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No. 38230-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAY ADAMS AND CYNTHIA ADAMS
APPELLANTS,
V.

LARRY APELAND AND SHARON APELAND,
Husband and wife, and the marital community therein,
RESPONDENTS

BRIEF OF APPELLANTS
JAY AND CYNTHIA ADAMS

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Adams

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1 A. INTRODUCTION

2 This is an appeal on Motion for Summary Judgment [CP 9-16] brought by
3 the respondents, Larry and Sharon Apeland, which dismissed the appellants, Jay
4 and Cynthia Adams, case in its entirety.

5 This is a case of first impressions. But, when you delve deeper into the facts
6 and issues raised in the Adams claim, you will discover the issues that are
7 addressed are complex and could ultimately change the playing field for landlords
8 and tenants.

9 The ultimate ruling on the issues presented in the Adams' claim could have a
10 drastic impact on landlord's obligations and liabilities and provide a remedy when
11 there are no claims of personal injury, by following the ruling made in a previous
12 ruling of Division III, Court of Appeals, where the trial court awarded not only
13 damages for proven damages for personal injuries suffered, but, returned all rents
14 paid by the tenants during their tenancy under several theories of liability presented
15 by the petitioners.

16 The Adams' have relied on this case and the issues addressed in it to
17 prepare their claim and the outcomes of the two cases are opposed when they
18 present identical facts, causes of action, and theories of liability. Division III
19 ultimately found that a remedy is available under several others theories of liability
20 and the Adams are requesting this Court to reverse the Trial Court's holding
21 dismissing the Adams case in favor of the Apelands.
22
23
24
25

1 Larry and Sharon Apeland, a married couple owned the rental home at issue
2 in this case and in early 1998 they placed an advertisement in the local paper to
3 rent the home for \$650 per month. Tiger Lake supplied water to the home.

4 Jay and Cynthia Adams, a married couple responded to the Apelands'
5 advertisement.

6 The Bremerton-Kitsap County Board of Health requires that all surface water
7 sources of potable water be tested at least once a year for bacterial quality and
8 meet certain water quality and very specifically places responsibility of compliance
9 with the ordinance upon the owners or operators of a private or public water system
10 within its scope and jurisdiction.
11

12 The Apelands leased the home to the Adams in March of 1998 for \$650 per
13 month. The term of the tenancy was from March 19, 1998 through April, 1999. The
14 Adams asked if the water was drinkable. Mr. Apeland responded it was as long as
15 a filter was used, but, added you may want to buy bottled water if you have any
16 concern with the water.

17 The Adams and Apelands signed a written residential lease prepared by the
18 Apelands. [CP 36-37] The parties ultimately extended the lease through July
19 2007. [CP 33] The Adams began to experience flu like symptoms and discussed
20 them with their family doctor, but, dismissed them as non significant.
21

22 The Adams sued for damages based upon their contract (obligation to
23 perform major maintenance and repair and breach of the implied warranty of
24 habitability and covenant of quiet enjoyment); and violation of the Land-Lord Tenant
25 Act; and negligent misrepresentation of the water quality. [CP 1-5]

1 The Apelands filed a Motion for Summary Judgment [CP 9-16]. The Adams
2 filed their response [CP 22-38] and a hearing was held on July 25th, 2008, before
3 the Honorable Theodore Spearman, who dismissed the Adams' case in its entirety.

4 The Adams filed their Notice of Appeal To Court Of Appeals Division II on
5 August 25, 2008 [CP 69-73]. On October 14, 2008 the Adams filed with the Clerk
6 of Kitsap County their Designation Of Clerk's Papers and Exhibits and their
7 Statement of Arrangements pursuant to **RAP 9.2** and **RAP 9.6** [CP 74-75]. On
8 October 1, 2008 the Apelands filed Counter Designation Of Clerk's Papers Per
9 Request Of Respondents To The Court Of Appeals [CP 86-88]. Finally, on
10 December 5, 2008, the Adams filed with the Clerk of Kitsap County their
11 Submission Of Original Trial Transcript And Designation Of Clerk's Papers Per
12 Request Of The Appellants To The Court Of Appeals [See Appendix No. 1] even
13 though the file reflects that the transcript was filed on August 8, 2008. [CP 75].

14
15 **B. ASSIGNMENT OF ERRORS**

16 (1) Assignment of Errors

- 17 a. Appellants asserts that the Trial Court erred by finding that there were no
18 genuine issues of facts.
- 19 b. Appellants asserts that the Trial Court erred by limiting its ruling to only
20 the petitioners' tort claims.
- 21 c. Appellants asserts that the Trial Court erred by not addressing the
22 petitioners' other causes of action based upon contract, common law,
23 statute and **the Residential Landlord-Tenant Act of 1973**.
- 24 d. Appellants assert that the Trial Court erred in interpreting the statutory
25 rules of construction regarding contracts.
- e. Appellants asserts that the Trial Court erred by finding petitioner's
assumed the risks inherent in leasing the house without first determining
what risks are inherent in renting or leasing a house?

1 (2) Issues Pertaining to the Assignment of Error

- 2 a. May a Trial Court dismiss a appellant's case when there are genuine
3 issues of material facts?
- 4 b. May a Trial Court dismiss a appellant's case when there are unresolved
5 claims based upon contract law, statutory law, common law and the
6 **Residential Landlord-Tenant Act of 1973**?
- 7 c. May a Trial Court dismiss appellant's claims based upon contract, statute
8 and common law without applying the rule of law?
- 9 d. Did the Trial Court properly find that the respondents met their obligations
10 under **Washington State's Residential Landlord-Tenant Act of 1973**
11 by "keeping the premises fit for human habitation" and to particularly
12 "maintain the premises in substantial compliance with health or safety
13 codes for the benefit of the tenant" as required by **RCW 59.18.060(1)**?
- 14 e. Did the Trial Court properly find that "except for normal wear and tear"
15 that the respondents made "repairs necessary to put and keep the
16 premises in as good as condition as it by law or rental agreement should
17 have been, at the commencement of the tenancy" as required by **RCW**
18 **59.18.060(5)**?
- 19 f. Did the Trial Court properly determine the threshold question "whether
20 the condition of this water source, Tiger Lake, interfered with the
21 appellants' quiet enjoyment of the home?"
- 22 g. Did the Trial Court properly determine "whether the water source, Tiger
23 Lake, required "major maintenance" as spelled out in the lease
24 agreement?"
- 25 h. Did the Trial Court properly determine "whether the respondents fully
complied with the **Residential Landlord-Tenant Act of 1973**" as
required by **RCW 59.18**?
- i. Did the Trial Court properly determine "whether the respondents fully
complied with the **Bremerton-Kitsap County Board of Health Rules
and Regulations for Private and Public Water Supplies**?"
- j. Did the Trial Court properly determine "whether a reasonable person or in
the exercise of ordinary care should have known that this water source,
Tiger Lake, should have at a minimum be tested annually, as part of the
major maintenance of the home?"
- k. Did the Trial Court properly determine whether the respondents knew or
should have known of this latent defect?

1
2 i. Did the Trial Court properly determine "whether the respondents knew or
3 should have known of the local code requirements requiring the annual
4 testing" of the water source?

5 m. Did the Trial Court properly determine whether the respondents were in
6 violation of a landlord's implied duty of habitability for failing to exercise
7 reasonable care to repair the condition?

8 n. Did the Trial Court properly determine whether the respondents' actions
9 and/or omissions breached a duty created by statute or administrative
10 regulation?

11 C. STATEMENT OF THE CASE

12 (1) Relief Sought

13 Appellants ask this Court to reverse the Court's Order of July 25, 2008 [CP
14 39-41] on the grounds that (1) there are genuine issues of material facts that
15 remain unresolved and were not either adequately addressed by the Trial Court or
16 were not addressed at all and (2) the Trial Court improperly applied the assumption
17 of the risk doctrine to this case as a total bar to recovery. The Court should then
18 remand these proceedings to the Superior Court with instructions to comply to have
19 a hearing on the issues raised in the Adams' claim. [CP 3-5]

20 (2) Statement of Facts

21 The Apelands leased a rental home that they owned on Tiger Lake located
22 in Bremerton, Washington to the Adams. The rental house's water source was
23 pumped directly from Tiger Lake.

24 The Adams signed a written residential lease prepared by the Apelands [CP
25 6 and 17-21 and 32] that clearly stated the monthly rental fee would be \$650.00 per
month and was silent in regards to any accord or satisfaction regarding the water
source. The term of the lease was from March 19, 1998 through April 31, 1999.

1 The Adams asked if the water was drinkable and Mr. Apeland responded it
2 was safe to drink as long as a filter was used, but, added you may want to buy
3 bottled water if you have concern with the quality of the water. [CP 10 and 33]

4 The lease was ultimately extended through July of 2007 without any
5 changes to the original lease agreement. [CP 6]

6 Shortly after moving into the rental home the Adams began to experience flu
7 like symptoms, discussed them with their family physician, but, dismissed them as
8 non significant.

9 The Apelands discussed the water source with the Adams on several
10 occasions during the term of the lease and even offered to install a well if the
11 Adams would agree to rent the house for an additional four years and pay an
12 increase in the monthly rent. The Adams agreed to the increased term and raise in
13 rent and the Apelands failed to install the well. [CP 10 and 18 and 33]

14 After several months of inquiries by the Adams into the status of the well
15 installation the Apelands raised the rent and when the Adams inquired when the
16 well would be installed the Apelands terminated the lease with the Adams, installed
17 the well and sold the property to their neighbor. [CP 10, 18, and 33]

18 The Adams vacated the home at the end of July 2007. The Adams moved
19 into the house they purchased on August 1, 2007 and promptly called the Apelands
20 and left their new address and phone number with the Apelands. [CP33] When the
21 Apelands failed to return their deposit the Adams attempted unsuccessfully to
22 contact the Apelands to inquire into the status of their deposit. [CP 11 and 33]

1 The Apelands failed to return the Adams' deposit until September 25, 2007,
2 in violation of the Residential Landlord-Tenant Act of 1973. [CP 10, 18–19, and 33]

3 The Adams sued for damages based upon their contract (obligation to
4 perform major maintenance and repair, implied covenant of habitability, and
5 covenant of quiet enjoyment); and violation of the Land-Lord Tenant Act; and
6 negligent misrepresentation of the water quality; and statutory violations [CP 1-5].

7
8 The Apelands filed a Motion for Summary Judgment which argued
9 that the Adams' assumed the risk inherent in leasing a home and that since the
10 Adams could not demonstrate physical injuries there could be no award of
11 damages. [CP 9-16]. The Adams filed their response [CP 22-31] and a hearing
12 was held on July 25th, 2008, before the Honorable Theodore Spearman [CP 42-68],
13 who dismissed the Adams' case in its entirety holding:

14 "I don't believe that there is genuine issue of fact
15 regarding the theories of liability that have been claimed under
16 tort law because there is no injury that has been alleged to
17 create a genuine issue of fact.

18 Secondly, regarding the home being leased without the
19 water, I believe the argument that the defendants have made
20 with entering into this based on their allegations concerning the
21 rent and the reduction and the knowledge of it and the activity
22 and failure to rebut by the plaintiffs leads me to believe that
23 they were aware that ingestible water should be brought in. I
24 think that it's a highly suspect case in terms of folks having this
25

1 right, but I am going to let a higher court tell me that I am
2 wrong." [CP 66-67]

3 The Adams filed their Notice of Appeal To Court Of Appeals Division II on
4 August 25, 2008. [CP 69-73] On October 14, 2008 the Adams filed with the Clerk
5 of Kitsap County their Designation Of Clerk's Papers and Exhibits and their
6 Statement of Arrangements pursuant to **RAP 9.2** and **RAP 9.6**. [CP 74-75]

7 On October 1, 2008 Apelands filed Counter Designation Of Clerk's Papers
8 Per Request Of Respondents To The Court Of Appeals [CP 86-88].

9 Finally, on December 5, 2008, the Adams filed with the Clerk of Kitsap
10 County their Submission Of Original Trial Transcript And Designation Of Clerk's
11 Papers Per Request Of The Appellants To The Court Of Appeals.
12

13 The ADAMS have appealed. [CP 69-73].

14 D. SUMMARY OF ARGUMENT

15 The Court found that there was no genuine issue of material facts regarding
16 the theories of liability that have been claimed under tort law because no injury was
17 suffered by the Adams. The Court also found that there was a rent reduction as
18 alleged by the Apelands and that the Adams had assumed the risks inherent in
19 leasing a house without making a determination of exactly what risks are inherent in
20 leasing houses. [CP 42-68] Based upon this the Court dismissed the Adams case.
21 This was an abuse of discretion.
22

23 The Adams' claims were based upon several theories of law, contract,
24 statutory, common law and the **Residential Landlord-Tenant Ac of 1973**. The
25 Adams' claim minimized the tort claims and emphasized the contract, common law,

1 statutory and the **Residential Landlord-Tenant Act** based claims and the Court's
2 dismissal of the case was based only upon tort theory and the flawed application of
3 contract law and the assumption of the risk doctrine addressed by the Apelands.

4 The Trial Court only addressed two of the legal theories in the Adams' claim
5 and failed to address the other issues in their claims which were the same issues
6 that were argued in the case of **Tucker v. Hayward**, 118 Wn. App. 246, 251, 75.
7 P.3d 980 (2003) which is an identical fact pattern with the Adams' case with the
8 following two exceptions (1) there was personal injury in **Tucker** versus the Adams'
9 case and (2) the water source was a well in **Tucker** versus the lake in the Adams'
10 case. Other than these two exceptions **Tucker** is on point for the claims that the
11 Adams filed against the Apelands.
12

13 The record will clearly show that the Trial Court was not itself convinced that
14 there were no genuine issues of fact and the Apelands' attorney's testimony clearly
15 demonstrates that the defense believes that there are issues of fact that are
16 unresolved. [CP 47-50, 53, 55, and 63]

17 Specifically, the water quality of the water source is in dispute, and whether
18 the water source was an approved source for potable water, and whether there was
19 an accord reached as advanced by the respondents, as well as whether the
20 Apelands disclosed the dangers of that the water source and obtained a waiver
21 from the Adams as alleged by the Apelands. There are the issues of whether the
22 Apelands complied with their obligations under the **Residential Landlord-Tenant**
23 **Act of 1973** and all other local and state laws, regulations, and ordinances that
24 remain unresolved.
25

1 Further, there are questions of whether the condition of this water source,
2 Tiger Lake, interfered with the Adams' quiet enjoyment of the home as required by
3 the Lease and common law, as well as whether the water source required "major
4 maintenance" as spelled out in the lease agreement. Then there is the question of
5 whether a reasonable person knew or in the exercise of ordinary care should have
6 known this water source, Tiger Lake, should have at a minimum be tested annually
7 – as a part of the major maintenance of the home.
8

9 Finally, there are issues surrounding the trial court's finding that the Adams
10 assumed the risk inherent in renting houses without explaining what those inherent
11 risks might be and whether the Apelands breached their duties and covenants, as
12 well as the issue of whether the Apelands met their burden of proof that no genuine
13 issues of material facts exist.

14 To determine whether summary judgment was properly granted to the
15 Apelands, it is essential to define what duties the Apelands owed to the Adams and
16 what risks were assumed by the Adams. And, the only place that can assist in this
17 analysis is the Lease Agreement and the **Residential Landlord-Tenant Act of**
18 **1973.**

19 The Adams have then raised an issue of fact – whether the Apelands knew
20 of should have known of this latent defect and whether the Apelands knew or
21 should have known about the local code requiring the annual testing of the water
22 source to the house.
23

24 The Trial Court's dismissal failed to consider that damages can be other than
25 personal injury as when the **Tucker** court awarded not only damages suffered by

1 the plaintiffs for personal injuries, but, also awarded the plaintiffs damages for the
2 rents that they paid to the defendants concluding since that home was not
3 inhabitable the house was not rentable.

4 Therefore, it is clear the court can award damages for rents paid as did the
5 **Tucker** court. This was an abuse discretion.

6 The Trial Court erred by dismissing the case because there are genuine
7 issues of facts that have not adequately been addressed by the Trial Court.

8 The Apelands, not the Adams, have the burden of proving that they met all
9 their statutory obligations as landlords, not, the Adams, as the court has decided.
10 The Apelands have the burden of proof by demonstrating that there are no genuine
11 issues of material fact and not the Adams as the court has decided. This is an
12 abuse of discretion.
13

14 The Trial Court's choice of remedies was error.

15 The Trial Court not only denied the Adams of their day in court but also
16 granted the Apelands affirmative relief by dismissing the case. This was error
17 because the trial court's relief was greater than what was reasonably necessary to
18 protect the Apelands.

19 The Court should reverse and remand to the trial court with directions to
20 have an open and fair hearing on the Adams' claims.

21 **E. ARGUMENT**

22 (1) Standard of Review

23 This is an appeal from summary judgment. So this Court will engage in the
24 same inquiry as the trial court. **Mountain Park Homeowners Ass'n, Inc. v.**
25

1 **Tydings**, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Summary judgment is
2 appropriate “if pleadings, depositions,.. affidavits, if any, show that there is no
3 genuine issue as to any material fact and that the moving party is entitled to a
4 judgment as a matter of law.” **CR 56(c)**. “A material fact is one upon which the
5 outcome of litigation depends.” **Clements v. Travelers Indem. Co.**, 121 Wn.2d
6 243, 249, 850 P.2d 1298 (1993). And the court must consider the facts and all
7 reasonable inferences in light most favorable to the nonmoving party.” **Mountain**
8 **Park**, 125 Wn.2d at 341. “The burden is on the moving party to prove no genuine
9 issue of material fact exists.” **Jacobsen v. State**, 89 Wn.2d 104, 108, 569 P.2d
10 1152 (1977).

11
12 The court will review a trial court’s grant of summary judgment de novo.
13 **Tucker**, 118 Wn. App. at 251 and summary judgment will be granted where there
14 are no genuine issues of material fact and the issues presented can be resolved as
15 a matter of law. Id.; **CR 56(c)**.

16
17 (2) Statutory Rules of Construction

18
19 In light of the lack of pertinent reported cases, it is incumbent upon the Court
20 to review the plain wording of the statute, and make a ruling consistent therewith.
21 **Berrocal v. Fernandez**, 155 Wash.2d 585, 599 (2005). Strained meanings and
22 absurd results in interpreting statutes should be avoided. **State v. Neher**, 112
23 Wn.2d 347, 351 (1989). When interpreting statutes, courts are not required to
24 abandon their common sense. **Allison v. Housing Authority**, 118 Wn.2d 79, 86
25 (1991) (quoting **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989)). A court

1 must "give the meaning to every word the legislature includes in a statute, and....
2 must avoid rendering any language superfluous." **Fernandez**, 155 Wash.2d at
3 599-600.

4
5 Statutory interpretation is a question of law, subject to de novo review.
6 **Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.**, 159 Wn.2d 292,
7 298, 149 P.3d 666 (2006). Whether a statute applies to a particular set of facts is a
8 question of law that the court will review de novo. **State v. Dearbone**, 125 Wn.2d
9 173, 178-179, 883 P.2d 303 (1994). **Guillen v. Contreras**, 2008-WA-1107.387 at
10 4.

11
12 Municipal ordinances are local statutes that are to be construed according to
13 the rules of statutory construction. **Ford Motor Co., v. City of Seattle**, 160 Wn.2d
14 32, 156 P.3d 185, 189 (2007) (quoting **McTavish v. City of Bellevue**, 89 Wn. App.
15 561, 565, 949 P.2d 837 (1998)). Where a statute is clear on its face, its plain
16 meaning should "be derived from the language of the statute alone. **Ford**, 160 149
17 P.3d at 189 (quoting **Kilian v. Atkinson**, 147 Wn.2d 16, 20, 50 P.3d 638 (2002)).

18
19 The court will apply the same rules of statutory construction to ordinances as
20 we do statutes. **Kitsap County v. Mattress Outlet**, 153 Wash.2d 506, 509, 104
21 P.3d 1280 (2005).

22
23 The Court reviews the trial courts findings of fact for substantial supporting
24 evidence in the record. If the evidence supports the findings, they then consider
25 whether the findings support the court's conclusions of law. **Landmark Dev. Inc. v.**

City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (citing **Willener v.**

1 **Sweeting**, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)). The Court reviews questions
2 of law and conclusions de novo. **Sunnyside Valley Irrigation Dist. v. Dickie**, 149
3 Wn.2d 873, 880, 73 P.3d 369 (2003). "Substantial evidence" is evidence that would
4 persuade a reasonable fact finder of the truth of the declared premise. **World Wide**
5 **Video, Inc. v. City of Tukwila**, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), cert
6 denied, **503 U.S. 986**, 112 S. Ct. 1672, 118 L.Ed. 2d 391 (1992).
7

8 Similarly, the trial court has discretion in ruling on evidentiary matters and its
9 decisions with respect to that evidence are ordinarily reviewed on an abuse of
10 discretion standard. **Sintra, Inc. v. City of Seattle**, 131 Wn.2d 640, 662-63, 935
11 P.2d 555 (1997).
12

13 If the provisions of a lease create an ambiguity, the court will adopt the
14 interpretation more favorable to the lessee, particularly when, as here, the lease
15 was written by the lessor. **Stuchell v. Mortland**, 8 Wn. App. 884, 893, 509 P.2d
16 770 (1973); **Allied Stores Corp. v. North West Bank**, 2 Wn. App. 778, 784, 469 P.
17 2d 993 (1970); **Blume v. Bohanna**, 39 Wn.2d 199, 203, 228 P.2d 146 (1951).
18

19 The purpose of contract interpretation is to determine the intent of the
20 parties. **Berg v. Hudesman**, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). The court
21 must search for intent through the objective manifest of the language of the contract
22 itself. **Hearst Commc'ns., Inc. v. Seattle Times Co.**, 154 Wn.2d 493, 503, 115
23 P.3d 262 (2005). The court attempts to determine the parties' intent by focusing on
24 the objective manifestations of the agreement. Contract construction involves the
25

1 application of legal principles to determine the legal effect of contract terms.

2 **Hearst**, 154 Wn.2d at 502 n. 9.

3
4 (3) The Trial Erred by finding that there were no genuine material issues of
5 fact present. The contractual, statutory and common law claims were not
6 addressed in the hearing.

7 The following claims were addressed in the Adams' claim and were not fully
8 addressed or addressed at all by the Trial Court. One of the cases in Washington
9 particularly dispositive of the issues presented in this case and based upon a
10 similar fact pattern is **Tucker**, 118 Wn. App. at 246.

11
12 The **Tucker** court addressed the following claims which are parallel to the
13 Adams' claims:

14 The claims brought by the appellants, Jay Adams and Cynthia Adams, are
15 identical to the issues addressed in **Tucker**, along with other issues based in
16 common law and statutory law.

17
18 The **Tucker** case involved the lease of a residential property whose water
19 source was a well located on the property. The Tuckers signed a lease prepared
20 by the Haywards to rent the Hayward rental property as a residence. The lease
21 included (1) an express covenant of quiet enjoyment and (2) required the lessor to
22 maintain and repair the leased premises.

23 The Tuckers son who was disabled became ill once they moved into the
24 rental unit and required medical intervention. Through testing it was determined
25

1 that the son's source of infection was from the water that he was ingesting at home,
2 the well.

3 The Tuckers brought suit against the Haywards for personal injury and, any
4 and all other remedies available in equity or contract.

5 Ultimately, Division III, of the Washington State Appeals Court held in favor
6 of the Tuckers and found that the Haywards had breached their duties as required
7 by statute, common law, contract and under the **Residential Landlord-Tenant Act**
8 **of 1973 ("RLTA")** and awarded the Tuckers monetary awards for their personal
9 damages and all the rents collected by the Haywards during the Tucker's
10 residency.
11

12 The material differences between the **Tucker** case and the Adams' case are
13 (1) there are no claimed personal injuries for physical harm suffered by the Adams
14 being claimed and (2) the water source in the Adams' case was a lake, Tiger Lake
15 (surface water), and the water source in the **Tucker** case was a well located on the
16 property.
17

18 Both courts were asked to determine whether the landlords violated the
19 lease, the **RLTA**, the covenant of habitability and the covenant of quiet enjoyment.
20 The outcomes of **Tucker** and the Adams' cases are opposite.

21 In a Motion for Summary Judgment brought by the Apelands before the
22 Honorable Theodore Spearman on July 25, 2008, the Apelands' argued that the
23 Adams had assumed the risk associated with the questionable water source and
24 since the Adams did not claim or prove damages for personal injuries that they
25 suffered there were on genuine issues of facts. The Adams argued that the issues

1 addressed in the **Tucker** case were valid claims and needed to be addressed by
2 the Trial Court.

3 The Trial Court ultimately held:

4 "I don't believe that there is genuine issue of fact regarding the
5 theories of liability that have been claimed under tort law
6 because there is no injury that has been alleged to create a
7 genuine issue of fact.

8 Secondly, regarding the home being leased without the
9 water, I believe the argument that the defendants have made
10 with entering into this based on their allegations concerning the
11 rent and the reduction and the knowledge of it and the activity
12 and failure to rebut by the plaintiffs leads me to believe that
13 they were aware that ingestible water should be brought in. I
14 think that it's a highly suspect case in terms of folks having this
15 right, but I am going to let a higher court tell me that I am
16 wrong."

17 Prior to issuing its ruling the Trial Court pronounced that there were "several
18 theories of liability that the plaintiffs have raised... There is not only a theory based
19 under the Residential Landlord-Tenant Act, the common law imposed by – on
20 landlords and contract under the lease agreement,... and I assume there is a
21 breach of habitability, which is tied to the Residential Landlord-Tenant Act and the
22 common law." [CP 47]. So it is clear that the Trial Court was aware that the
23 Adams' claim was based upon several theories of liability besides those based in
24
25

1 tort law and did not address these theories of liability in its pronouncement. This is
2 an abuse of discretion.

3 The Trial Court noted that the **Tucker** took “a great deal of time to explain,”
4 that “the policy of the Residential Landlord-Tenant Act is to encourage landlords to
5 maintain and improve the quality of housing.” [CP 48]. The Trial Court went onto
6 say “as I read the Landlord-Tenant Act and its overriding policy is that these kinds –
7 the housing gets better.” [CP 48]. But, the Trial Court did not address these
8 material collateral issues involved in the **RLTA** and the common law when it made
9 its decision to dismiss the Adams’ case. This is an abuse of discretion.
10

11 The Trial Court noted the “remedies under that **RLTA**” is what they were
12 “predominantly looking at.” The Trial Court acknowledged that “when it says the
13 house – there would be a duty that implied habitability... is in every lease... that is
14 the theory of liability, and how can I deny them {Adams} a chance to prove a
15 remedy of some type if your client {Apelands}has decided to lease a place without
16 water – not provide water?” [CP 50]. Once again, the Trial Court did not address
17 these material issues in its holding. This is an abuse of discretion.
18

19 Based upon the holding of the Trial Court the Adams appealed the case
20 because it is clear that the Trial Court did not address all the claims and attendant
21 issues in its dismissal of their claims and that the Trial Court abused its discretion.

22 The Adams’ claims were based upon several theories of law, contract,
23 statutory, common law and the **RLTA**, some of which had tort implications. The
24 Adams’ claim minimized the tort related claims and emphasized the claims set forth
25 in the **Tucker** case. Clearly, the Trial Court’s holding was based only upon tort

1 theory and what appears to be the flawed application of contract law and
2 assumption of the risk argued by the Apelands.

3 The record reflects that the Trial Court was not convinced that there were no
4 genuine issues of fact and that the Apelands' attorney was aware of unresolved
5 questions of fact. In fact, the Trial Court stated "sometimes the issues deserves to
6 be appealed because this is a serious public issue. I don't know if this is the case
7 or not, but I have a hunch that it might be because of what our statutes says. And I
8 don't have a case on point. When I don't have that, then I have to figure out what
9 to do from the cases that I do have." [CP 63-65]. The Trial Court did have a case
10 on point, **Tucker**, and failed to recognize its entire value to the issues raised by the
11 Adams. This was an abuse of discretion.

12
13 In fact, the Trial Court did not apply the right rule of law. The ruling in
14 **Jacobsen v. State**, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977) specifically states,
15 "The burden is on the moving party to prove no genuine issues of **material** fact
16 exists." The Trial Court did not limit its ruling to material issues of fact when it
17 handed down its ruling as required under **Jacobsen**, 89 Wn.2d at 108.

18
19 The Trial Court wrongly placed the burden to prove that there were no
20 genuine issues of facts on the Adams, when it is the moving party, the Apelands, in
21 the case at hand, that has the burden of showing there are no genuine material
22 issues of fact.

23 The Trial Court stated "The plaintiff has the burden to prove by a
24 preponderance of the evidence, but in summary judgment motion it has to be
25 shown that there is no genuine issue of fact – create a genuine issue of fact." [CP

1 65]. Just the opposite is true. The Apelands have the burden of proving to the
2 court that no genuine material issues of fact exist under the statutory rules of
3 construction. **Jacobsen**, 89 Wn.2d at 108.. Therefore, it is clear that the Trial
4 Court applied the standard incorrectly. This was an abuse of discretion.

5 There are many questions that have not been addressed by the Trial Court
6 before a basis could be formed to reach the holding that was reached by it.
7 Specifically, (1) the quality of the water source is in dispute, and (2) whether the
8 water source was an approved source for potable water, and (3) whether there was
9 an accord reached between the parties as advanced by the respondents, as well as
10 (4) whether the respondents disclosed the dangers of the water source. There are
11 the issues of (5) whether the respondents complied with their obligations under the
12 **Residential Landlord-Tenant Act of 1973** and all other local laws, regulations,
13 and ordinances that remain unresolved.

14 Under the **RLTA** and common law there are the issues of (6) whether the
15 Apelands knew of or should have known of this latent defect and (7) whether the
16 Apelands knew or should have known about the local codes requiring the annual
17 testing of the water source for the house for contaminants and bacteria.

18 Further, there are questions of (8) whether the condition of this water source,
19 Tiger Lake, interfered with the Adams' "quiet enjoyment" of the home as required by
20 the Lease Agreement and common law, as well as (9) whether the water source
21 required "major maintenance" as spelled out in the lease agreement. Then there is
22 the question of (10) whether a reasonable person knew or in the exercise of
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24
25

1 ordinary care should have known this water source should have at a minimum be
2 tested annually – as a part of the major maintenance of the home.

3 Finally, (11) there are issues surrounding the Trial Court's finding that the
4 Adams assumed the risk inherent in renting houses without explaining what those
5 inherent risks might be and (12) whether the Apelands breached their duties and
6 covenants, as well as the issue of (13) whether the Apelands met their burden of
7 proof that no genuine issues of material facts exist.

8
9 To determine whether summary judgment was properly granted to the
10 Apelands, it is essential to define what duties the Apelands owed to the Adams and
11 what risks were assumed by the Adams. But, before we can even address this
12 question we must determine (14) whether the assumption of the risk principle even
13 applies to tenants.

14 If we determine that the assumption of the risk principle does not apply to
15 tenants, then, we do not have to decide the first issues, because clearly, if the
16 assumption of the risk doctrine was misapplied by the Trial Court in the Adams'
17 case the decision of the Trial Court must be reversed.

18 It is unequivocally clear that the Adams have then raised issues of fact that
19 were not addressed by the Trial Court and their decision should be reversed and
20 remanded.

21
22 The Trial Court stated "there is no tort action... without physical injury...but
23 what I don't see, is there still may be damages, as I read it..." [CP 47]. Therefore,
24 (16) it clear from the record that even the Trial Court recognizes that there can be
25

1 damages other than based in tort law and did not fully explore those possibilities
2 before it dismissed the Adams case.

3 In order to start the analysis of the record of the Trial Court we must first
4 determine the relationship of the parties. It is clear that the landlords, the Apelands,
5 prepared the Lease Agreement that was executed by the tenants, the Adams.

6 Therefore, the Apelands and Adams were bound by a contractual
7 relationship via the Lease Agreement and formed a landlord-tenant relationship
8 between them.

9
10 Clearly, the Adams and Apelands were bound to their contractual duties and
11 obligations to each other and the Apelands were bound by the obligations of
12 landlords under contract law, common law and the **RLTA** and other statutory rules
13 and regulations, as were the Adams.

14 We next turn to the contract that the parties signed to determine their
15 respective duties, responsibilities and possible remedies. The Apelands prepared
16 the Lease Agreement that was signed between the parties. Therefore, "if the
17 provisions of a lease create an ambiguity, the court will adopt the interpretation
18 more favorable to the lessee, when, as here, the lease was written by the lessor."

19 **Stuchell v. Mortland**, 8 Wn. App. 884, 893, 509 P.2d 770 (1973); **Allied Stores**
20 **Corp. v. North West Bank**, 2 Wn. App. 778, 784, 469 P.2d 993 (1970); **Blume v.**
21 **Bohanna**, 39 Wn.2d 199, 203, 228 P.2d 146 (1951),
22

23 The Trial Court's holding inferred that it had received acceptable evidence
24 that the Apelands and the Adams had negotiated a reduction of the stated rent
25 when it stated "I believe the argument that the defendants have made with entering

1 into this based on their allegations concerning the rent and the reduction.." [CP 66-
2 67].

3 But, the record clearly demonstrates that the Apelands' previous
4 recollections and statements cannot be taken literally and the Trial Court should
5 have taken their past indiscretions into account when giving great weight to the
6 Apelands' allegations that an accord had been reached when nothing of that nature
7 was noted in the Lease Agreement.

8
9 The Adams maintain they were paying \$650 a month for the entire term of
10 the lease [See Appendix No. 2, specifically Request For Admission No. 12 and the
11 Adams' answer to said Request] and had the Trial Court conducted more fact-
12 finding on this issue, especially since, the Trial Court placed so much emphasis on
13 this accord [CP 60 and 66-67], the Adams would have been able to produce rent
14 checks made out to the Apelands for \$650 per month throughout the term of the
15 Lease Agreement, which is the same amount stated in the Lease Agreement.

16 One of the Adams' claims was made pursuant to **RCW 59.18.270**, which
17 requires that the landlord return the tenants deposit within 14 days after the
18 termination of the lease term. The Apelands terminated the lease with the Adams
19 in July of 2007 and the Adams moved out of the rental at the end of July, 2007.
20 The Apelands stated in the record [CP 7] that they were not left a forwarding
21 address by the Adams and were unable to return their deposit as required by RCW
22

23 The record will demonstrate that the Apelands' earlier declarations were
24 false because the Adams have filed with the court a note prepared and signed by
25 Mrs. Apeland dated September 25, that clearly contradicts their declarations. [CP

1 32-38]. Mrs. Apeland's note [CP 38] states "Jay and Cindy, Please forgive me for
2 returning your deposit so late. Between company and back and forth to the lake, I
3 just forgot! I should have sat down that morning and done it. Anyway...here it is,
4 and we wish you the best. You were good renters – thanks! Sharon"

5 This note and check number 2245 dated 9/25/07 in the amount of \$650 with
6 the notation "Dep on 4670 Tiger Lake (500 – Dep/150 – Pet)" signed by Sharon
7 Apeland and made out to Jay Adams [CP 38] that accompanied the note. These
8 and a copy of the envelope that they were mailed in were filed with the Trial Court
9 [CP 38].
10

11 When the Court reviews the Trial Court's findings of fact for substantial
12 supporting evidence in the record, and, if the evidence supports the findings, they
13 then consider whether the findings support the Trial Court's conclusions of law.

14 **Landmark Dev. Inc. v. City of Roy**, 138 Wn.2d 561, 573, 980 P.2d 1234

15 (1999)(citing **Willener v. Sweeting**, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)).

16 "Substantial evidence" is evidence that would persuade a reasonable fact finder of
17 the truth of the declared premise. **World Wide Video, Inc. v. City of Tukwila**, 117
18 Wn.2d 382, 387, 816 P.2d 18 (1991), cert denied, 503 U.S. 986, 112 S.Ct. 1672,
19 118 L.Ed.2d 391 (1992).
20

21 The evidence that the Trial Court has justified their holding on does not meet
22 the "substantial evidence" test.

23 Therefore, there is a genuine material issue of fact in dispute and without
24 more information the Trial Court's ruling on this issue must be reversed and
25 remanded for extra fact finding. Similarly, the Trial Court has discretion in ruling on

1 evidentiary matters and its decisions with respect to that evidence are ordinarily
2 reviewed on an abuse of discretion standard. **Sintra, Inc. v. City of Seattle**, 131
3 Wn.2d 640, 662-63, 935 P.2d 555 (1997).

4 Since the record is conflicting the Trial Court had the duty to adopt the
5 interpretation more favorable to the lessee, when as here, the lease was written by
6 the lessor. That would have required the Trial Court to find the amount of rent to be
7 paid by the Adams under the Lease Agreement was to be \$650.00 per month.

8 There is also a collateral issue between the parties of when the Adams
9 actually vacated the rental home. The Adams maintain they vacated the house at
10 the end of July 2007 and the Apelands allege that the Adams vacated the rental
11 house at the end of August 2007. This is a material fact in controversy that goes
12 directly to the Adams' cause of action for the late return of their deposits which was
13 not addressed by the Trial Court. Further fact-finding may be necessary.

14 This finding would have taken the wind out of half of the Trial Court's
15 justification for holding the Adams had assumed the risk and this was a complete
16 bar to recovery.

17
18 **CONTRACT CLAIMS:**

19 The purpose of contract interpretation is to determine the intent of the
20 parties. **Berg v. Hudesman**, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). The
21 Court must search for intent through the objective manifestation of the language of
22 the contract itself. **Hearst Comm'ns., Inc. v. Seattle Times Co.**, 154 Wn.2d 493,
23 503, 115 P.3d 262 (2005). The Court attempts to determine the parties' intent by
24 focusing on the objective manifestations of the agreement. Contract construction
25

1 involves the application of legal principles to determine the legal affect of contract
2 terms. **Hearst**, 154 Wn.2d at 502 note 9.

3 Therefore, the Trial Court must give the weight of the evidence regarding the
4 contract terms and conditions to the Lease Agreement's four corners. A review of
5 the Lease Agreement will show there are no words in the Lease Agreement that
6 express that a rent reduction was agreed to between the parties as alleged by the
7 Apelands. [CP 20-21 and 36-37] Therefore, the substantial evidence strongly
8 suggests that no accord was reached between the parties and without more, the
9 Trial Court cannot fill in the gaps by adding words to the Lease Agreement that
10 make the accord a fact, as the Trial Court did in their holding.
11

12 The obligations imposed by this Lease Agreement will be discussed below.
13 **Brown v. Hauge**, 195 Wn. App. 800, 804, 21 P.3d 716 (2001) spells out the
14 contract exception to the general rule of nonliability.

15 A tenant may recover for personal injuries caused by the breach of a repair
16 covenant only if the unrepaired defect created an unreasonable risk of harm to the
17 tenant. **The Restatement (Second) of Torts § 357** (1965) provides that the lessor
18 of land is liable if (a) the lessor has contracted to keep the land in repair; (b) the
19 disrepair creates an unreasonable risk that performance of the lessor's agreement
20 would have prevented; and (c) the lessor fails to exercise reasonable care in
21 performing this agreement.
22

23 **Brown** stood for the proposition that the landlord must have notice of the
24 "defect" before he is subject to liability. In **Tucker** the court did not read their
25 'decision so broadly." **Tucker**, 118 Wn. App at 252. The **Tucker** court noted that

1 **Brown** did rely on **Teglo v. Porter**, 65 Wn.2d 772, 774-75, 399 P.2d 519 (1965)
2 which adopted part of the **Restatement of Torts** which are relevant to the claims in
3 **Tucker** and to the claims here and stated,

4 “The lessor’s duty to repair... is not contractual but is a tort duty based on
5 the fact that the contract gives the lessor ability to male the repairs and control over
6 them... Unless the contract stipulates that the lessor shall inspect the premises to
7 ascertain the need of repairs, a contract to keep the interior in a safe condition
8 subject the lessor to liability if, but only if, reasonable care is not exercised after the
9 lesses has given him notice of the need of the repairs.” **Tucker**, 118 Wn. App. at
10 252.
11

12 The **Tucker** court noted that “Notice then under this provision of the
13 **Restatement** becomes an issue when the particular condition under consideration
14 is inside the residence where the landlord has no right to enter. **Tucker**, 118 Wn.
15 App. at 252.

16 But, as the **Tucker** court noted that was not the case in **Tucker** and that is
17 not the case in here. The source of the water in **Tucker** was an outside well, which
18 the Court noted that the landlord had physical access to and ruled in this case that
19 actual notice is not then required. **Tucker**, 118 Wn. App. at 253.
20

21 The Adams’ water source was pumped directly from Tiger Lake supplied by
22 a water line that had a filter attached to the outside of the rental house where like in
23 the **Tucker** case the landlord had physical access to the water system. Therefore,
24 like **Tucker** the Adams are not required to give the Apelands actual notice of the
25 defect.

1 Here as in the Tucker Lease Agreement, the Lease Agreement includes (1)
2 an express covenant for quiet enjoyment and (2) requires that the lessor maintain
3 and repair the leased premises. [CP 20-21 and 36-37].

4 So the factual threshold questions are the usual threshold question where
5 the claim has been dismissed on motion for summary judgment – whether the
6 condition of the water source interfered with the Adams' "quiet enjoyment" of the
7 rental home, and, whether the water source required "major maintenance" as
8 spelled out in the Adams' Lease Agreement. These were identical issues
9 addressed in the **Tucker** case.
10

11 QUIET ENJOYMENT:

12 Until **Tucker**, no Washington case directly addressed the impact of drinking
13 water on one's "quiet enjoyment" of their home. Washington courts have
14 recognized the relationship of water and habitability. In **State ex rel. Andersen v.**
15 **Superior Court**, 119 Wash. 406, 407-08, 205 P. 1051 (1922) the court held that
16 without water, a property is uninhabitable. The **Tucker** court noted that other
17 jurisdictions have also held that a property without potable water is uninhabitable.
18 **Tucker**, 188 Wn. App. at 253 footnote 7.

19 The **Tucker** court held "It is well settled that unsafe drinking water renders a
20 home uninhabitable. And that by definition interferes with the quiet enjoyment of
21 the home." **Tucker**, 118 Wn. App. at 254.
22

23 Even the Trial Court noted in its holding "there is no dispute that that the
24 water was not safe as it was pulled from the lake... and I take that fact as given that
25 it was not safe to drink the water from the lake without having a filter placed on it or

1 – bringing water, I say, to ingest.” [CP 47-48]. “And so the troubling thing for me is,
2 how do I grant summary judgment when it’s acknowledged that this place was not
3 inhabitable? It was untenable, as the **Tucker** court points out, and that there – I
4 think it was the **Erie** case when Judge Marshall pointed out that wherever there is a
5 wrong there should be a remedy of some type.” [CP 49]

6 The Trial Court noted “But when it says that house” speaking to the **RLTA**,
7 “there is a duty that implied habitability – warrant of habitability is in every lease...
8 that is the theory of liability, and how can I deny them {Adams} a chance to prove a
9 remedy of some type if your client {Apelands} has decided to lease a place – and
10 not provide water? [CP50].

11
12 So even the Trial Court notes that the Apelands have breached their duties
13 under contract, common law and the **RLTA**. Therefore, it is clear that the Adams
14 have made out an actionable claim for breach of the covenants of “quiet enjoyment”
15 and the “implied warranty of habitability” if the court looks at the evidence in the
16 light most favorable to the Adams.

17 **MAJOR MAINTENANCE AND REPAIR:**

18 The Kitsap County Health Department Code requires that water sources be
19 tested as least annually for bacteria. **Bremerton-Kitsap County Board of Health**
20 **Ordinances 1999-6.**

21
22 The scope of coverage applies to all territories contained within the
23 boundaries of the Bremerton-Kitsap County Health District. The provisions of these
24 rules and regulations shall apply to all residences, places of business, or other
25 buildings or places where persons congregate, reside or are employed to which a

1 private or public water supply provides a potable source of drinking water.

2 **Bremerton-Kitsap County**, Section 1. Coverage.

3 "It is the express purpose of this ordinance to provide for and promote the
4 health, safety and welfare of the general public" and "it is the specific intent of this
5 ordinance to place the obligation of complying with its requirements upon the owner
6 or operator of a private or public water system within its scope." **Bremerton-Kitsap**
7 **County**, Rules and Regulations for Private and Public Water Supplies.

8 The code states "A Water Right Permit must be obtained from Ecology for
9 the source, quantity, type and place of use. Failure to obtain said permit shall be a
10 violation of **Chapter 173-160 WAC** and this ordinance." **Bremerton-Kitsap**
11 **County**, Rules and Regulations for Private and Public Water Supplies.

12 The code further requires "Water Treatment systems are required and shall
13 be in compliance with **WAC 246-290-250 & 440** as well as **WAC 246-291-230**.
14 Provisions for maintenance of a reserve supply of chemical and other supplies used
15 in connection with any water treatment system, quality control and monitoring, or
16 major segment of the system must be addressed. **Bremerton-Kitsap County**,
17 Rules and Regulations for Private and Public Water Supplies. **Bremerton-Kitsap**
18 **County**, Rules and Regulations for Private and Public Water Supplies.

19 Water Quality Requirements must conform to Maximum Contaminant Levels
20 (MCLs) for coliform as specified in **WAC 246-290-310** and finished water quality
21 from existing sources shall conform to the MCLs established in **WAC 246-290-310**
22 and **WAC 246-291-230** and these regulations and treatment for secondary
23 contaminants shall comply with the Department's or the Health District's most
24
25

1 current written policy entitled *Complaints and Treatment Requirements*.

2 **Bremerton-Kitsap County**, Rules and Regulations for Private and Public Water
3 Supplies.

4 The code defines "potable water" as "water that is suitable for drinking by the
5 public." And defines "sources" as "the source of supply for drinking water purposes
6 which can be either surface or groundwater." According to the code "surface water"
7 includes "natural and artificial lakes." **Bremerton-Kitsap County**, Rules and
8 Regulations for Private and Public Water Supplies.

9
10 Therefore, it is clear that the rental unit would be within the scope of the
11 **Bremerton-Kitsap County Board of Health Ordinances 1999-6** and that it was
12 the sole obligation of the Apelands to comply with its requirements. The next
13 question is whether this code applies to this particular set of facts.

14 Statutory interpretation is a question of law, subject to de novo review.
15 **Cosmopolitan Eng'g Group, Inc. v. Ondo Degremont, Inc.**, 159 Wn.2d 292,
16 298, 149 P.3d 666 (2006). Whether a statute applies to a particular set of facts is a
17 question of law that the court will review de novo. **State v. Dearbone**, 125 Wn.2d
18 173, 178-179, 883 P.2d 303 (1994). **Guillen v. Contreras**, 2008-WA-1107.387 at
19 4.

20
21 Municipal ordinances are local statutes that are to be construed according to
22 the rules of statutory construction. **Ford Motor Co., v. City of Seattle**, 160 Wn.2d
23 32, 156 P.3d 185, 189 (2007) (quoting **McTavish v. City of Bellevue**, 89 Wn. App.
24 561, 565, 949 P.2d 837 (1998)). Where a statute is clear on its face, its plain
25

1 meaning should "be derived from the language of the statute alone. **Ford**, 160 149
2 P.3d at 189 (quoting **Kilian v. Atkinson**, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

3 The court will apply the same rules of statutory construction to ordinances as
4 we do statutes. **Kitsap County v. Mattress Outlet**, 153 Wash.2d 506, 509, 104
5 P.3d 1280 (2005).

6 The Court must then give local rules the same statutory construction as you
7 do statutes.

8 The fact patterns between the case before this Court and the **Tucker** case
9 are identical, as are the issues presented in both cases with the exceptions that the
10 water source was lake water in this case versus a well in the **Tucker** case and
11 there were damages in tort claimed and proved for physical injuries in the **Tucker**
12 case and none were claimed in the case before this Court. Otherwise, they are
13 identical cases with far different outcomes.

14 Therefore, it could not be clearer that if the local codes were taken into
15 consideration in the ruling of the court in **Tucker**, the **Bremerton-Kitsap County**
16 **Board of Health Ordinances 1999-6** should be taken into consideration in the Trial
17 Court's holding in the Adams' case. This was an abuse of discretion.

18 There was no evidence entered into the record that indicates that the
19 Apelands complied with **Bremerton-Kitsap County Board of Health Ordinances**
20 **1999-6** and it is clear that it is incumbent upon the Apelands as owners of the rental
21 unit and their roles as landlord to comply with these rules and not that of the
22 tenants as the Trial Court has implied by the holding. The Apelands even admitted
23
24
25

1 in their Answer to the Adams' claim that they are obligate to keep the premises fit
2 for human habitation. [CP 8]

3 The question then is whether a reasonable person knew or in the exercise of
4 ordinary care should have known this water source, Tiger Lake, should have at a
5 minimum be tested annually – as a part of the major maintenance of the home.

6 The evidence viewed in the light most favorable to the Adams includes a
7 requirement to have the water source tested at least annually for bacteria, to have a
8 Water Right Permit, an approved Water Treatment system and the water quality
9 must meet multiple **WAC** requirements. The evidence will also demonstrate that
10 the water source and system that supplied the rental house would not meet code
11 requirements or the definition of "potable water" defined in the code because there
12 is no evidence what-so-ever in the record that the Apelands even knew of the
13 **Bremerton-Kitsap County Board of Health Ordinances 1999-6** little lone comply
14 with it.

15
16 In the present case the Apelands offered no evidence that they have
17 complied with the local health codes regarding "potable water sources" and it is
18 incumbent upon the moving party to prove there are no genuine issues of fact.

19 **Jacobsen**, 89 Wn.2d at 108.

20
21 There can be no doubt that there are issues of material fact regarding the
22 Apelands' compliance with their obligations as defined in the **RLTA**, the local health
23 codes, and common law regarding the Apelands' compliance with these laws and
24 regulations.

1 There can also be no doubt that the quality of the water source was not
2 addressed fully before the Trial Court and this is certainly a material question of fact
3 that remains unresolved and needs to be addressed more fully.

4 **DUTIES AT COMMON LAW:**

5 Traditional Common Law Landlord Liability. Common law landlord liability
6 requires a showing: “(1) latent or hidden defects in the leasehold (2) that existed at
7 the commencement of the leasehold (3) of which the landlord had actual knowledge
8 (4) and of which the landlord failed to inform the tenant.” **Tucker**, 118 Wn. App. at
9 255 (quoting **Younger v. United States**, 662 F. 2d. 580, 582, (9th Cir. 1981). “A
10 landlord is liable only for failing to inform the tenant of known dangers which are not
11 likely to be discovered by the tenant.” **Tucker**, 118 Wn. App. at 255 (quoting
12 **Aspon v. Loomis**, 62 Wn. App. 818, 827, 816 P.2d 751 (1991).

14 The Adams moved into this home in March of 1998. To date the water
15 source, Tiger Lake, has not been tested by the Apelands for any bacteria or other
16 contaminants, nor have the Apelands ever replaced the filter on the water system
17 despite a requirement by the Health Department that it be tested at least annually
18 and there be an approved water treatment system.

19 This water system was not then maintained at the time the property was
20 leased to the Adams. And the condition of the water was certainly hidden or latent
21 as to the Adams. The Apelands did not warn the Adams.

23 The Apelands were aware or should have been aware of the Code that
24 required the annual testing.

1 The Adams have then raised an issue of fact – whether the Apelands’ knew
2 or should have known of this latent defect and whether the Apelands’ knew or
3 should have known of the local code requirements requiring the annual testing.

4 As the court in **Tucker** stated “a ‘should have known’ standard is enough
5 since we have eased the strict requirement of actual knowledge. It is sufficient that
6 the landlord knew or should have been able to identify a defect unknown to the
7 tenant at the time if the initial tenancy.” **Tucker**, 188 Wn. App. at 255.

8 In the present case the Apelands offered no evidence that they have
9 complied with local health codes regarding potable water sources and it is
10 incumbent on the moving party to prove there are no genuine issues of fact.
11 **Jacobsen**, 89 Wn.2d at 108.

12 **IMPLIED WARRANTY OF HABITABILITY:**

13 A landlord is subject to liability for physical harm caused to the tenant and
14 others upon the leased property with the consent of the tenant or his subtenant by a
15 dangerous condition existing before or arising after the tenant has taken
16 possession, if he has failed to exercise reasonable care to repair the condition and
17 the existence of the condition is in violation of: (1) an implied duty of habitability; or
18 (2) a duty created by statute or administrative regulation. **RESTATEMENT**
19 **(SECOND) OF PROPERTY § 17.6 (1977)**

20 The **Tucker** court noted that the court has adopted this section of *the*
21 **Restatement of Property** citing **Lian v. Stalick**, 106 Wn. App. 811, 822, 25 P.3d
22 467 (2001). And that it was there the court recognized “a cause of action for the
23
24
25

1 implied warranty of habitability under the *Landlord Tenant Act* according to subpart
2 (1) of section 17.6 of the **Restatement.** Tucker, 118 Wn. App. at 256.

3 Both **Tucker** and **Lian** then supports the appellants' cause of action under
4 subpart (1) of section 17.6 of the **Restatement.**

5 Therefore, it reasons that if it was applicable in the **Tucker** case and the
6 facts and issues are essentially the same in both the **Tucker** case and the Adams'
7 case there is indeed a cause of action for the breach of the implied warranty of
8 habitability under the **RLTA** according to subpart (1) of section 17.6 of the
9 **Restatement** and the Adams claim covers this theory of liability and yet it was not
10 addressed fully by the Trial Court.

11
12 **RESIDENTIAL LAND-LORD TENANT ACT OF 1973:**

13 **Washington State's Landlord-Tenant Act.** The Landlord-Tenant Act
14 requires the landlord to "keep the premises fit for human habitation" and to
15 particularly maintain the premises in substantial compliance with health or safety
16 codes for the benefit of the tenant. **RCW 59.18.060(1).** It requires the landlord to
17 make repairs, except in the case of normal wear and tear, "necessary to put and
18 keep the premises in as good condition as it by law or rental agreement should
19 have been, at the commencement of the tenancy." **RCW 59.18.060(5).**

20
21 The Apelands did not offer any evidence what-so-ever that they have
22 complied with **Bremerton-Kitsap County Board of Health Ordinance 1999-6,**
23 which they are required to do by **RCW 59.18.060(1).** Therefore, whether the
24 Apelands' complied with this code is an issue of fact that remains unresolved.

1 **RCW 59.18.060** list the landlord's obligations and the tenant's remedies: (1)
2 terminate the rental agreement; (2)"[b]ring an action in an appropriate court, or at
3 arbitration if so agreed, for any remedy provided under this chapter or otherwise
4 provided by law;" or (3) pursue the other remedies available under the Landlord-
5 Tenant Act. **RCW 59.18.090**.

6 The **Tucker** court held that the **Washington State Landlord-Tenant Act of**
7 **1973** provides a cause of action for the injury sustained here. **Tucker**, 118 Wn.
8 App. at 258.

9 The **Tucker** court reversed the Trial Court's summary judgment order and
10 this Court should reverse this Trial Court's summary judgment order.

11 **ASSUMPTION OF THE RISK:**

12 There are four kinds of assumption of risk: (1) express assumption of risk;
13 (2) implied primary assumption of risk; (3) implied reasonable assumption of risk;
14 and (4) implied unreasonable assumption of risk. **Scott v. Pac. W. Mountain**
15 **Resort**, 119 Wash.2d 484, 496, 834 P.2d 6 (1992).

16 With the enactment of the comparative negligence and comparative fault
17 statutes, it became essential to separate the various kinds of assumption of risk to
18 distinguish between the kinds that shift the defendant's duty to the plaintiff (and
19 hence bar the claim) and the types which are essentially contributory negligence
20 (and hence simply reduce damages).

21 Under the traditional Prosser and Keeton analysis, the assumption of risk
22 doctrine is divided into four classifications: (1) express; (2) implied primary; (3)
23
24
25

1 implied reasonable; and (4) implied unreasonable. **Shorter v. Drury**, 103 Wn.2d
2 645, 655, 695 P.2d 116, cert. denied, **474 U.S. 827** (1985).

3 Express assumption occurs when parties agree in advance that one of them
4 is under no obligation to use reasonable care for the benefit of the other and will not
5 be liable for what would otherwise be negligence. When such a plaintiff is injured by
6 one of the risks for which he or she has agreed to forgo suit, the claim will be
7 barred because that risk was assumed by the plaintiff.

8
9 The bar of express assumption is based on contract and survives the
10 enactment of comparative negligence statutes. However, such assumption only
11 bars a claim with regard to the risks actually assumed by the plaintiff.

12 Implied primary assumption of risk arises where a plaintiff has impliedly
13 consented (often in advance of any negligence by defendant) to relieve defendant
14 of a duty to plaintiff regarding specific known and appreciated risks.

15 It is important to carefully define the scope of the assumption, i.e., what risks
16 were impliedly assumed and which remain as a potential basis for liability.

17 A classic example of primary assumption of risk occurs in sports cases. One
18 who participates in sports "assumes the risks" which are inherent in the sport. To
19 the extent a plaintiff is injured as a result of a risk inherent in the sport, the
20 defendant has no duty and there is no negligence. Therefore, that type of
21 assumption acts as a complete bar to recovery.

22
23 In **Kirk v. WSU**, 109 Wn.2d 448, 746 P.2d 285 (1987), a college cheerleader
24 sued her university to recover for injuries sustained while she was practicing
25 cheerleading allegedly under dangerous conditions and without adequate

1 supervision. The university argued her claim was barred because she had assumed
2 the risks inherent in the sport. This court explained that the basis of both express
3 and implied primary assumption of risk was the plaintiff's consent to the negation of
4 defendant's duty with regard to those risks assumed. Since implied primary
5 assumption of the risk negates duty, it acts as a bar to recovery when the injury
6 results from one of the risks assumed. As Dean Prosser explains, primary implied
7 assumption of risk should continue to be an absolute bar after the adoption of
8 comparative fault because in this form it is a principle of "no duty" and hence no
9 negligence, thus negating the existence of any underlying cause of action.
10

11 Although the plaintiff in **Kirk** did assume the risks inherent in the sport of
12 cheerleading, she did not assume the risks caused by the university's negligent
13 provision of dangerous facilities or improper instruction or supervision. Those were
14 not risks "inherent" in the sport. Hence, in a primary sense, she did not "assume the
15 risk" and relieve defendants of those duties. However, to the extent she continued
16 to practice (on a dangerous surface, without instruction), she may have
17 "unreasonably assumed the risk" i.e., have been contributorily negligent. This
18 unreasonable assumption of the risk is assumption in the secondary sense which
19 does not bar all recovery.
20

21 In **Leyendecker v. Cousins**, 53 Wn. App. 769, 773-74, 770 P.2d 675,
22 review denied, **113 Wn.2d 1018** (1989), the Court of Appeals correctly explained
23 that those who choose to participate in sports or amusements consent to being
24 injured by the risks inherent in the activity, and that such conduct constitutes
25

1 "primary" assumption of risk, which continues as a complete bar to recovery even
2 after the adoption of comparative negligence. . . .

3 In contrast, implied reasonable and unreasonable assumption of risk arise
4 where the plaintiff is aware of a risk that already has been created by the
5 negligence of the defendant, yet chooses voluntarily to encounter it. In such a case,
6 plaintiff's conduct is not truly consensual, but is a form of contributory negligence, in
7 which the negligence consists of making the wrong choice and voluntarily
8 encountering a known unreasonable risk.
9

10 Under the facts presented, the Trial Court should not have applied the
11 doctrine of primary implied assumption of risk as a complete bar to plaintiff's
12 recovery against the Apelands.

13 Hence the question becomes what risks the Adams impliedly assumed by
14 choosing to engage in the activity of renting the house.

15 As stated earlier to determine whether summary judgment was properly
16 granted to the Apelands, it is essential to define what duties the Apelands owed to
17 the Adams and what risks were assumed by the Adams.

18 A landlord is in the business of renting properties. The landlord owes a duty
19 to tenants to discover dangerous conditions through reasonable inspection, and
20 repair that condition or warn the tenants, unless it is known or obvious.
21

22 The Apelands I suppose are arguing that they owed no duty to the Adams
23 because the water source was an obvious hazard and that they warned the Adams
24 of this hazard. This issue cannot be decided on summary judgment as this inquiry
25 is disputed.

1 Implied primary assumption of the risk means the plaintiff assumes the
2 dangers that are inherent in and necessary to the particular sport or activity.

3 In sum, it must be proven that the Adams did assume the risks inherent in
4 the activity of renting a house and that this case involves the type of activities
5 contemplated by implied primary assumption of the risk that the Apelands
6 advanced at the summary judgment hearing.

7 If in fact the court finds that the Adams were contributorily negligent for
8 engaging with the dangers inherent in renting houses any such contributory
9 negligence would reduce, rather than bar, the Adams' recovery.
10

11 Under the facts of this case, did the trial court properly apply the doctrine of
12 primary implied assumption of risk as a complete bar to plaintiff's recovery and did
13 the record support this finding?

14 Since the Adams evidence raised genuine issues of material fact with regard
15 to whether the Apelands acted negligently and whether such negligence, if any,
16 was a proximate cause of the injuries, these issues are not properly decided on
17 summary judgment.

18 Accordingly, the Court should reverse the summary judgment in favor of the
19 Apelands and remand to the trial court for further proceedings and additional fact-
20 finding.
21

22 **CONCLUSION:**

23 Where it is clear that there are (1) genuine issues of material facts that were
24 either not adequately addressed by the Trial Court or not addressed at all (2) a
25

1 clear misapplication of law by the Trial Court and (3) a misapplication of the
2 assumption of the risk doctrine as a total bar to recovery.

3 And in the words of the Honorable Theodore Spearman “wherever there is a
4 wrong there should be a remedy of some type.” [CP 49] and “how do I grant
5 summary judgment when it’s acknowledged that this place was not inhabitable?”
6 [CP 49] And closed by stating “sometimes the issues deserves to be appealed
7 because this is a serious public issue. ..I have a hunch that it might be because of
8 what the statutes say. [CP 63] ...but I am going to let a higher court tell me that I
9 am wrong.” [CP 66-67]

10
11 The Court should reverse and remand to the Trial Court with directions to
12 conduct more fact-finding and to conduct a full hearing on the claims presented in
13 the Adams’ claim.

14
15 DATED this 14th day of January, 2009.

16 Respectfully submitted,

17
18 

19 DENNIS XAVIER GOSS, WSBA#33628
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21 Port Orchard, WA 98366
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APPENDIX

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DAVID W PETERSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
WASHINGTON STATE COURT OF APPEALS
DIVISION TWO
IN AND FOR KITSAP COUNTY

JAY ADAMS and CYNTHIA ADAMS,
husband and wife,

Appellants/Plaintiffs,

Appeal Cause No. 38230-0-II
No. 08-2-00188-3

vs.

LARRY APELAND and SHARON
APELAND, husband and wife,

Respondent/Defendants.

SUBMISSION OF ORIGINAL
TRIAL TRANSCRIPT AND
DESIGNATION OF CLERK'S
PAPERS PER REQUEST OF
THE APPELLANTS TO THE
COURT OF APPEALS

(Clerk's Action Required)

COMES NOW, the Petitioners/Appellants, Cynthia and Jay Adams, by and through
their attorney of record, Dennis Xavier Goss, pursuant to Rules of Appellate Procedure
(RAP) 9.2 and submits to the Trial Court Clerk an original copy of the verbatim report of
the proceedings pursuant to the Statement of Arrangements filed by the
Appellants/Plaintiffs on October 14th, 2008.

COPY

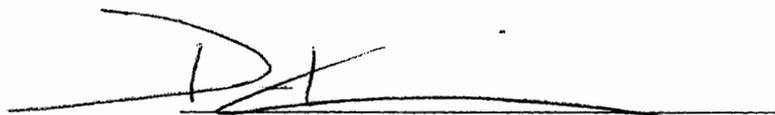
SUBMISSION OF OFFICIAL TRIAL
TRANSCRIPT AND DESIGNATION OF CLERK'S
PAPERS PER REQUEST OF THE
APPELLANTS TO THE COURT OF APPEALS

DENNIS XAVIER GOSS
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1 The verbatim report of the proceedings before the Honorable Theodore Spearman on
2 July 25th, 2008 in Department 4 of the Kitsap County Superior Court and recorded by
3 Official Court Reporter, Jami R. Jacobsen, CCR #2179 IS attached hereto.

4 Pursuant to RAP 9.5(a) the plaintiffs/appellants respectfully request the Clerk to
5 accept and include the Original and Copy of the transcript of the transcript for the subject
6 case and to designate the Original trial transcript as Clerk's Papers per the request of the
7 Appellants/Plaintiffs to the Court of Appeals. The Appellants/Plaintiffs shall file their
8 Opening Brief with proof of service with the trial court clerk within forty-five (45) days
9 after filing the hearing transcript pursuant to RAP 10.2(a) and (h).
10

11 SIGNED at Port Orchard, Washington on December 5th, 2008.

12
13 
14 DENNIS XAVIER GOSS - WSBA#33628
15 Attorney for Appellants/Plaintiffs
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SUBMISSION OF OFFICIAL TRIAL
TRANSCRIPT AND DESIGNATION OF CLERK'S
PAPERS PER REQUEST OF THE
APPELLANTS TO THE COURT OF APPEALS

PAGE 2

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mailed 5/29/08
by DXG

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KITSAP COUNTY

JAY ADAMS and CYNTHIA ADAMS,
husband and wife,
Plaintiffs,

No. 08-2-00188-3

vs.

**PETITIONER'S RESPONSE TO
DEFENDANT'S REQUESTS FOR
ADMISSION TO PLAINTIFF'S**

LARRY APELAND and SHARON
APELAND, husband and wife, and their
marital community,

Defendants.

TO: Defendants Apelands; and

TO: George A. Mix, their attorney.

Pursuant to CR 36 Fourth Party Defendants request Plaintiffs to admit or deny the truth of the matter set out below within thirty (30) days from the date of this request.

REQUEST FOR ADMISSION NO. 1: Admit you were aware at or before the tenancy commenced that the water for the residence was pumped from the lake.

RESPONSE: Yes

REQUEST FOR ADMISSION NO. 2: Admit the defendants informed you at or before the tenancy commenced that the water for the residence was pumped from the lake.

RESPONSE: Yes

PETITIONER'S RESPONSE TO DEFENDANT'S
REQUESTS FOR ADMISSION TO PLAINTIFF'S
PAGE 1

COPY

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1 **REQUEST FOR ADMISSION NO. 3:** Admit you have not treated with any
health care providers as a result of the allegations set forth in the complaint.

2 **RESPONSE: Yes**

3 **REQUEST FOR ADMISSION NO. 4:** Admit that you did not drink the water
4 from the lake.

4 **RESPONSE: Yes**

5 **REQUEST FOR ADMISSION NO. 5:** Admit that you brought your own drinking
6 water to the residence.

6 **RESPONSE: Yes**

7 **REQUEST FOR ADMISSION NO. 6:** Admit you never requested the defendants
8 put a well on the property prior to March 1, 2004.

8 **RESPONSE: No**

9 **REQUEST FOR ADMISSION NO. 7:** Admit that you made an offer to purchase
10 the property in March of 2004 for \$135,000.

10 **RESPONSE: Yes**

11 **REQUEST FOR ADMISSION NO. 8:** Admit that you did not leave the
12 defendants a phone number of forwarding address after you vacated the premises.

12 **RESPONSE: No**

13 **REQUEST FOR ADMISSION NO. 9:** Admit that you received a check from the
14 defendants dated September 25, 2007 in the amount of \$650.00.

14 **RESPONSE: Yes**

15 **REQUEST FOR ADMISSION NO. 10:** Admit that the \$650.00 represented a
16 \$500.00 security deposit and \$150.00 pet deposit.

16 **RESPONSE: Yes**

17 **REQUEST FOR ADMISSION NO. 11:** Admit that you cashed or deposited the
18 \$650.00 security deposit into your bank account on or about October 2, 2007.

18 **RESPONSE: Yes**

19 **REQUEST FOR ADMISSION NO. 12:** Admit that your rent was \$650.00 per
20 month prior to the time the well was put on the property.

20 **RESPONSE: Yes**

21 **REQUEST FOR ADMISSION NO. 13:** Admit that the defendants told you that
22 they would raise your rent after a well was installed on the property.

22 **RESPONSE: Yes**

23 **REQUEST FOR ADMISSION NO. 14:** Admit that your rent never increased
24 prior to the time the well was installed on the property.

25 **PETITIONER'S RESPONSE TO DEFENDANT'S
REQUESTS FOR ADMISSION TO PLAINTIFF'S
PAGE 2**

**DENNIS XAVIER GOSS-Attorney at Law
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2299 Bethel Road, Suite 201
Port Orchard, Washington 98366
(360) 895-8529 – FAX (360) 895-3222**

1 **RESPONSE: Yes**

2 **REQUEST FOR ADMISSION NO. 15:** Admit that your rent increased to \$800.00
3 per month after the well was put on the property.

4 **RESPONSE: Yes**

5 **REQUEST FOR ADMISSION NO. 16:** Admit that you never delivered any
6 written notices to defendants regarding any defective conditions on the property.

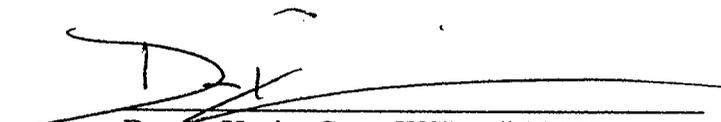
7 **RESPONSE: Yes**

8 **REQUEST FOR ADMISSION NO. 17:** Admit you did not make any complaints
9 or reports to a governmental authority concerning the failure of the defendants to comply
10 with any code, statute, ordinance, or regulation governing the maintenance or operation of
11 the premises.

12 **RESPONSE: Yes**

13 The undersigned attorney for the Petitioners Adams has read the foregoing answers
14 to interrogatories and believe they are in compliance with CR 36.

15 ANSWERS DATED: May 28, 2008.

16 
17 Dennis Xavier Goss, WSBA # 33628
18 Attorney for Petitioners Adams

1 STATE OF WASHINGTON)
2 COUNTY OF KITSAP)

3 JAY ADAMS AND CYNTHIA ADAMS, being first duly sworn, deposes and says:

4 That we are the Plaintiffs herein, have read the Requests for Admission of the
5 Defendants and the foregoing answers and responses thereto, knows the contents thereof,
6 and believe the same to be true to the best of our knowledge.

7 [Signature]
8 Jay Adams

[Signature]
Cynthia Adams

9 SUBSCRIBED AND SWORN TO before me this 28 day of May, 2008.



11 [Signature]
12 Signature of Notary

13 TIFFANI MARTINEZ
14 Printed Name of Notary

15 Notary Public in and for the State of
16 Washington, residing at Kitsap Co.
17 My appointment
18 Expires May 23, 2010

1 1191 2nd Avenue, Suite 500
2 Seattle, WA 98101

3 This is a new address for the respondent/defendants attorney of record. There has
4 been no notice to the appellants or to the Courts that the respondents' attorney of record has
5 changed his address as of the week before Christmas and discovered this change of address
6 when I attempted to deliver the Appellants' Brief to the respondents' attorney of record on
7 January 15th, 2009.

8
9 SIGNED at Tacoma, Washington on January 16th, 2009.

10
11 

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DECLARATION OF PERSONAL SERVICE

PAGE 2

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