 75141-7

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Court of Appeals
Division I
State of Washington

No. 75141-7

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

CHRISTINE A. TOLMAN,

Appellant,

vs.

KEITH S. JOHNSON and COLONIAL PARK, LLC,

Respondents.

RESPONDENTS' RESPONSE BRIEF

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I. INTRODUCTION

In this personal injury/premises liability case, Plaintiff/Appellant Ms. Tolman fractured her ankle on a rotted deck board, which surrounded her mobile home. Respondents Colonial Park LLC and its owner, Keith Johnson (collectively Colonial Park), owners of the mobile park, admitted before trial that it owed and breached a common law duty to Ms. Tolman, an invitee at the mobile park, to maintain the deck at her mobile home.

Colonial Park stipulated to the reasonableness and necessity of her medical expenses and wage loss. At trial, the jury was asked to decide: (1) her personal injury general damages; and (2) whether Colonial Park's acts or omissions proximately caused her damages under the Consumer Protection Act. The jury awarded $109,681.26 in general damages and determined that Colonial Park's acts/omissions did not proximately cause her injuries.

The trial court denied her pre- and post-trial request for attorney's fees and costs. Here, Ms. Tolman asks this Court to decide, as a matter of law, whether she is entitled to those attorney's fees and costs pursuant to either a clause in her rental agreement and/or the Mobile Home Landlord Tenant Act (MHLTA) for her personal injury claim.

Colonial Park requests that the Court affirm the trial court's denial of attorney's fees and costs because her simple personal injury/premises liability action was grounded in neither her rental agreement nor the MHLTA. Specifically, (1) Ms. Tolman's personal injury did not "arise out of" her rental agreement or MHTLA; (2) neither party breached the rental agreement, nor did she assert a claim for breach of contract; (3) Colonial Park agreed that a specific rental agreement clause shifting the duty to maintain the deck from it to her was void and unenforceable at the summary judgment hearing, and that it owed her a common law duty to maintain the premises; and (4) she was not really the prevailing party since she won her stipulated premises liability claim, but lost her CPA claim.

Alternatively, if the Court finds as a matter of law that she is entitled to reasonable attorney's fees and costs, Colonial Park requests that those be limited to fees/costs incurred up to October 16, 2015, when Colonial Park admitted liability and withdrew its affirmative defenses. Colonial Park disputes the reasonableness of her fees and costs, but the trial court did not reach this issue, so the only issue before this Court is whether she is, in fact, entitled to them based on the rental agreement or the MHLTA, as a matter of law.

II. No Assignment of Error

Colonial Park submits that the trial court did not err in ruling that there was neither a contractual nor statutory basis to award Ms. Tolman attorney's fees and costs in this premises liability case, which was grounded in Colonial Park's breach of its common law duty to maintain the premises for its invitees.

III. Restatement of the Issue

Whether Ms. Tolman is entitled to pre- and post-trial attorney's fees and costs—in this premises liability case—under the terms of her rental agreement or the MHLTA when Colonial Park conceded that a provision requiring her to maintain the deck was void and unenforceable, and stipulated that it breached a common duty to maintain the premises?

IV. Restatement of the Case

A. Ms. Tolman Injured Herself on Colonial Park's Premises.

On January 9, 2010, Plaintiff/Appellant Christine Tolman entered a Rental Agreement with Colonial Park to rent a lot space. *See* Clerk's Papers (CP) 155-163. A few days later, she purchased a vacated 1994 mobile home that was currently in the lot space. CP 165. She gradually moved in during July and August 2010. CP 170 at 23:3-7. The mobile home lot contained a

deck, carport, stairs, and handrails leading to a grassy yard. The deck had been built by a prior tenant. While gradually moving in, she noticed that the handrails were wobbly; Colonial Park's maintenance personnel repaired the rails *at no charge to Ms. Tolman.* CP 170 at 24:9-10; CP 171 at 26:7-11 and 27:25-23.

A few months later in November 2010, Ms. Tolman, a 57-year-old nurse, was walking on the deck when a deck board gave way. CP 172 at 33:22. Her right foot fell through the board, and she fractured her right ankle. After the incident, Colonial Park replaced the entire deck *at no charge to Ms. Tolman.* CP 470:15-22.

Ms. Tolman filed a personal injury lawsuit 20 months after her injury. CP 38-41. Ms. Tolman alleged that she was "exposed to and fell through a rotten deck" and asserted that Colonial Park was negligent. CP 39. She also asserted "statutory violations of the Landlord Tenant Act (RCW 59.20 et seq.) and/or Consumer Protection Act (RCW 19.86 et seq.)." CP 40. Ms. Tolman did <u>not</u> allege a cause of action for breach of contract. Colonial Park denied the allegations and asserted the typical affirmative defenses that plaintiff *may have been* contributorily at fault; third parties *may have been* at fault; and she *may have* failed to mitigate her damages. CP 35-36. Colonial

Park did not assert an affirmative defense that Ms. Tolman was at fault for breaching her rental agreement.

B. Ms. Tolman Moved for Partial Summary Judgment that Colonial Park Had a Non-Delegable Duty to Maintain the Deck; Colonial Park Admitted Liability.

Over three years after filing her lawsuit,[1] Ms. Tolman moved for partial summary judgment to establish that Colonial Park had a non-delegable duty to maintain Ms. Tolman's deck. She characterized her claim as a "personal injury premises liability" claim. Her motion explains that "[t]his is a personal injury premise liability case" against Colonial Park "arising from the collapse of a rotten board on a wood deck that plaintiff rents from defendants." CP 329 at 18-20.

Colonial Park opposed the motion, explaining that "the deck was constructed by a previous tenant," therefore she was responsible for maintaining the deck. CP 128:1-2. Its position was based on a clause in the rental agreement that required her to maintain "existing facilities and any new structures *acquired by tenant*," which Colonial Park believed included the deck to her mobile home constructed by the prior tenants. *Id.* The

[1] Ms. Tolman's Opening Brief states that Colonial Park "fought the application of MHLTA for over three years." Appellant's Opening Brief at 7. However, Ms. Tolman could have avoided a purported "three-year fight" or protracted litigation by simply moving for partial summary judgment as a matter of law much earlier in the litigation. Colonial Park is not responsible for Ms. Tolman waiting until the eve of trial to move the Court on a dispositive issue.

responsibility for this maintenance hinged on the definition of "permanent structure" in RCW 59.20.135.

The MHLTA prohibits mobile home park owners from transferring responsibility for maintenance and care of *permanent structures* within the park to their tenants. RCW 59.20.135(2)-(3). However, Colonial Park contended that RCW 59.20.135(3) provided an exception. The statute states that a "permanent structure does not include structures built or affixed by the tenant." Accordingly, Colonial Park argued that it was not responsible for maintaining Ms. Tolman's deck because it was a structure built by or affixed by the prior tenant, which Ms. Tolman then purchased. CP 278-80.

At the hearing on October 16, 2015, Colonial Park stipulated to liability and withdrew its affirmative defenses. CP 225. The Honorable Brian Stiles of Skagit County Superior Court granted Ms. Tolman's motion for partial summary judgment, ruling that "Defendants owned plaintiff a non-delegable duty to maintain the deck and other permanent structures pursuant to the Mobile Home Landlord Tenant (MHLTA); and 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 law to tenant

plaintiff." CP 226. The trial court dismissed Colonial Park's affirmative defenses. CP 228-29.

C. The Trial Court Deferred Ms. Tolman's Request for Pre-Trial Attorney's Fees.

After Colonial Park admitted liability, Ms. Tolman moved for a pre-trial award of attorney's fees and costs, contending—before trial—that she was the prevailing party primarily under the rental agreement because she was the "non-breaching party." CP 350. The provision upon which she relied in the rental agreement states:

> **Attorney's Fees and Costs**. Tenant shall pay for all attorney's fees and costs incurred by the Landlord to enforce this Agreement. If any legal action arising out of this Agreement, including eviction, the prevailing party shall be entitled to reasonable attorney's fees and costs.
>
> If by reason of any breach or default on the part of either party hereto it becomes necessary for the other party 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 including any such costs and attorneys' fees

> incurred for appeal or in bankruptcy. The non-breaching party shall be entitled to recover reasonable attorneys' fees and costs and expenses, as provided above, regardless of whether litigation is actually commenced.

CP 159. Ms. Tolman argued that her personal injury action arose primarily from the rental agreement, which she asserted was "central to this dispute," even though she did not allege that Colonial Park breached the rental agreement, and Colonial Park never asserted an affirmative defense that she breached the agreement. CP 354-55. Nevertheless, she characterized the basis for her request for attorney's fees as follows: "Plaintiff has prevailed on the contract claims and defenses." CP 356:2.

Ms. Tolman requested a lodestar fee of $102,600.00 "multiplied by 1.50" ($30,800) plus litigation expenses totaling $27,632.10, for a **total pretrial award of $161,032.10**. CP 359:18 to CP 360:2.

Colonial Park disputed the proposed costs and attorney's fees as grossly excessive, duplicative, wasted effort, and unreasonable for a simple premises liability case. CP 288-90. Colonial Park questioned: (1) the necessity of employing two senior partners with a combined experience of 55 years to prosecute a simple personal injury claim; and (2) submitting an

invoice for $15,015 in costs for an expert to inspect Ms. Tolman's deck—even though the condition of the deck was never an issue, and the deck had been replaced long before the expert began his investigation. CP 289-90.

The trial court reserved ruling on her motion until after the trial. CP 301.

D. The Jury Awarded Personal Injury Damages of $109,681, but Determined that the CPA Violation Did Not Cause Her Injury or Damages.

Colonial Park stipulated to the reasonableness and necessity of Ms. Tolman's past medical and wage loss damages of $58,681.26. CP 254:1-8. At trial, she acknowledged that she was unaware of the invalid clause in the rental agreement, and she did not submit any evidence or testimony suggesting that Colonial Park attempted to enforce the invalid clause or otherwise require her to maintain her own deck. CP 267:11-13. In fact, the evidence submitted at trial was to the contrary. During cross examination, Ms. Tolman admitted that Colonial Park performed repairs to the hand rails leading to the deck. CP 267:14-16.

On November 3, 2015, the jury was asked to decide: (1) the amount of Ms. Tolman's general damages; and (2) whether Colonial Park's violation of the Consumer Protection Act proximately caused Ms. Tolman's damages.

The jury unanimously returned a verdict of $109,681.26 solely for general damages arising from her personal injury claim—to which Colonial Park had already stipulated to one-half of this award. CP 27.

The jury declined to find in her favor that Colonial Park's "unfair or deceptive acts or practices proximately caused injury or damages to plaintiff." CP 28. Ms. Tolman is not appealing the CPA verdict and is not seeking attorney's fees under the CPA. *See* Appellant's Opening Brief at 10 and n.3.

E. Colonial Park Offered to Settle the Claim for $255,000.

Two weeks before trial, Colonial Park extended an offer to resolve her claim for $175,000.00. CP 89, 92. Ms. Tolman rejected this offer and counter-offered for $475,000.00, inclusive of her actual attorney fees and costs. CP 89-90, 94. One week before trial, Colonial Park offered to resolve her claim for $205,000.00, to which Ms. Tolman counter-offered for $455,000.00. CP 90, 96. Before Ms. Tolman began her case in chief at trial, Colonial Park offered to settle for $255,000.00 to resolve the entire matter, which remained open until the jury was called for the verdict. CP 90, 100. Ms. Tolman did not accept the offer or propose a counter offer.

The gross jury verdict of $109,681.26 was $145,318.74 *less than* Colonial Park's last settlement offer, and $95,318.74 *less than* its last pre-

trial settlement offer. CP 251:21-22. None of the settlement negotiations were formally made under CR 68.

F. Ms. Tolman Did Not Truly Prevail at Trial.

It is true that Ms. Tolman filed a Cost Bill for statutory fees and costs, however, she really was not the prevailing party because she lost on her CPA claim. Colonial Park did not file a Cost Bill, even though the jury found in its favor that any violation of the MHLTA did not proximately cause her injuries. If both parties prevail on major issues, then both parties bear their own attorney's fees. *See Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996). Although Colonial Park did not formally make its settlement offers under the guise of CR 68, Ms. Tolman certainly did not improve her position at trial, when Colonial Park offered $255,000.00, but the jury awarded $109,681.26.

G. The Trial Court Denied Ms. Tolman's Request for Post-Trial for Attorney's Fees and Costs.

After trial, Ms. Tolman: (1) renewed her motion for all attorney's fees and costs under MHLTA, CPA, and the rental contract, CP 362-69; (2) moved for a new trial on future damages, CPA damages, or for additur and request for treble damages, CP 577-87; and (3) moved for judgment as a

matter of law on the CPA claim. CP 566-76. On March 30, 2016, the trial court denied her post-trial motions.

Ms. Tolman's appeal solely concerns her request for attorney's fees under MHLTA and the rental agreement. *See* Appellant's Opening Brief at 10 and n.3. As of December 21, 2015, she contends that her attorney's fees are $249,375.00, plus a 1.5 multiplier, for a total of **$299,250.00**, (CP 30); she contends her costs are **$59,231.35**. (CP 369) While Colonial Park disputes the reasonableness of these fees and costs, and disputes recovery for attorney's fees and costs for the CPA claim upon which she did not prevail, the trial court never reached these issues. Accordingly, this appeal solely concerns whether she is, in fact, entitled to recover attorney's fees and costs under the rental agreement or MHLTA.

The trial court ruled that "[t]his suit was essentially a premises liability suit for personal injuries. The jury decision that no injury was caused by the violation of the MHLTA from loss of use or the investigation precludes recovery for attorney fees and costs, except statutory fees and costs, under the MHLTA and CPA." CP 43.

V. LEGAL ARGUMENT

A. The Legal Basis for Awarding Contractual or Statutory Attorney Fees Is Reviewed De Novo.

The legal basis for an award of attorney fees, or whether a contract or a particular statute authorizes an award of attorney fees, is a question of law reviewed de novo. *McGuire v. Bates*, 169 Wn.2d 185, 189, 234 P.3d 205 (2010); *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009) ("Whether a contract or statute authorizes an award of attorney fees is also a question of law reviewed de novo.") Colonial Park respectfully submits that, as a matter of law, Ms. Tolman is not entitled to attorney fees under either the rental agreement or MHLTA.

B. The Rental Agreement Does Not Apply to Attorney's Fees and Costs in a Personal Injury/Premises Liability Action.

Clause 27 of the rental agreement provides several bases for recovering attorney's fees and costs:

> **ATTORNEY'S FEES AND COSTS**. Tenant shall pay for all attorney's fees and costs incurred by the Landlord to enforce this Agreement. If any legal action arising out of this Agreement, including eviction, the prevailing party shall be entitled to reasonable attorney's fees and costs.
>
> If by reason of any breach or default on the part of either party hereto it becomes necessary for the other party 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 including any such costs and attorneys' fees incurred for appeal or in bankruptcy. The non-breaching party shall be entitled to recover reasonable attorneys' fees and costs and expenses, as provided above, regardless of whether litigation is actually commenced.

CP 159 (emphasis added).

"An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective." *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985), *review denied*, 105 Wn.2d 1015 (1986), citing *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) ("Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it.")

Applying these rules to this case, the first sentence of the first paragraph specifically states the subject matter of the clause 27: "Tenants shall pay for all attorney's fees and costs incurred *by the Landlord* to *enforce this Agreement*." By its plain terms, Ms. Tolman agrees to pay for attorney's fees and costs incurred by Colonial Park *to enforce the rental agreement.* But Colonial Park did not enforce any provision of the rental agreement from which it might have incurred fees and costs. It never required or asked Ms. Tolman to maintain her deck, and in fact, made numerous repairs to the stair rail, without charge, before her accident; then replaced the deck, without

charge, after her accident. This sentence does not provide recovery of Ms. Tolman's fees and costs.

The second sentence of the first paragraph broadly modifies the first sentence. It specifies that if any legal action "arising out of this Agreement" occurs, then "the prevailing party shall be entitled to reasonable attorney's fees and costs." Ms. Tolman, relying on insurance coverage cases, urges the Court to read "arising out of" broadly enough to encompass a personal injury that purportedly arose from the rental agreement. *See* Appellant's Opening Brief at 12.

In *National Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, 772-73, 256 P.3d 439 (2011), *aff'd*, 176 Wn.2d 872, 297 P.3d 688 (2013), the Court of Appeals affirmed the trial court's ruling that National Security did not have a duty to defend in several lawsuits challenging Immunex's use of an inflated average wholesale price (AWP). Immunex argued that the underlying AWP resulted in discrimination, but no AWP plaintiff alleged a claim for "discrimination." *Id.* at 772.

The Court stated that "we must look to the type of offense that is alleged and determine whether that offense is arising out of discrimination." *Id.* The Court determined that "Immunex seeks too broad of an

interpretation of the term 'arising out of.' Washington courts have previously defined 'arising out of' as meaning "'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.'" *Id.* at 773, citing *Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 774, 198 P.3d 514 (2008); *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989); and *Avemco Ins. Co. v. Mock*, 44 Wn. App. 327, 329, 721 P.2d 34 (1986).

Following the foregoing cases, the Court of Appeals limited coverage to "offenses originating from discrimination" and stated that the "injuries here do not. While it is true that some AWP complaints alleged that consumers of certain groups paid a higher price as a result of Immunex's actions, *the offenses originate not from discriminatory actions but from fraudulently inflating the AWP*." *Nat'l Sur. Corp.*, 162 Wn. App. at 773 (emphasis added).

The Court explained that "[a]lthough the effect of that action might have impacted some consumers and providers more than others, that does not mean the offenses originated from discrimination. The theories underlying the offenses are not that the consumers and providers paid higher prices as compared to others, but that the price itself was fraudulently inflated." *Id.*

Similarly, Ms. Tolman identifies the nature of her complaint as "[t]he

injuries and damages alleged occurred on or about November 1, 2010 when plaintiff invitee Christine A. Tolman, was exposed to and fell through a rotted deck on the property she was leasing from the defendant[.]" CP 39:17-19. Her claim for premises liability was based on "negligence, recklessness, willful and wanton misconduct, and/or statutory violations of the Landlord Tenant Act [] and/or Consumer Protection Act [], and also that the manner of injury and circumstances are of such character to warrant an inference of negligence and fault." CP 39-40, ¶ 5.1. She has repeatedly represented her claim as one for personal injury/premises liability. CP 329:18-20; CP 340:15-16. This is consistent with her causes of action. However, when she requested pre-trial attorney's fees and costs, she re-characterized her claim as one for breach of contract. ("The Rental Contract is central to this dispute." CP 350:22. Ms. Tolman was the "non-breaching party." CP 353:18.)

Here, Ms. Tolman's personal injury claim did not originate from an invalid clause in the rental agreement, a statutory violation of MHLTA, or from a breach of the rental agreement. The rental agreement does not contain any provisions requiring Colonial Park to maintain the deck. Her premises liability claim originated from Colonial Park's breach of its common law duty to properly maintain the deck for its invitees. *This common law duty arises*

independent of the rental agreement. Accordingly, Ms. Tolman is not entitled to attorney's fees and costs because her claim did not "arise out of" or "originate" from the rental agreement.

Colonial Park conceded that the rental clause requiring Ms. Tolman to maintain the deck was invalid, even though it was never enforced and Ms. Tolman was unaware of the clause. Establishing that an (unenforced) clause in a rental agreement is invalid is not the same as seeking to enforce an existing contract term, or establishing that a party failed to comply with a material term of the contract. This sentence does not apply.

In sum, the entirety of the first paragraph does not provide recovery of fees and costs because (1) her personal injury claim did not arise out of the rental agreement; and therefore (2) she was not the prevailing party.

The second paragraph of clause 37 allows a party to recover attorney's fees and costs as follows: (1) if the rental agreement was breached, necessitating the employment of an attorney; (3) then the non-breaching party may recover reasonable attorney's fees and costs. But Ms. Tolman did not allege that Colonial Park breached the rental agreement, and Colonial Park never enforced the invalid clause. It made repairs and performed maintenance on the property at no charge; Ms. Tolman was unaware of the invalid clause.

For the foregoing reasons, Ms. Tolman is not entitled to fees and costs under the rental agreement. The trial court's ruling should be affirmed.

C. Ms. Tolman Is Not Entitled to Attorney's Fees and Costs Under MHLTA.

Ms. Tolman filed suit for personal injuries sustained on premises owned by Colonial Park. She was unfamiliar with the invalid lease provision requiring her to maintain the deck (CP 253:17-18), and Colonial Park never enforced the invalid lease provision. After Ms. Tolman's leg fell through a rotted deck board, Colonial Park replaced the deck, at no charge. Colonial Park admitted liability in this case, and withdrew its affirmative defenses. CP 225. With respect to her personal injury/admitted liability claim, the only question for the jury was the amount of her general damages. CP 27.

Colonial Park conceded that a clause in the rental agreement that shifted the duty to maintain the deck to the tenant was invalid, however, the trial court did <u>not</u> find that Colonial Park breached the rental agreement, but instead found that a specific clause was unlawful and unenforceable. CP 226.This is a distinction with a difference.

The trial court's ruling was premised on RCW 59.20.135(2), which states that a "mobile home park owner is prohibited from transferring responsibility for the maintenance or care of permanent structures within the

mobile home park to the tenants of the park. A provision within the rental agreement or other such document transferring responsibility for the maintenance or care of permanent structures within the mobile home park to the park tenants is void."

Tracking this language, the trial court ruled that the clause in Colonial Park's rental agreement "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 226. Here, Ms. Tolman requests attorney's fees and costs under the MHLTA, which states: "In any action arising out of this chapter, the prevailing party shall be entitled to reasonable attorney's fees and costs." RCW 59.20.110. The Court reviews questions of statutory interpretation de novo. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015).

Colonial Park respectfully submits that Ms. Tolman's action for personal injury based on Colonial Park's failure to properly maintain the deck did not "arise out" of the MHLTA, and incorporates its arguments concerning the interpretation of "arising out of" set forth above. The fact that Colonial Park had an invalid clause in its rental agreement was inconsequential in this

case because it never enforced the provision, and Ms. Tolman was wholly unaware of it. At the summary judgment motion, Colonial Park conceded that the clause was invalid, and the jury ultimately found that the violation of MHTLA (*i.e.*, the invalid clause) was not a proximate cause of her injuries for purposes of her remaining CPA claim. CP 28. She did not prevail on this cause of action. The trial court's March 20, 2016 order denies her request for fees and costs because "the jury decision that no injury was caused by the violation of the MHTLA [for CPA damages] precludes recovery for attorney fees and costs." CP 43.

Finally, Colonial Park's breach of its duty to maintain the deck arises from common law—not MHLTA. The common law doctrine of premises liability has been recognized in Washington since as early as 1910. *Greene v. Seattle Athletic Club*, 60 Wash. 300, 303, 111 P. 157, 158 (1910); *Juntila v. Everett Sch. Dist.*, 183 Wash. 357, 361, 48 P.2d 613 (1935). "We have continued to address whether a duty is owed under traditional premises liability standards."

The Supreme Court's decision in *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 49, 914 P.2d 728, 731 (1996) is instructive. In *Degel*, a child fell into a creek that ran through the property of a mobile home park. The

child lived, but suffered brain damage from oxygen deprivation and near drowning. The Court in *Degel* outlined the history of premises liability under the common law and specifically applied it to *Landlord-Tenant Law, mobile home parks, and the MHLTA*.

The Supreme Court in *Degel* held that "*[u]nder the common law* of this state a landowner's duty of care to persons on the land is governed by the entrant's common law status as an invitee, licensee or trespasser." *Id.* at 49 (emphasis added). *Degel* then classified tenants of mobile home parks as invitees and stated: "[T]o invitees the landowner owes an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition." *Id.*

The Supreme Court stated that "[i]n the context of landlords and tenants, this means that a landlord has an affirmative obligation to maintain the common areas of the premises in a reasonably safe condition for the tenants' use." *Id.* (referencing the Mobile Home Landlord-Tenant Act, RCW 59.20.130). The Court then *referenced and analyzed* a mobile home park's "duty," as codified in RCW 59.20.130, as a common law duty. "Thus, under the Restatement and *this state's common law*, the landlord [of a mobile home park] had a duty to exercise reasonable care to protect all of the tenants of the mobile home park from unreasonable risks which were not known or

obvious."

Colonial Park submits that this case is controlling on the issue. The MHLTA does not create a new duty. It simply recognizes and codifies existing common law duties. Therefore, RCW 59.20.135 bars the delegation of this common law duty as to permanent structures but does not create a new duty. Accordingly, Colonial Park breached a common law duty to maintain the premises for its invitees—here, to maintain Ms. Tolman's deck. Colonial Park conceded that its maintenance of the deck fell below the requisite standard of care, and that it owed a common law duty to maintain the deck, but these concessions did not "arise out of the rental agreement" or MHLTA.

As the trial court ruled "[t]his suit was essentially a premises liability suit for personal injuries. The jury decision that no injury was caused by the violation of the MHLTA from loss of use or the investigation precludes recovery for attorney fees and costs, except statutory fees and costs, under the MHLTA and CPA." CP 43. Contractual or statutory attorney's fees and costs are not recoverable in this case.

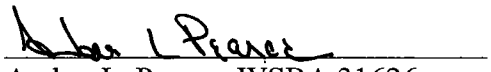
VI. CONCLUSION

Colonial Park respectfully requests that this Court affirm the trial court's ruling that Ms. Tolman is not entitled to pre- or post-trial attorney's

fees and costs, including those requested on appeal. This was a simple personal injury/premises liability claim wherein Colonial Park breached its common law duty to maintain the deck for its invitee, Ms. Tolman. The jury awarded her general damages. Justice was served.

Respectfully submitted this 19 day of September, 2016.

FLOYD, PFLUEGER & RINGER, P.S.



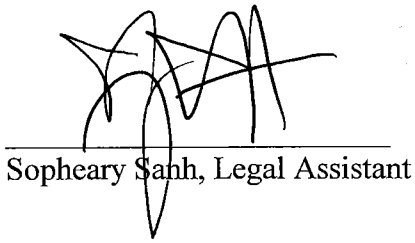
Amber L. Pearce, WSBA 31626
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

Patricia E. Anderson, WSBA No. 17620 J. Andrew Hoyal, WSBA No. 21349 Luvera Law Firm 701 5th Avenue, Ste. 6700 Seattle, WA 98104 patricia@luveralawfirm.com andy@luveralawfirm.com	____ Facsimile _X_ Messenger ____ U.S. Mail _X_ E-Mail via COA Div. I

DATED this 19th day of September, 2016.



Sopheary Sanh, Legal Assistant