

No. 36510-3-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
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CHRISTOPHER NEELY; STEFANI NEELY; and JEFFREY L.
JACOBS, as Guardian ad Litem for MAKENNA D. NEELY, a minor,

Respondents,

vs.

THE REID COMPANY, LLC; MARK W. VUKANOVICH and
KRISTINA M. VUKANOVICH, husband and wife,

Appellants.

THE REID COMPANY, LLC; MARK W. VUKANOVICH; and
KRISTINA M. VUKANOVICH, husband and wife,

Third-Party Plaintiffs,

vs.

HAYDEN ENTERPRISES, INC., a Washington corporation; HLM, INC.,
an Oregon corporation; BARRY R. SMITH, P.C., ARCHITECT, an
Oregon professional corporation; and MILGARD MANUFACTURING,
INC., a Washington corporation,

Third-Party Defendants.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Plaintiffs/Respondents Christopher Neely, Stefani Neely (now Almond and hereinafter referred to as “Ms. Almond”), and Jeffrey L. Jacobs, as Guardian ad Litem for Makenna D. Neely (collectively “Plaintiffs”), by and through their attorneys Gregory E. Price and Laurence R. Wagner of Baumgartner, Nelson & Price, PLLC, submit this Brief of Respondents in response to the Brief of Appellants filed by Defendants the Reid Company, LLC, Mark W. Vukanovich, and Kristina M. Vukanovich (collectively “Defendants”).

Makenna Neely, who was then 5-years-old, was severely injured when she fell through a window in an upstairs living room of a duplex her mother, Ms. Almond, had rented only a few days before from Defendants. Makenna Neely spent less than two hours in the rental premises before the accident occurred. The majority of that time was downstairs on the ground floor.

The bottom sill of the window that Makenna fell through was only 11 inches off the floor. The window was the size of a patio door. It also opened like a patio door, sliding sideways to create an opening 36" wide and 72" high. It was a warm day and it was extremely hot in the upstairs

living room, so Ms. Almond had opened the window earlier that day for ventilation. As she was still in the process of moving into the duplex, the only furniture was bedroom furniture for the master bedroom, which was located off the upstairs living room, and the two other bedrooms on the ground floor of the duplex.

Ms. Almond has three young daughters. They had been staying with their father, and the day of the fall was the first day they visited the duplex. As mentioned above, the girls had only arrived an hour and a half to two before the accident and had spent most of that time downstairs where it was cooler. They moved upstairs only about 10 minutes before the fall, so that Ms. Almond could put her youngest daughter, who was only about two years-old at the time, down for a nap in the master bedroom.

While Ms. Almond was in the bedroom with the youngest daughter, her other two daughters played with some toys in the vacant living room. After she had been in the bedroom for about 10 minutes, Ms. Almond heard a noise and her oldest daughter, who was than seven years-old, rushed into the bedroom screaming that Makenna had fallen through the window. Ms. Almond then rushed downstairs to her daughter, who

was lying unconscious on a concrete patio over 10 feet below the upstairs living room window.

When Ms. Almond reported the accident to Mr. Vukanovich, he told her that he had always been concerned about the window. In his deposition, Mr. Vukanovich testified that he thought about the risk presented by the window prior to the accident and would not have had the window opened up if his six-year-old daughter was playing anywhere near the vicinity.

Defendants moved for summary judgment arguing they are not liable because the condition of the window was obvious and they are only liable for latent defects in the premises. The Clark County Superior Court denied Defendants' motion, without making any findings of fact or conclusions of law.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The Superior Court did not err in denying Defendants' motion for summary judgment.

III. RESPONSE TO STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. In *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001), the Court of Appeals for Division 3 adopted Restatement (Second) of

Property § 17.6 (1977) ("Section 17.6"), to provide tenants a remedy under Washington's Residential Landlord Tenant Act ("RLTA") for the tenant's personal injuries resulting from a landlord's failure to exercise reasonable care in making repairs of conditions in violation of an implied warranty of habitability or applicable codes. In the present case, the window through which Plaintiffs' young child fell was in violation of the applicable building code. The building code required guardrails along any open-sided walking surfaces, landings, porches, balconies, or raised floor surfaces more than 30 inches above the grade. The sill of the window through which Plaintiffs' young child fell was only 11 inches above the floor, but was more than 10 feet above the outside grade. Did the Superior Court err in denying Defendants' motion for summary judgment, where the building code required a guard across the window and Plaintiffs may recover their personal injuries resulting from Defendants' breach of the RLTA in failing to place a guard across the window under Section 17.6?

B. Under Section 17.6, a tenant may also recover for a condition of the premises that violates the RLTA's implied warranty of habitability. A condition of the premises violates this warranty if (1) the condition was dangerous, (2) the landlord was aware of the condition or

had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition, and (3) the condition is sufficiently dangerous to affect the fundamental safety of the dwelling, rather than a mere defect in workmanship giving rise to only trivial or aesthetic concerns. Whether a condition of the premises is sufficiently dangerous to violate the implied warranty of habitability is a question of fact. Did the Superior Court err in denying Defendants' motion for summary judgment, where, at a minimum, questions of fact exist concerning whether the condition of the window was sufficiently dangerous to violate the RLTA's implied warranty of habitability?

C. The Restatement (Second) of Torts § 343A (1965) ("Section 343A") provides an exception to non-liability for open and obvious hazards, if the possessor of land should anticipate the harm despite the obviousness of the condition. Washington Courts have applied this exception in the context of residential tenancies with regard to conditions in common areas and this exception should apply equally to defects in non-common areas. Did the Superior Court err in denying Defendants' motion for summary judgment, where questions of material fact exist under this exception concerning whether Defendants should have

anticipated harm from the window despite the obviousness of its condition?

IV. STATEMENT OF FACTS

Ms. Almond was first shown the duplex by another renter of Defendant Mark Vukanovich's ("Mr. Vukanovich"), who lived a couple of doors down from the residence, about a day or two before she moved in. (CP 53) She decided to rent it immediately after seeing it. (CP 54) She signed the rental agreement for the duplex on August 18, 2004, three days before the accident on August 21, 2004. (CP 55) Mr. Vukanovich gave her a walk-through of the duplex on the Thursday before the accident, which would have been August 19, 2004, two days before Makenna's fall. (CP 56) The only thing the two discussed during this walk-through was that the light over the stairway did not work. (CP 56) After the walk-through, Ms. Almond also asked Mr. Vukanovich to fix a washing machine that was broken and also to fix the door between the residence and the garage, which would not shut. (CP 57)

Ms. Almond and Mr. Neely had just separated and Ms. Almond was moving to the duplex from a Camas residence she had shared with Mr. Neely. (CP 58) She planned on moving bedroom furniture and two

couches from the Camas residence into the duplex. (CP 58) The bedroom furniture was moved in as soon as she rented the duplex, but the couches were not moved in until about a week later, because they had difficulty getting them into the duplex. (CP 59)

Ms. Almond's two girls did not come to the duplex to stay with her until the day of the accident. (CP 60) Before that, she was the only person occupying the rental. (CP 60) During this time, she was going back and forth between her old residence and her new one, packing and moving personal belongings. (CP 60) By the day of the accident, all she had moved into the duplex were boxes of belongings and the bedroom furniture. (CP 61-62)

Makenna and Ms. Almond's two other girls had only been in the duplex for an hour and a half to two hours before Makenna fell from the window. (CP 62) During this time, they were mostly on the ground floor of the duplex, where it was cool and where the girls' toys were located. (CP 62) This was where a bonus room and the girls' bedrooms were located. (CP 63) Other than when they first entered the duplex with their mother, they were only upstairs for about 10-15 minutes before the accident. (CP 63) They went upstairs so that Ms. Almond could put her

youngest daughter, Mallory, down for a nap. The girls played in the living room while she did this. (CP 64) At the time, Ms. Almond's oldest girl, Maddison, was seven, Makenna was five, and Mallory was almost two. (CP 64)

The master bedroom where she was putting her youngest down for a nap was off of the upstairs living room, but Ms. Almond could only see her other two girls playing when they were over by the bedroom door. She could not see them if they were playing by the living room window. (CP 64-65) She had only been in the master bedroom for about 10 minutes before she became aware that something had happened. (CP 65) She became aware that something had happened when she heard a noise. (CP 66) Maddison then came in to the bedroom screaming that Makenna had fallen out of the window. Ms. Almond then ran downstairs to where Makenna was unconscious on the patio. (CP 66)

The window through which Makenna fell was open because it was warm downstairs and the upstairs was "extremely hot." (CP 68) Ms. Almond had opened the window for ventilation before the girls arrived. (CP 68-69) Ms. Almond had never lived in a residence before that had a window with a bottom sill as close to the floor as the window out of which

Makenna fell. (CP 69) There was a screen in the window at the time of the accident. It was broken in Makenna's fall. (CP 71) The window was never opened again after the fall. (CP 74)

Ms. Almond testified in her deposition that Mr. Vukanovich told her in their first conversation after the accident that he had always been concerned about the window. (CP 72) In his deposition, Mr. Vukanovich testified that he does not recall this conversation, but it is possible it took place. (CP 77) Mr. Vukanovich further testified about his concern if his six-year-old daughter was playing anywhere near an open window:

“Q. As you sit here today, do you have any concern about the fact that this window opens up essentially the size of a sliding glass door and is only 11 inches off the ground with a significant drop below it?

“A. After - - given what has transpired?

“Q. Sure. Exactly.

“A. Given what's transpired, if I had my six-year-old daughter in that house, I'm not opening up that window when she's out there playing. Yeah.

“If you had asked me that before the accident happened, I might not had thought about it, quite honestly. Actually, no, I would have thought about it. I wouldn't have opened the window up.”
(CP 77-78)

V. ARGUMENT IN RESPONSE

A. Summary Judgment Standard.

As explained in *Attwood v. Albertson's Food Centers, Inc.*, 92

Wn.App. 326, 330, 66 P.2d 351 (1998):

“On review of summary judgment, an appellate court engages in the same inquiry as the trial court. *Hill v. J.C. Penney, Inc.*, 70 Wn.App. 225, 238, 852 P.2d 1111, *review denied*, 122 Wn.2d 1023, 866 P.2d 39 (1993). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). The appellate court considers all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249, 850 P.2d 1298. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Clements*, 121 Wn.2d at 249, 850 P.2d 1298.”

B. Section 17.6 Applies to Provide Plaintiffs a Remedy to Recover for Their Personal Injuries Under the RLTA.

In *Lian v. Stalick*, 106 Wn.App. 811, 25 P.3d 467 (2001), a tenant was injured in a fall on rotten steps leading into her apartment unit. Both the tenant and the landlord were aware of the condition of the steps before the tenant's fall. The trial court held that the steps breached the Residential Landlord-Tenant Act's (RLTA) implied warranty of habitability, contained in RCW 59.18.060. However, the Court of Appeals

for Division Three noted that, in *Dexheimer v. CDS, Inc.*, 104 Wn.App. 464, 17 P.3d 641 (2001), published after the *Lian* trial court had entered its judgment, the Court had held that a tenant's remedies under the RLTA are limited to the specific remedies listed in the Act. The Court ruled that the trial court had therefore erred in instructing the jury that it could award personal injury damages for a breach of the RLTA. *Id.*, at 818-19.

However, the *Lian* Court also noted that its decision in *Dexheimer* did not preclude a negligence claim in the residential landlord-tenant context for breach of a common law duty. *Id.*, at 819. As discussed below, the *Lian* Court then discussed application of the exception stated in Section 343A to the general rule of non-liability of a landlord for open and obvious hazards, concluding that in the landlord-tenant context this exception could apply to defects in non-common areas. *Id.*, at 821.

However, as the trial court had not clearly addressed the application of Section 343A in its written findings, and having just held in *Dexheimer* that a tenant could not recover personal injury damages directly under the RLTA, the *Lian* Court then turned to the issue of whether there was some other common law theory under which a tenant could recover personal injury damages from a landlord. The Court found this common

law theory in Section 17.6, which provides:

“A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:

“(1) an implied warranty of habitability; or

“(2) a duty created by statute or administrative regulation.” *Id*, at 821-22.

The *Lian* Court adopted this section, holding that this rule provides a tenant a remedy under which the tenant may recover for personal injuries under the RLTA. *Id*, at 822.

There is no conflict between *Lian* and *Pruitt v. Savage*, 128 Wn.App. 327, 332, 115 P.3d 1000 (2005), as contended by Defendants. *Pruitt* involved a roller blader, who was hit by a falling garage door at a rental house, where he was not a tenant. He sued the landlord of that house for his injuries. Relying on *Lian*, the roller blader contended that he could recover because the landlord breached an implied warranty of habitability. The *Pruitt* Court only noted that the plaintiff in *Lian* was a tenant and that, consequently, the *Lian* Court was not asked to decide and did not decide whether the implied warranty of habitability should extend

to persons other than a tenant. *Pruitt*, 128 Wn. App. at 332.

C. The Window Violated the Building Code.

As noted by Defendants in their memorandum in support of summary judgment, the subject window was almost six feet wide and six feet high, with a pane that slid sideways, like a patio door, to create an opening almost three feet wide and six feet high. (CP 15) The bottom of the window was only 11 inches above the second story floor. (CP 15) The bottom of the window was approximately 10 feet above a concrete patio below the window. (CP 39) Despite the fact that these dimensions are comparable to a sliding patio door, and the opening was only a step above the second floor and leading out to a 10 foot drop to concrete, there was no guard to prevent someone from falling through the opening when the window was opened (although the photocopy of the photograph attached as Appendix A to Defendants' brief, which is Exhibit 1 to the Christopher Neely Deposition, appears to show a guard across the window, the copy is of very low quality and the photograph only depicts a partly drawn shade, as is evident when a lighter photocopy of this deposition exhibit is examined, which Plaintiffs' have attached as Supplemental Appendix A to their brief).

Both building code provisions discussed by Defendants require guards on openings to drops of more than 30 inches to the floor or grade below. Section 1012 of the International Building Code (“IBC”) addresses openings next to open-sided walking surfaces, mezzanines, industrial equipment platforms, stairways, ramps and landings. Section R312.1 of the International Residential Code (“IRC”) addresses openings next to porches, balconies, raised floor surfaces, stairs, and decks. The second floor at the duplex was a walking surface that was “open-sided” when the window was open and was approximately 10 feet above the ground, so according to the plain meaning of the English language, it was both a “raised floor surface” and an “open-sided walking surface.”

Defendants argue that if these code provisions required a guard across the opening of the subject window, then a guard would be required across any opening window on any floor more than 30 inches above grade. However, it is only because the bottom sill of the window was less than 30 inches above the finished floor, which was in turn approximately 10 feet above grade, that a guard was required by code.

The new code sections cited by Defendants, IBC 1405.12.2 and R613.2, specifically provide that, where a window is more than six feet

above the surface below, the bottom sill of the opening portion of the window must be at least two feet above the floor. Defendants argue that these new code sections indicate that IBC 1012 and IRC R312.1 do not apply to windows, as if they did there would be no need for the new sections. However, a better explanation is that the new code provisions simply clarify and slightly relax the requirements of the code with respect to windows, lowering the bottom sill height requirement from 30 to 24 inches. The subject window still violates these new code requirements, having a bottom sill only 11 inches above the floor.

Defendants contend that Plaintiffs' interpretation of the code defies common sense. However, the new code sections actually support Plaintiffs' interpretation of the code, as they are a specific recognition of the dangers posed by windows with low sills. The subject window has dimensions equivalent to a typical sliding glass patio door. That IBC 1012 and IRC R312.1 apply to the subject window can be illustrated by simply substituting for the subject window a sliding glass patio door raised one step up from the floor. Under Defendants' argument, no guard would be required across such a door, since doors are not listed in either code section. Plaintiffs respectfully submit this argument is the one that defies

common sense.

Therefore, the Superior Court did not err in denying Defendants' motion to the extent that this denial was based on a conclusion of law that the window violated the applicable building codes, because they can be reasonably construed as requiring a guard across the window.

D. Questions of Fact Exist Concerning Whether the Placement of the Window Violated the Implied Warranty of Habitability.

Since its decision in *Lian*, Division 3 has concluded that it was wrong in holding in *Dexheimer* that a tenant could not recover personal injury damages directly under the RLTA:

“We again note that a claim for personal injuries by a tenant can be premised on three distinct legal theories: contract (a rental agreement), common law obligations imposed on a landlord, and the Washington Residential Landlord-Tenant Act of 1973 (Landlord-Tenant Act), chapter 59.18 RCW. In *Dexheimer v. CDS, Inc.* we concluded that the remedies available to a tenant under the Landlord-Tenant Act were limited to those outlined in the statute. We were wrong.” *Tucker v. Hayford*, 118 Wn.App. 246, 248, 75 P.3d 980 (2003).

Consequently, although this Court may base liability on the RLTA's warranty of habitability through Section 17.6, it may also do so based directly on this warranty, which provides in relevant part:

“The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular:

“(1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition substantially endangers or impairs the health or safety of the tenant;

“* * * * *

“(5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy;

“* * * * *” RCW 59.18.060.

Both Plaintiffs and Defendants discussed *Lian* and the application of Section 17.6 in the memoranda they submitted to the Superior Court in connection with Defendants’ motion for summary judgment. Section 17.6 provides a remedy under the RLTA for injuries caused by conditions of the premises that either violate the building code or the RLTA’s implied warranty of habitability. In their memorandum in support of their motion for summary judgment, after noting that the common law warranty of habitability has been superseded by the RLTA, Defendants only argued that they could not be held liable under the RLTA’s implied warranty because the window did not violate the building code. (CP 17-19) In response, Plaintiffs also discussed the issue of whether the window

violated the building code. (CP 86-89) However, Plaintiffs also briefed the issue that, without anything to prevent someone from falling through the open window, the low sill of the window was a hazard regardless of whether it complied with the building code. (CP 81, 88-89, 90-94)

As the moving party, Defendants were responsible for raising all issues on which they thought they were entitled to summary judgment. *White v. Kent Medical Center, Inc., P.S.*, 61 Wn.App. 163, 168, 810 P.2d 4 (1991). The Superior Court did not enter any findings of fact or conclusions of law in denying Defendants' motion for summary judgment. Plaintiffs should not be held to have conceded the issue of whether liability can be found under the RLTA's implied warranty of habitability, when both Plaintiffs and Defendants briefed the issue of whether the window was a hazard because it violated the building code, and both parties also briefed the issue of whether, regardless of any building code violation, the window was hazardous despite any obviousness of its condition.

As explained by the *Lian* Court, a defect need not be so severe as to render the dwelling uninhabitable in order for the implied warranty of habitability to apply. Instead, the warranty is breached whenever the

defects pose an actual of potential safety hazard to the occupants. *Lian*, 106 Wn.App. at 818 (citing to *Atherton Condominium Apartment-Owners Association Board v. Blume Development Company*, 115 Wn.2d 506, 520, 522, 799 P.2d 250 (1990) and *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 416, 745 P.2d 1284 (1987)). Although the RLTA's warranty of habitability speaks in terms of a landlord's duty to "maintain" the premises, "a building that is not in compliance with the applicable building codes is not 'maintained' for purposes of the law." *Pinckney v. Smith*, 484 F.Supp.2d 1177, 1182 (W.D. Wash. 2007).

In *Atherton*, the plaintiff condominium association sued the builder of the complex after portions of the exterior walls, which the plaintiff thought were covered in stucco, began to crack and fall off. The defendant builder at first repaired the walls at no expense, but later refused to do so. The plaintiffs then hired a contractor to do the repairs, and discovered that the walls were not actually covered in stucco, but instead were covered by an allegedly inferior stucco substitute, that did not meet the building code 1-hour fire resistivity standard. The plaintiffs later discovered other defects in the buildings they contended also violated the building code.

The plaintiffs alleged claims for negligence, negligence per se,

nuisance, breach of the implied warranty of habitability, and fraudulent concealment of defects against the builder. The builder moved for summary judgment dismissing all of the plaintiffs' claims. The Superior Court granted this motion, holding that, even if the complex was not constructed in compliance with building code fire resistivity standards, the plaintiffs did not have an actionable claim against the builder.

On appeal, the Washington State Supreme Court first addressed the issue of whether the plaintiffs could state a claim against the builder under the implied warranty of habitability. In deciding this issue, the Court rejected the restrictive interpretation of this warranty argued for by the builder, also argued for by the Defendants in the subject case, that the implied warranty of habitability only applies to defects that profoundly compromise the building as a dwelling or egregious defects in the fundamental structure of the home:

“The allegations raised here present serious questions of the safety of the Atherton condominium, a consideration recognized in *Stuart*. *Stuart*, at 417, 745 P.2d 1284. The claimed violations of the UBC fire resistivity requirements are serious and substantial and, if proven, have the potential to severely restrict the habitability of the condominiums. As such, the Owners' claims fall within the purview of the warranty of habitability, at least for purposes of the summary judgment proceedings.” *Atherton*, 115 Wn.2d at 520.

The *Atherton* Court went on to explain that:

“Although the implied warranty of habitability does not extend to ‘mere defects in workmanship’ or impose upon a builder-vendor an obligation to construct a perfect residential dwelling, *Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987); accord, *Klos v. Gockel*, 87 Wn.2d 567, 571-72, 554 P.2d 1349 (1976), the alleged defects in this case are not ‘mere defects in workmanship.’ The alleged building code violations are neither trivial or aesthetic concerns, nor those involving procedural breaches. Rather, the alleged building code violations concern fundamental fire safety provisions regarding the construction of Atherton's floors and ceilings. As such, the alleged defects are within the purview of the implied warranty of habitability and should not have been dismissed on summary judgment as a matter of law.” *Atherton*, 115 Wn.2d at 522 (footnotes omitted.)

In *Lian v. Stalick*, 106 Wn.App. 811, 25 P.3d 467 (2001), the Court of Appeals remanded to the Superior Court for clarification of the trial court's liability theories. *Lian*, 106 Wn.App. at 825-26. On remand, the Superior Court found that the landlord was liable under Section 17.6, that the landlord had breached the implied warranty of habitability under the RLTA, and that the landlord had also breached common law duties owed to the tenant. The landlord again appealed and the Court of Appeals issued a second opinion, *Lian v. Stalick*, 115 Wn.App. 590, 593-94, 25 P.3d 933 (2003)(“*Lian II*”). In *Lian II*, the Court explained that Section 17.6 applies even when the dangerous condition is in an area under the control of the tenant, so long as the defect constitutes either a violation of

the implied warranty of habitability or a duty imposed by statute or regulation, and that Section 17.6 applies even if the tenant has notice of the defective condition. *Lian II*, 115 Wn.App. at 594-95. The *Lian II* Court further explained:

“Hence, to prevail on a § 17.6 claim, the tenant must show: (1) that the condition was dangerous, (2) that the landlord was aware of the condition or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition, and (3) that the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation.” *Id.*, 115 Wn.App. at 595.

The defendant landlord conceded the stairs were dangerous, but contended among other things that the Superior Court erred in finding him liable under the implied warranty of habitability under the RLTA. As the Defendants do in the present case, the defendant landlord in *Lian II* argued that the warranty of habitability is limited to defects rendering a house unfit to live in or profoundly compromising the essential nature of the structure as a dwelling. *Lian II*, 115 Wn.App. at 598. The Court noted that the defendant landlord had made these same arguments in his first appeal and that in *Lian* it had already held that the Superior Court had not erred in finding the defendant landlord in breach of the RLTA’s implied warranty of habitability. *Lian II*, 115 Wn.App. at 598-99.

In *Pinckney*, the U.S. District Court for the Western District of Washington noted the conflict between Division 1 and Division 3 concerning whether a condition was sufficiently dangerous to implicate the implied warranty of habitability in Washington. In that case, the plaintiff rented a residential home from the defendant. The home consisted of a finished upstairs living area and an unfinished basement, connected only by an exterior stairway. This stairway consisted of six steps and did not have any handrails. After living in the home for almost three years, the plaintiff decided to go to the basement to do some laundry. As she stepped out the doorway, she caught the heel of her shoe on the cuff of her pants. She fell to her right, not contacting anything until she struck the ground, fracturing her femur. There was no evidence that the stairway's condition had caused any other injuries, or that the plaintiff or any other tenant had requested that the defendant install handrails on the stairway.

The defendant landlord moved for summary judgment. The Court first noted that, while a landlord is generally not liable to a tenant for injuries caused by a defective condition on the leased premises, Section 17.6 creates an exception to this general rule if the condition is in violation of an implied warranty of habitability, or a duty created by statute or

regulation. *Pinckney*, 484 F.Supp.2d at 1180. Citing to *Lian II*, the *Pinckney* Court set forth the following elements of a claim under Section 17.6:

“To establish liability under § 17.6, the tenant must show that: (1) the condition was dangerous; (2) the landlord was aware of the condition or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition; and (3) the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation. *Lian v. Stalick*, 115 Wn.App. 590, 595, 62 P.3d 933 (2003).” *Id.*

The *Pinckney* Court concluded that, if called on to decide the issue, the Washington State Supreme Court would follow Division 1's analysis in *Lian* and *Lian II*, and hold that in the RLTA context a defect does not have to be egregious to violate the implied warranty of habitability under the RLTA:

“However, in *Lian I*, division three considered *Stuart*, *Howard*, and *Wright*, and rejected a bright-line rule. 106 Wn.App. at 817, 25 P.3d 467. The court distinguished those cases based on the Washington Supreme Court's decision in *Atherton Condominium Apartment-Owners Association Board v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990). In that case, the Court declined to apply *Stuart* as a general rule, and stated that violations of the warranty of habitability should be determined on a case-by-case basis. *Id.* at 520, 799 P.2d 250. The Court stated that building codes pertaining to fire safety were neither trivial nor aesthetic concerns and concluded that the defendant's violation of those codes was sufficiently dangerous to implicate the warranty of habitability. [Footnote omitted.] *Id.* at 522, 799 P.2d 250. The *Lian I* court relied on the Court's holding in *Atherton* when it

concluded that the landlord's failure to comply with building codes requiring a handrail and failure to maintain the steps in a useable condition constituted a violation of the warranty of habitability. 106 Wn.App. at 817-18, 25 P.3d 467. Summing up the rule, the court stated that a condition violates the warranty if it poses an actual or potential safety hazard to its occupants. *Id.* at 818, 25 P.3d 467.

“* * * * *

“Plaintiff does not need to prove that the building was actually unfit to live in to prove a violation of the warranty of habitability. First, both *Howard* and *Wright* relied solely on the older Washington Supreme Court case--*Stuart*--and did not consider *Atherton*, which states that questions relating to the warranty of habitability must be made on a case-by-case basis. *Atherton* is also notable because it involved a discussion of the warranty of habitability in the context of a sale between two owners of property. 115 Wn.2d 506, 799 P.2d 250. There is an even stronger case for extending the more flexible *Atherton* analysis to landlord-tenant disputes in light of the legislature's decision to provide extra protection to tenants when it enacted the RLTA. Second, because *Lian I* repudiated the *Howard* decision, it also undermined the foundation of the *Wright* decision which relied on *Howard*. Finally, the Washington Supreme Court has stated that although housing code violations do not establish a prima facie case that premises are uninhabitable, they are evidence which aid in establishing that premises are uninhabitable. *Foisy v. Wyman*, 83 Wash.2d 22, 31, 515 P.2d 160 (1973).” *Pinckney*, 484 F.Supp.2d at 1184.

The *Pinckney* Court concluded that there was sufficient evidence to create a genuine issue of material fact concerning whether the stairs violated the implied warranty of habitability, and denied the defendant landlord's motion for summary judgment. *Pinckney*, 484 F.Supp.2d at

1184-85.

In the present case, the large window was placed so close to the upstairs floor as to be the functional equivalent of a patio door. Defendants do not dispute that there was no guard or other means of protecting occupants from falling out of the window. The placement of the window was dangerous, as when the window was open there was nothing to prevent a 10 foot fall to concrete below except an 11 inch sill, that was more of a tripping hazard than a protection against a fall. The placement of the bottom of the window so close to the floor was not a mere defect in workmanship and does not raise merely trivial or aesthetic concerns. Instead, the placement of the window raises fundamental safety concerns with regard to the safety of the second floor of the unit. Therefore, the Superior Court did not err in denying summary judgment to Defendants, because as in *Atherton* and *Pinckney*, questions of fact exist concerning whether the placement of the window violated the implied warranty of habitability.

E. Section 343A Also Applies, and Questions of Material Fact Also Exist Under This Rule Concerning Whether Defendants Should Have Anticipated Harm from the Window Despite the Obviousness of Its Condition.

The *Lian* Court noted that the plaintiff tenant could not recover

under a general latent defect theory, because the tenant knew of the obviously decrepit condition of the steps. *Lian*, at 820. However, the *Lian* Court then discussed the tenant's successful argument to the Superior Court that, as discussed in *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 50, 914 P.2d 728 (1996), "liability will attach if the possessor should have anticipated the harm despite the invitee's knowledge of the obviousness of the danger." *Lian*, 106 Wn.App. at 820, citing *Degel*, 129 Wn.2d at 50. The *Lian* Court noted that the underlying common law rule on which *Degel* is based, Section 343A, can also apply to portions of the premises under the control of the tenant:

"*Degel*, which involved a natural body of water adjacent to a mobile home park, was decided in a common-area type of context. *Id.* at 46- 47, 914 P.2d 728. But the underlying common law rule on which *Degel* is founded, Restatement (Second) of Torts § 343A(1) (1965), in appropriate circumstances, applies to portions of the premises under the control of a residential tenant. See *Anglin v. Oros*, 257 Ill.App.3d 213, 195 Ill.Dec. 409, 628 N.E.2d 873, 876 (1993) (finding no duty of care where landlord did not know of defective storm door and would not have anticipated harm to residential tenant's daughter). The determinative issue is not so much the location of the defect but whether the dangerous defect was so obvious that the landlord should have anticipated the harm even though the tenant knew of the defective condition. *Id.*, 195 Ill.Dec. 409, 628 N.E.2d at 877. Consequently, a duty of care would exist 'if the landlord should have anticipated the harm despite the tenant's knowledge of the danger or despite the obvious nature of the danger.' *Degel*, 129 Wn.2d at 50, 914 P.2d 728." *Lian*, 106 Wn.App. at 820-21.

Degel involved a two-year old child who was injured when he fell down a steep embankment and into a creek next to a play area. The Court first noted that the threshold determination of whether a duty exists is a question of law. As the child was a tenant, he was an invitee to whom the landowner owed an affirmative duty to keep the premises in a reasonably safe condition. *Degel*, 129 Wn.2d at 48-49. In the landlord/tenant context, this meant that the landlord had an affirmative duty to maintain the common areas of the premises in a reasonably safe condition. *Id.* at 49. After noting that Section 343 states this general rule and Section 343A then addresses a landlord's liability where the danger is known or obvious, the Court declared:

“Thus, under the Restatement and this state's common law, the landlord in this case had a duty to exercise reasonable care to protect all of the tenants * * * from unreasonable risks which were not known or obvious. *An additional duty would exist if the landlord should have anticipated the harm despite the tenant's knowledge of the danger or despite the obvious nature of the danger.*” *Id.* at 50. (Emphasis added.)

As discussed above, the *Lian* Court extended these duties to non-common areas of the premises. Several Washington decisions have applied Section 343A in other contexts.

In *Jarr v. Seeco Construction Co.*, 35 Wn.App. 324, 666 P.2d 392

(1983), the plaintiff was injured while inspecting an unfinished townhouse at an open house. He pulled some sheets of sheetrock from a stack leaned against the wall. The stack moved and fell on the plaintiff's leg. Based upon Section 343 and Section 343A, the Court ruled that the real estate broker that was showing the unit owed a duty to the plaintiff "with respect to those dangerous conditions on the premises which posed an unreasonable risk of harm." *Jarr*, 35 Wn.App. at 329. The Court then ruled that the foreseeability of the specific harm, the obviousness of the danger, contributory negligence, and the reasonableness of the broker's conduct at the open house were all questions of ultimate fact for the trier of fact. *Id.* at 330.

The plaintiff in *Lettengarver v. Port of Edmonds*, 40 Wn.App. 577, 699 P.2d 793 (1985), was injured when, while stepping from his boat, he slipped on bolts extending less than two inches above the surface of the defendant's dock. The plaintiff was very familiar with the pier and had stumbled over the bolts several times before, but never complained. At the time of the accident he did not look to see where he was placing his foot. There were numerous cleats and other obstructions on the dock in addition to the protruding bolts. The defendant agreed that it had a duty to

maintain its premises in a reasonably safe condition for the protection of invitees, but contended that the dock was built using the best known methods available and the condition complained of was neither dangerous nor defective. Citing to Restatement (Second) of Torts § 343, Comment *b*, the Court held that the mere fact that reasonable care was taken in the construction of the premises did not relieve the defendant from its duty to exercise reasonable care in the maintenance of the premises. The Court then held that it was foreseeable that a person stepping on a dock might trip over the bolts and that reasonable minds could differ concerning whether it was negligent to construct or maintain a dock in that manner. *Lettingarver*, 40 Wn.App. at 580. The defendant then argued the plaintiff knew about the bolts and therefore, even if they were dangerous, the Port had no duty to repair. After quoting Section 343A, the Court declared they could not say as a matter of law that the defendant should not have anticipated the harm despite the plaintiff's knowledge or the obviousness of the condition. Having determined the legal question of whether a duty was owed in the affirmative, it was the jury's function to set the scope of the duty by determining the foreseeable range of danger. *Id.* at 581.

In *Mucsi v. Graoch Associates Ltd. Partnership No. 12*, 144 Wn.2d

847, 31 P.3d 684 (2001), a tenant who slipped and fell on ice outside a clubhouse of an apartment complex where he resided sued the apartment-complex owner, alleging that the defendant negligently failed to clear the clubhouse's side exit of snow and ice to make it safe for use. The trial court dismissed the complaint, and the Court of Appeals affirmed in an unpublished opinion. Reversing and remanding, the Washington State Supreme Court held that the plaintiff had presented sufficient evidence to establish that the defendant breached its duty of reasonable care so that a jury trial was warranted. Referencing Section 343A, the Court stated: "This Court has recognized an invitee's awareness of an unsafe condition does not necessarily preclude a landowner of liability"; and that: "Liability may manifest where the landowner has reason to expect the tenant will encounter the known or obvious danger because to a reasonable person in that position the advantages of doing so would outweigh the apparent risk." *Mucsi*, 144 Wn.2d at 859-60 (citing *Iwai v. State*, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996)).

In *Sjogren v. Properties of the Pacific Northwest, LLC*, 118 Wn.App. 144, 75 P.3d 592 (2003), the plaintiff was injured in a fall down a dark staircase in an apartment building. The plaintiff fell after visiting

her daughter, a tenant in the apartment building. It was dark when the mother left the apartment and the stairway lights were not working. The mother was about half way down the stairs when her daughter closed her apartment door. Without the light from the apartment, the stairs became completely dark. The mother proceeded down the stairs slowly, holding on to the railing, but she misjudged a step and fell, fracturing her leg.

The *Sjogren* Court noted that a landlord's duty to maintain common areas in a reasonably safe condition does not ordinarily extend to dangers that are open and obvious, but in limited circumstances Section 343A creates a duty in such a situation if the landlord should anticipate the harm despite the invitee's knowledge of the danger or the obviousness of the danger. *Sjogren*, 118 Wn.App. at 148-49. The Court ruled that the plaintiff had presented evidence sufficient to fit her claim within Section 343A. The Court reasoned that, as the plaintiff only became aware of the darkened stairs when she was halfway down them, a reasonable juror could conclude that the landlord had reason to expect that, under these circumstances, she would decide that the advantages of continuing down the stairs outweighed the apparent risks of doing so. *Id.* at 150.

The *Sjogren* Court discussed *Lian*, noting in that case the Court

held that, despite the limited repair or rent withholding remedies provided by the RLTA, the landlord could be held liable for personal injuries under Section 17.6 for personal injuries for violating the Act's warranty of habitability or a duty created by statute or regulation. The *Sjogren* Court declined to adopt this section, noting that the dangerous condition in *Lian* was not in a common area, that the decrepit stairs in *Lian* were well known to both the landlord and tenant, and "more importantly, *Sjogren* fits within the limited circumstances of Restatement (Second) of Torts, Section 343A, under which an obvious danger does not automatically bar her recovery." *Id.* at 151. See also *Ticoni v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139-40, 875 P.2d 621 (1994) (distraction, forgetfulness, or foreseeable, reasonable advantages from encountering the danger are factors which trigger the landowner's responsibility to warn of, or make safe, a known or obvious danger); *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 884, 866 P.2d 1271 (1994) (landowner should expect harm where reason to believe invitee will encounter known or obvious danger because to a reasonable person advantages of doing so outweigh apparent risk); and *Gordon v. Herzog*, 410 NW 2d 405 (Minn. Ct. App. 1987) (tavern patron sued after falling through an open window at the end of the

bar next to the stool he was sitting on, with a lower sill was only three or four inches off of the floor; the Minnesota Court of Appeals applied Section 343A and held that a question of fact existed concerning whether the defendant should have anticipated the harm despite the obviousness of the condition).

In the subject case, Ms. Almond testified that Mr. Vukanovich told her that he had always been concerned about the window, which has not been denied by Mr. Vukanovich. Furthermore, Mr. Vukanovich testified that he would have thought about the hazard presented by the window before the accident. Specifically, he would not have let his six-year-old daughter play near the window when open. The window was in the upstairs living room that got “extremely hot”, even when the weather outside was only warm. The window could be opened and had a screen on the opening providing a false sense of security when the window was opened. Questions of fact exist for the jury to decide concerning whether Defendants should have anticipated that tenants would open the window for ventilation despite the low sill.

VI. CONCLUSION

Section 17.6 applies and under this rule and the RLTA, Defendants may be found liable if the window violated the building code and/or the RLTA's implied warranty of habitability. Without a guard across the opening the window violated the building code. Even if the window technically did not violate code, a question of material fact exists concerning whether the window's low sill was sufficiently dangerous so as to violate the implied warranty of habitability. Section 343A also applies, and a question of material fact also exists under this rule concerning whether Defendants should have anticipated harm from the window despite the obviousness of its condition. Therefore, the Superior Court did not err in denying Defendants' motion for summary judgment.

RESPECTFULLY SUBMITTED this 7th day of January, 2008.

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Subject window in living room

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C. Neely
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DIVISION II

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

I certify that on the 7th day of January 2008, I caused ~~true~~ and

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correct copies of the foregoing Brief of Respondents and Supplemental

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