this landlord-tenant context, §343 applies only to common areas. The answer is typically yes, because by definition a landlord is not the “possessor” of non-common areas.<sup>5</sup>

*Id.* Thus, for instance, “under common law a landlord has no duty to repair non-common areas absent an express covenant to repair.” *Martini*, 178 Wn. App. at 167; *see also Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 225, 377 P.2d 642 (1963) (“in the absence of fraud or concealment on the part of the landlord, a rule similar to that of caveat emptor applies and throws upon the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects.”).

A landlord may be liable to the tenant for failure to disclose

---

would have been irrelevant to the facts, since *Degel* did not involve injury from failing to maintain permanent structures.

<sup>5</sup>Restatement (Second) of Torts § 343 (1965) is the section on premises liability duty relied on by *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d at 49-50.

concealed “known dangers” under the “latent defect” theory. *Aspon v. Loomis*, 62 Wn. App. 818, 826-27, 816 P.2d 751 (1991). This theory, however, does not impose “any duty to discover obscure defects or dangers,” or “any duty to repair a defective condition.” *Id.* at 826-27. And it does not impose a duty to *maintain* structures in non-common areas, the duty on which Ms. Tolman proceeded in this case, and which is imposed by RCW 59.20.135.

*Pruitt* and *Degel* confirm that at common law, a landlord’s duty to exercise reasonable care to maintain premises in a reasonably safe condition is limited to common areas. RCW 59.20.135, however, changes the standards imposed by the common law as to mobile home parks. It directly establishes the duty of mobile home landlords to maintain “permanent structures,” even if those structure are in non-common areas.

The legal background is helpful in understanding why the legislature passed RCW 59.20.135 in 1994. See Appellant’s Brief at 14-15. The statute addressed “significant safety hazards to the tenants as well as to visitors to the mobile home park” which the common law does not address. RCW 59.20.135(1). A “permanent structure” may be in a common area, such as a clubhouse. But a permanent structure could as easily be located on and be integral to an individual tenant’s lot, such as the deck in this case. The statute placed the duty of maintaining

permanent structures, such as decks, on the landlord, regardless whether the landlord or the tenant was in actual possession, or whether the permanent structure was in a common area. In doing so, the statute created a statutory duty independent of the common law duty.

The statute here is uniquely concerned with safety concerns that may cause injury to a particular class of persons. The legislature recognized that mobile home tenants were frequently unable to properly maintain the permanent structures for the protection of themselves, and visitors. It recognized that tenants also were unable to obtain insurance to cover those who are injured. It therefore imposed a statutory duty on the landlords, who were in a better position to maintain these structures, and to maintain and provide insurance in the event of personal injury from their failure to repair. In so doing, the legislature broadened the statutory duties and remedies compared to the common law. Having established the duty because of these overriding safety concerns, the statute then prohibited the landlord from failing in or transferring that duty to the tenant by contract, a type of exculpatory agreement, at the risk of liability for attorney fees.<sup>6</sup>

The statutory cause of action also addresses the shortcomings of

---

<sup>6</sup> “Some park tenants have expressed concern they are unable to obtain insurance on these structures because they do not own them, may be injured while trying to

the “latent defect” theory to prevent injuries and the legislature’s other public safety concerns. The latent defect theory imposes only a duty to *disclose* known and concealed dangers to the tenant. It does not impose a duty to repair or maintain on the landlord. The legislature imposed the additional duty to maintain on the landlord out of its concern that even with knowledge of a defect, the mobile home tenant would not be able to avoid injury by keeping the structure in good repair, and/or to purchase insurance to compensate persons injured as a result of dangerous and deteriorating structures.

In the present case, Ms. Tolman was not injured in a common area. The deck where she was injured was located on *her* mobile home lot, and affixed to *her* mobile home. This was not a walkway or clubhouse or perimeter area which all tenants had a right to use.<sup>7</sup> Had plaintiff proceeded under the common law without the statutory duty, she would have faced the uphill task of establishing that the defendants were the possessors of the deck located on her mobile home lot, and that she was only an invitee, not a possessor, on her own deck. At best, there would be

---

repair the structures, or don’t have the resources to maintain the structures.” Final Bill Report, ESB 5154, attached as Appendix A-3.

<sup>7</sup> The MHLTA does not define the mobile home lot itself as a common area. Rather, it states: “Mobile home lot” describes “a portion of a mobile home park ... designated as the location of one mobile home, manufactured home, or park model *and its accessory buildings*, and intended for the *exclusive use as a primary residence by the occupants....*” RCW 59.20.030(9) (emphasis added).

a disputed factual issue regarding the possessor of the deck, simply in order to find a common law duty.

Plaintiff accordingly moved under the MHLTA; she did not move for summary judgment to establish a common law duty. Defendants admitted liability after that statutory duty was established. Plaintiff then pursued through trial her full statutory remedies, thus by-passing the need for additional litigation on common law distinctions involving possessors and invitees, latent or obvious defects, constructive or actual knowledge, and common areas or exclusive premises.

But even had Ms. Tolman established that defendants were in possession of her deck, the contract shifted to her the burden of maintaining the facilities, including the deck, on her own mobile home lot. If it were not for the statute prohibiting that contractual delegation of duty, Ms. Tolman would have been solely responsible for her own personal injuries, without any recovery. Both in establishing the duty owed her, and in invalidating the provision shifting the duty back to her, RCW 59.20.135 was essential and critical.

For the reasons discussed above, defendants' assertion that the MHLTA "simply recognizes and codifies existing common law duties" is wrong, but it is also irrelevant. Resp. Br. at 23. If the MHLTA codified existing common law duties, then by definition, the litigation would have

arisen out of the statute, because the common law duties and remedies would become the statutory duties and remedies on which plaintiff prevailed.

In light of the proper understanding of the non-delegable duty created by the statute, the flaws in defendants' argument that the action did not "arise out of" the statute, but rather arose out of and were restricted to the common law, are apparent. See Resp. Br. 17-18. The statute, contrary to defendants' argument, created an actionable duty to maintain the permanent structure without regard to common law limitations regarding possession, common areas and the like. The statutory remedies include the very personal injuries targeted by the non-delegable duty to repair, as well as an express attorney fee award.

Finally, plaintiff pled the MHLTA, and obtained affirmative relief that the lease violated the MHLTA in the October 16, 2015 order.

Defendants' rental contract is void, unenforceable, unlawful *and in violation of the MHLTA* in that it unlawfully shifts their non-delegable duty to maintain the deck and other existing permanent structures on the mobile home lot to tenant plaintiff.

CP 325 (October 16, 2015 order granting partial summary judgment).

Defendants do not explain why litigation resulting in affirmative relief under the MHLTA does not arise out of the MHLTA.

**D. Defendants’ “Alternative” Concession That Plaintiff is Entitled to a Fee, at Least Through Summary Judgment, Proves the Trial Court Committed Reversible Error in Denying Any Fees.**

Defendants tacitly concede that plaintiff is legally entitled to a fee when they propose as an “alternative” response that attorney fees be limited to those incurred through October 16, 2015, when the trial court entered summary judgment on the statute. Resp. Br. at 2. Not only did defendants admit the statutory action, and the other theories of liability, they cannot actually point to a common law duty which was established as a matter of law by the facts in this case. Plaintiff agrees that she is entitled to fees at least through summary judgment, but the statutory rights established in that order, and concomitant remedies, did not suddenly drop out of the case upon her motion success. The statutory cause of action became the source of plaintiff’s personal injury damage award at trial. That award arose out of the statute, under the statutory cause of action. Plaintiff prevailed, and now is entitled to the additional remedy of attorney fees and costs for the entire litigation, and on appeal.

**E. Plaintiff is Entitled to Reasonable Attorney Fees under Defendants’ Rental Contract Provision for Attorney Fees and Costs for “Any Legal Action Arising out of this Agreement.”**

The right to attorney fees under contract can arise from defending the contractual claims. *Mike’s Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68, 975 P.2d 532 (1999). Defendants’ argument that the contract

does not authorize attorney fees to a tenant defending against an unlawful attempt to enforce the contract is also unsupported by any controlling authority. Instead it is predicated upon the first of three attorney fee provisions in the contract: “Tenants shall pay for all attorney’s fees and costs incurred by Landlord to enforce this Agreement.” Resp. Br. at 14; CP 223. Defendants made the same argument below: “The lease *only* authorizes attorney’s fees and costs in an action to enforce a lease clause. Neither party sought to enforce the lease.” CP 258.

Plaintiff’s opening brief did not rely upon this provision for the obvious reason that it concerns the *landlord’s* recovery of attorney fees. The landlord defendants have not asked for or received attorney fees for enforcement of the agreement. This appeal is about the *plaintiff/tenant’s* right to attorney fees. Further, the landlord did attempt to enforce the lease, specifically the provision shifting the statutory maintenance duty to plaintiff. CP 275-81; see e.g., CP 279 (“Accordingly a clause within the lease requiring tenants such as the plaintiff to maintain their property - including the deck – is not void under to [sic] RCW 59.20.135.”). The lease provision was defendants’ only defense against liability, and they sought to enforce that provision. The landlords lost, but plaintiff incurred significant attorney fees and costs to contest the contract defense.

Defendants argue that the remainder of the attorney fees provisions

“broadly modif[y]” the enforcement provision. Response at 14. As discussed in Appellant’s brief at 21-26, the remaining provisions constitute separate and independent bases for attorney fees.

[1] If *any legal action arising out of this Agreement*, including eviction, the *prevailing party* shall be entitled to reasonable attorneys fees and costs. [2] If by reason of any breach or default on the part of either party hereto it becomes necessary for the other party hereto to employ an attorney, then *the non-breaching party shall have and recover against the other party in addition to costs allowed by law, reasonable attorneys’ fees and litigation-related expenses. . .*”

CP 223 (emphasis and brackets added).

These provisions are not limited to landlords, nor are they limited to enforcement of the lease. Rather, the first provision applies to all parties for any legal action arising out of the agreement; it is not limited to enforcement actions brought by landlords. The second provision applies to all parties even if no legal action is brought, if a party must retain an attorney as a result of a breach of the agreement. These provisions do not *modify* the enforcement provision. They *expand* the right to attorney fees beyond the landlord’s enforcement action. Defendants’ argument attempts to re-write and restrict the contract, a contract which must be construed against defendants as the drafters.

Defendants’ reliance on *National Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, 256 P.3d 439 (2011) is misplaced. The policy in

*Immunex* limited coverage to injuries arising out of *specifically defined* “offenses.” The policy covered “injury, including consequential Bodily Injury, arising out of one or more of the following offenses [including] **Discrimination.**” *Id.* at 770 (emphases and brackets in original). The plaintiffs had not brought a claim for discrimination and the Court found that the injury did not arise out of discrimination.

The contractual attorney fees provision in this case is not limited to any specific type of action. To the contrary, it applies to “*any* legal action arising out of the agreement.” Unlike *Immunex*, it is not limited to contract claims, discrimination claims or any other specifically named action. The parties certainly could have agreed to an attorney fees provision which was limited to actions for breach of contract. But the parties did not in this case. The rental agreement, drafted by defendants, provided for attorney fees for any action.

In the opening brief, plaintiff argued that, by law, the agreement incorporated the terms of the MHLTA. See Appellant’s brief at 23-24. The MHLTA itself states: “This chapter [the MHLTA] shall regulate and determine legal rights, remedies, and obligations *arising from any rental agreement* between a landlord and a tenant regarding a mobile home lot and including specified amenities within the mobile home park ....” RCW 59.20.040. (emphasis added).

The lease terms cannot be treated as though they were separate and distinct from the MHLTA, yet that is precisely what the defendants assert. Defendants' brief omits any mention of RCW 59.20.040, or the incorporation argument. Appellant's Br. 22-24. Defendants do not acknowledge the fundamental principle that "[t]he MHLTA controls the legal rights, remedies, and obligations arising from a rental agreement between a landlord and tenant regarding a mobile home lot." *W. Plaza, LLC v. Tison*, 184 Wn.2d 702, 707, 364 P.3d 76 (2015).

There may be additional contractual obligations imposed over and above the rights, remedies and obligations imposed by the MHLTA. But those MHLTA obligations are part of and control the remedies under the contract. The contract incorporated the non-delegable duty to maintain the deck. Defendants concededly breached that duty. Defendants' contract also imposed an illegal provision, which they indeed tried to enforce until the actual hearing on summary judgment as their only defense to liability. Plaintiff is entitled to attorney fees under the contract.

**F. The Trial Court Determines the Reasonableness of Fees.**

Defendants suggest in a footnote that plaintiff should have brought the summary judgment proceeding sooner. Resp. Br. at 5. They never explain why they asserted and then vigorously tried to enforce an unlawful contract that would require summary dismissal. Yet, these issues are not

before this Court. The trial court held as a matter of law that plaintiff was not entitled to any attorney fees as a matter of law. The trial court never reached the issue of the reasonableness of particular fees. That issue will be for remand.

However, in brief reply, the motion for summary judgment was not a pure legal issue. Defendants pressed its position on heavily factual grounds. They argued the deck was not a “permanent structure” within the MHLTA because it was built by a former tenant, and then sold to others, requiring significant discovery regarding the history of the deck. CP 277. It argued that the deck was not provided as an amenity, and thus raised a “factual scenario” different from the one in *Seashore Villa*, again requiring discovery. CP 278-29. Before defendants stipulated to liability, plaintiff also had to show the deck was defective, and that defendants had actual or constructive notice with time to repair it, all of which defendants denied, in order to recover under sec. 17.6 statutory liability. Plaintiff had to establish through expert testimony the condition of the deck, whether it had been properly maintained; and whether there was a failure to maintain constituting a breach. This was no easy task, because the deck was repaired before plaintiff’s expert could examine it. Therefore, he had to examine the other deck on the lot as well as stairs and other structures which were of the same nature and age as the deck which collapsed. CP

244-49 (Declaration of Stan Mitchell); CP 13-17 (Second Declaration of Stan Mitchell). These are issues required to prove statutory liability before the late admission, and which the trial court can address on remand if still disputed.

G. **Plaintiff is the Prevailing Party; Comparing Non-Comparables Does Not Defeat Her Statutory and Contract Right to Fees.**

Under the MHLTA, “[a] prevailing party is one who obtains a judgment in its favor.” *Seashore Villa Ass’n*, 163 Wn. App at 547. Plaintiff prevailed at trial and recovered damages for her personal injuries, for violation of the duty imposed by the MHLTA. The statutory attorney fees remedy under RCW 59.20.100 is mandatory. “In any action arising out of this chapter, the prevailing party *shall* be entitled to reasonable attorney’s fees and costs.” (emphasis added). This is a separate, stand-alone provision under the MHLTA, making it unique and broader than the RLTA and many other statutory actions.

Further, plaintiff was awarded costs under RCW 4.84.030. “The definition of who is a ‘prevailing party’ for an award of costs should be the same in determining the ‘prevailing party’ for an award of attorney’s fees.” *Stott v. Cervantes*, 23 Wn. App. 346, 348, 595 P.2d 563 (1979).

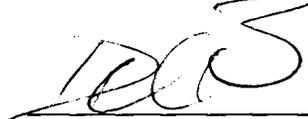
Although plaintiff did not prevail on the CPA claim, she could not recover for her personal injuries under the CPA. Plaintiff is not seeking attorney fees for the CPA claim. The trial court can resolve any

issues regarding segregation of the CPA issues on remand.

Defendants' comparison of a settlement offer with the jury verdict is misleading. Resp. Br. at 16. Defendants' offers all included injury damages and attorney fees. The jury verdict only included personal injury damages. The jury was not instructed on attorney fees, an issue to be decided by the trial court. Even if any of the offers had been a CR 68 offer—they were not—Washington law establishes that in comparing a verdict to a CR 68 offer, the court must “compare comparables.” *Magnussen v. Tawney*, 109 Wn. App. 272, 275, 34 P.3d 899, 900 (2001). An “offer that includes attorney fees should be compared with a verdict that also includes attorney fees if the prevailing party is entitled to attorney fees.” *Id.* See also *Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 717, 815 P.2d 293 (1991). Defendants here do not compare comparables. This argument is equally unavailing to avoid the statutory and contractual liability for attorney fees.

DATED this 20<sup>th</sup> day of October, 2016.

LUVERA LAW FIRM



---

DAVID M. BENINGER, WSBA #18432  
ANDREW HOYAL, WSBA #21349  
PATRICIA ANDERSON, WSBA #17620  
Attorneys for Appellant Tolman

**APPENDIX**

1	October 16, 2015 Order Granting Plaintiff's Motion for Partial Summary Judgment	A-1 to A -2
2	Final Bill Report ESB 5154	A-3

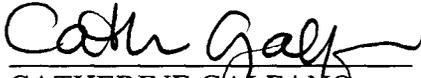
**CERTIFICATE OF SERVICE**

THE UNDERSIGNED hereby certifies that she caused delivery of the foregoing Brief to be served on October 19, 2016 on the below counsel of record in the following manner:

Amber Pearce  
Floyd, Pflueger & Ringer  
200 West Thomas Street, Suite 500  
Seattle, WA 98119-4296  
*Via Email Transmission & U.S. Mail*

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20<sup>th</sup> day of October, 2016, at Seattle, Washington.

  
\_\_\_\_\_  
CATHERINE GALFANO

FILED  
SKAGIT COUNTY CLERK  
SKAGIT COUNTY, WA  
2015 OCT 16 PM 2:09

IN THE SUPERIOR COURT OF WASHINGTON FOR SKAGIT COUNTY

<p>CHRISTINE A. TOLMAN, Plaintiff,  vs.  KEITH S. JOHNSON; COLONIAL PARK, LLC, a Washington Corporation,  Defendants.</p>	<p>NO. 12-2-01461-5  ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFS.' NON- DELEGABLE DUTY TO MAINTAIN DECK</p>
---	--

This matter came before the Court on plaintiff Tolman's Motion for Partial Summary Judgment Establishing Defendants' Statutory, Non-Delegable Duty to Maintain the Deck. The Court has heard oral argument, has considered the records on file including those listed below, and is fully apprised:

1. Plaintiff's Motion and Reply
2. First and Second Declarations of Patricia Anderson
3. First and Second Declarations of Stan Mitchell
4. Defendants' Response
5. Declaration of Brett Wieberg
6. Declaration of Nancy Skurdahl
7. Defendant at the hearing stipulated to liability and has withdrawn affirmative defenses.

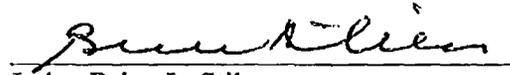
*(Signature)* PETA  
LUVERA LAW FIRM  
ATTORNEYS AT LAW

1 Now, therefore, the Court hereby

2 ORDERS:

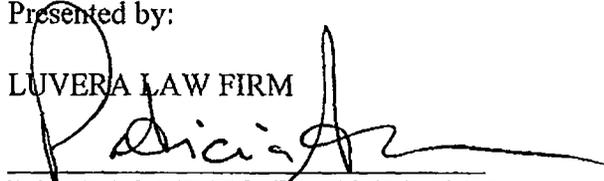
- 3 1. Plaintiff's motion is granted;
- 4 2. Defendants owed plaintiff a non-delegable duty to maintain the deck and other permanent
- 5 structures pursuant to the Mobile Home Landlord Tenant Act (MHLTA); and
- 6 3. Defendants' rental contract is void, unenforceable, unlawful and in violation of the
- 7 MHLTA in that it unlawfully shifts their non-delegable duty to maintain the deck and
- 8 other existing permanent structures on the mobile home lot to tenant plaintiff.

9 Dated October 16 2015.

11   
 12 Judge Brian L. Stiles

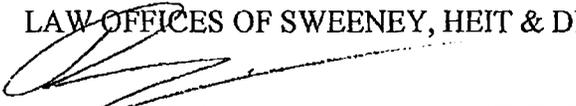
13 Presented by:

14 LUVERA LAW FIRM

15   
 16 DAVID M. BENINGER, WSBA 18432  
 17 PATRICIA E. ANDERSON, WSBA 17620  
 Attorneys for Plaintiff

18 Copy received, approved as to form, notice of  
19 presentation waived by:

20 LAW OFFICES OF SWEENEY, HEIT & DIETZLER

21   
 22 Brett M. Wieburg, WSBA 22353  
 Attorney for Defendants

**FINAL BILL REPORT**

**ESB 5154**

**C 30 L 94**

**SYNOPSIS AS ENACTED**

**Brief Description:** Concerning the maintenance in mobile home parks.

**SPONSORS:** Senator Winsley

**SENATE COMMITTEE ON LABOR & COMMERCE**

**HOUSE COMMITTEE ON TRADE, ECONOMIC DEVELOPMENT & HOUSING**

**BACKGROUND:**

Some mobile home park owners have transferred the responsibility for the maintenance and care of permanent structures in the mobile home park to the park tenants. Some park tenants have expressed concern they are unable to obtain insurance on these structures because they do not own them, may be injured while trying to repair the structures, or do not have the resources to maintain the structures.

**SUMMARY:**

A mobile home park owner is prohibited from transferring the responsibility for the maintenance or care of permanent structures in the park to the park tenants unless requested by the tenant or tenant association.

"Permanent structures" include the clubhouse, carports, storage sheds, or any other permanent structures provided as amenities to the park tenants. Structures built or affixed by the park tenants are not considered permanent structures.

Any provision in a rental agreement or other document transferring responsibility for the maintenance or care of permanent structures in the park to the park tenants is void.

**VOTES ON FINAL PASSAGE:**

Senate	43	3
House	93	0

**EFFECTIVE:** March 21, 1994