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NO. 43484-9-II

STATE OF WASHINGTON
BY

COURT OF APPEALS, DIVISION II DEPUTY
OF THE STATE OF WASHINGTON

THOMAS MARTINI, individually and as the personal representative of
the ESTATE OF JUDITH ABSON; DEBORAH SVANCARA;
KIMBERLY SVANCARA, a minor; and CHRISTINA SVANCARA, a
minor,

Appellants,

vs.

PAUL W. POST,
individually,

Respondent.

APPELLANTS' REPLY BRIEF

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A. INTRODUCTION

The trial court committed reversible error when it evaluated the evidence before it as if it were the trier of fact. Abson's¹ experts supplied the trial court with admissible evidence more than sufficient to raise a material question of fact. Although a simple inference is sufficient to create an issue of material fact, Abson submitted direct, unequivocal expert testimony to establish that their landlord, Paul Post, breached the standard of care and proximately caused Judith Abson's death. The trial court erred by granting summary judgment in favor of Paul Post, and erred again in denying the motion for reconsideration.

B. ARGUMENT

(1) Abson Submitted Admissible Evidence to Satisfy All Prima Facie Elements of a Negligence Claim.

In his opposition brief, Post argues that summary judgment was appropriate because Abson did not submit sufficient evidence to survive summary judgment. To support his argument, Post correctly states that "the plaintiff must show an issue of material fact as to each element – duty, breach of duty, causation, and damages." *See* Brief of Respondent at p. 8 (citing *Craig v. Washington Trust Bank*, 94 Wn.App. 820, 824, 876 P.2d 126 (1999)). Post's acknowledgement of the correct negligence

¹ Because the Appellants have different last names, this brief refers to all of them as "Abson" for clarity.

standard provides an appropriate mechanism for illustrating why the trial court's order granting summary judgment should be overturned.

a. Duty

Abson agrees that they must first establish that Post, their landlord, owed them a duty. Under well settled Washington law there are three independent bases upon which a tenant may bring a claim for damages. “[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 [RLTA].” *Tucker v. Hayford*, 118 Wn.App. 246, 248, 75 P.3d 980 (2003). Included within the common law and the RLTA is the landlord's duty to comply with the warranty of habitability that is inherent in all residential tenancies in Washington.

A landlord can be held liable to a tenant for personal injuries for failing to maintain the leased premises in a safe and hazard-free manner, and in accordance with the applicable building codes. Washington's state and federal courts have adopted the Restatement (Second) of Property § 17.6 (1997) in cases such as this. That section 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 state or administrative regulation.

This rule applies even when the dangerous condition occurs in an area of the premises under the control of the tenant so long as the defect constitutes a violation of either the implied warranty of habitability or a duty imposed by statute or regulation.

Restatement (Second) of Property § 17.6 (1997). *See also Lian v. Stalick*, 106 Wn.App. 811, 25 P.3d 467 (2001) (“*Lian I*”) (adopting Restatement (Second) of Property § 17.6); *Lian v. Stalick*, 115 Wn.App. 590, 62 P.3d 933 (2003) (“*Lian II*”) (affirming award of personal injury damages against landlord); *Pinckney v. Smith*, 484 F. Supp. 2d 1177 (2007) (illustrating application of *Lian I & II*). According to *Lian II*, “[T]o 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 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 the implied warranty of habitability or a duty created by statute or regulation.” 115 Wn.App. at 595. These conditions have been met in this case.

Post owed a duty to fix the defects in his rental unit once he learned that the building was unsafe. This duty stems from the RLTA's implied warranty of habitability, which states, in pertinent 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...if such condition 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. The implied warranty of habitability is triggered "whenever the defects in a particular dwelling render it uninhabitable or pose an actual or potential safety hazard to its occupants." *Lian I*, 106 Wn.App. at 818 (citing *Atherton Condominium Apartment-Owners Ass'n Board v. Blume Dev. Co.*, 115 Wn.2d 506, 520, 799 P.2d 250 (1990)). The defect need not be so severe that the dwelling is uninhabitable; however, the defect must constitute a violation of the landlord's duties under RCW 59.18.060. *Id.*

As the trial court was made aware, Post's failure to repair the stuck windows in Judith Abson's home violated the Tacoma Municipal Code ("TMC"). Chapter 2 of the TMC, which was in full force and effect during Abson's tenancy, sets forth the minimum building requirements to which a property owner must adhere.

No owner shall maintain, or permit to be maintained, any property which does not comply with the requirements of this chapter. All property shall be maintained to the Building Code requirements at the time of construction. Alterations or repairs shall meet the minimum standards of this section....

TMC § 2.01.070. This chapter further states that a property owner is prohibited from painting windows shut or otherwise rendering them inoperable.

Windows and glazing shall be in good condition and maintain a weather barrier against the elements. All glazing shall be uncracked and unbroken. Operable windows shall be able to operate in the manner in which they were designed and shall not be painted closed or otherwise bind in a manner rendering them inoperable.

TMC § 2.01.070(E). Post relies upon *Pruitt v. Savage*, 128 Wn.App. 327, 115 P.3d 1000 (2005) and *Sjogren v. Properties of the Pacific Northwest, LLC*, 118 Wn.App. 144, 75 P.3d 592 (2003) to support his argument. This case, however, is analogous to *Lian I* and *Lian II*.

The *Lian* cases originated from a tenant's suit against her landlord for an injury that she sustained while walking on decrepit stairs that led up

to her apartment. *Lian I*, 106 Wn.App. at 814. In that case, the Court of Appeals adopted the Restatement (Second) of Property § 17.6 in holding that a *tenant* has a remedy “through which he or she may recover for injuries caused by the landlord’s breach of the RLTA.” *Id.* at 822. The Court declined to find that a duty arose in *Sjogren* and *Pruitt*, on the other hand, because the injuries were sustained by *non-tenants* who were injured in *common* areas. *See Sjogren*, 118 Wn.App. at 151 (distinguishing *Lian I* because “the dangerous condition in *Lian* was not in a common area” and the duty to maintain a common area in a reasonably safe condition did not apply) and *Pruitt*, 128 Wn.App. at 322 (distinguishing *Lian I* because “the plaintiff in that case was a tenant.”). Although the trial court granted summary judgment only on the basis of causation, CP 82-83, should this Court reach the issue of duty, it should take this as an opportunity to follow the reasoning set forth in *Lian I* and *Lian II* and formally adopt a cause of action for tenants under § 17.6.

In this case, all of the *Lian* factors have been met. First, Judith Abson was a tenant. Second, the dangerous condition, although known to both Post and Abson, was in a non-common area of the rental unit. Third, Post violated the RLTA’s implied warranty of habitability and the Tacoma Municipal Code by failing to repair, after multiple requests from the

tenants, the inoperable window. In sum, Post owed a duty to his tenants to ensure that he complied with the RLTA's implied warranty of habitability.

b. Breach

Post does not specifically address the issue of breach in his brief. Rather, he appears to argue that there can be no breach absent a duty. *See* Brief of Respondent at pp. 38-41. Because the trial court decided this matter on a summary judgment motion, and Abson submitted declarations from the tenants stating that they had requested that Post fix the windows, and he never did, that fact must be taken as true. CP 69. In other words, because Post neglected to repair the hazardous and inoperable window, he breached his duties as a landlord under the RLTA, as forth in greater detail above. Moreover, the element of breach is a factual issue that is nearly always left for the trier of fact to decide. *Fuentes v. Port of Seattle*, 119 Wn.App. 864, 868, 82 P.3d 1175 (2003). It would constitute reversible error for the trial court to make a factual decision about breach in this case.

c. Causation

Proximate cause consists of two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Accordingly, proximate cause is a mixed question of law and fact. *Rasmussen v. Bendotti*, 107 Wn.App. 947, 955, 29 P.3d 56 (2001). "The

question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.” *Bordynoski v. Bergner*, 97 Wn.2d 335, 340, 644 P.2d 1173, 1176 (1982).

In regard to causation, Abson met their burden on summary judgment by relying on the declarations and evidence presented. In his declaration, Dr. Kiesel opines as follows: “Had Ms. Abson been able to open a window in the room where she was found, it is more likely than not that she would have survived.” CP 98. His opinion was based on the fact that (1) the other individuals who were trapped in the house survived by breathing fresh air through an open window and (2) his review of Ms. Abson’s autopsy and medical history, which indicated that she had no identified natural diseases that would have contributed to her death or increased her sensitivity to carbon monoxide. CP 98.

Debi Svancara’s lay witness opinion also provides sufficient admissible evidence to establish causation. In her declaration, Ms. Svancara stated that she and a house guest were able to “prevent [themselves] from succumbing to the smoke” by “putting [their] heads outside to breathe fresh air.” Finally, Abson presented a photo of handprints that were found in the room where Judith Abson was found,

which the trial court reviewed in making its conclusions. CP 184; Appx. A to Brief of Appellants. Together the evidence from these declarations and the inferences therefrom, i.e. that if Judith Abson was able to open the window that Post had painted shut in violation of the RLTA and the Tacoma Municipal Code, she would have survived. The handprints on the window are significant because they confirm that Judith Abson was at the window and was struggling to open it at the time that she was overcome with smoke.

In short, Abson submitted ample admissible evidence to preclude summary judgment from being entered under a cause-in-fact theory.

Relying on four cases in particular, Post argues that, because Judith was killed, she cannot offer any testimony to show that she was in fact trapped in the room where she was found and attempting to open the inoperable window, and that Abson's argument in support of that notion is too speculative to withstand Post's summary judgment motion. It is untrue that a required showing to defeat summary judgment cannot be made if a party like Judith Abson has died.² If this were true, no one could

² Although it is not binding precedent, this Court has rejected arguments similar to Post's. *Dominguez v. City of Tacoma*, 2008 WL 2746041, 145 Wn.App. 1041 (2008). In *Dominguez*, the decedent died when his motorcycle crashed in a construction zone that misplaced signage, in violation of relevant codes. *1. Because the decedent was killed at the scene, before he could testify about his thought processes and knowledge prior to the collision, the trial court granted summary judgment. On appeal, this Court concluded summary judgment was not warranted because the code violations at the construction site established evidence of negligence and created an issue of fact on proximate cause. *8.

bring a wrongful death claim where there are no witnesses to the death. Post relies, in part, on *Johanson v. King County*, 7 Wn.2d 111, 109 P.2d 307 (1941) to support this proposition. In *Johanson*, however, the Court suggested that a reasonable inference that the driver of an automobile was misled or deceived by the residue of a directional yellow line in a highway that had been recently expanded would be sufficient to defeat summary judgment. *Johanson*, 7 Wn.2d at 122. But because the *Johanson* plaintiff and his passenger both testified that they knew nothing of how or where the accident had happened, the trial court properly granted the summary judgment motion. *See also Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 379-80, 972 P.2d 475 (1999) (applying same reasoning to plaintiff who could not remember how her injury occurred); *Moore v. Hagge*, 158 Wn.App. 137, 154, 241 P.3d 787 (2010); and *Little v. Countrywood Homes, Inc.*, 132 Wn.App. 777, 778, 133 P.3d 944 (2006) (same).

Contrary, to the cases relied upon by Post, the facts here, and all inference therefrom, were sufficient to defeat summary judgment. The trial court had the following facts in front of it upon Post motion for summary judgment: (1) Judith Abson was found having succumbed to smoke inhalation in a bedroom in her house; (2) The windows in that room were inoperable; (3) Handprints were found around an inoperable window in that bedroom; (4) Others were trapped in the house until fire

crews arrived; (5) Those who escaped were able to breathe fresh air by opening a window in the bedroom where they were trapped; and (6) Eric Kiesel, M.D., Ph.D., the Medical Examiner who performed the autopsy on Judith Abson, opined that she would have survived absent the window being painted shut in violation of the RLTA and the Tacoma Municipal Code. The Court should have inferred from these facts that Judith Abson attempted to open the windows in the room where she was trapped and had she been able to open a window, she, like those who were rescued by fire crews, would not have sustained carbon monoxide poisoning. These facts, the inferences therefrom, and the expert testimony presented to the Court were sufficient to survive summary judgment. The trial courts grant of summary judgment was therefore in error and should be reversed.

d. Damages

Although Post does not address this element in his brief, Abson assumes that Post concedes this issue. Clearly, Judith Abson's death, and the resulting impact on her husband and children, rises to the level of damages necessary to establish a cause of action for negligence.

(2) The Trial Court Correctly Denied Post's Motion to Strike the Declaration of Dr. Eric Kiesel.

In response to Abson's Motion for Reconsideration, Post asked the trial court to strike Dr. Kiesel's declaration. CP 172-83. The trial court

denied Post's motion to strike and considered Dr. Kiesel's declaration in issuing its order. CP 184. Despite this fact, Post asks the Court to disregard Dr. Kiesel's testimony. This argument is contrary to established court precedent.

The Court of Appeals permits trial courts, at their discretion, to consider additional evidence presented for reconsideration. "In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration." *Chen v. State*, 86 Wn.App. 183, 192, 937 P.2d 612 (1997) (citing *Applied Indus. Materials Corp. v. Melton*, 74 Wn.App. 73, 77, 827 P.2d 87 (1994)). Nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn.App. 852, 865 n. 19, 851 P.2d 716 (1993) (overruled on other grounds by *Mackay v. Acorn Custom Cabinetry, Inc.*, 172 Wn.2d 302, 310, 898 P.2d 284 (1995)). Motions for reconsideration and the taking of additional evidence are within the sound discretion of the trial court. *Chen*, 86 Wn.App. at 192, (citing *Trohimovich v. Dep't. of Labor and Indus.*, 73 Wn.App. 34, 320, 869 P.2d 95 (1994)). Moreover, the cases that Post relies upon to support his argument to the contrary are not dispositive of this issue.

All of Post's cited cases involve post-trial motions under CR 59, which fall under a different analysis. *See Holaday v. Merceri*, 49

Wn.App. 321, 330, 742 P.2d 127 (1987) (addressing presentation of additional evidence in post-trial motion for reconsideration); *Jet Boats, Inc. v. Puget Sound National Bank*, 44 Wn.App. 32, 41, 721 P.2d 18 (1986) (same). Post's Brief also includes a block quotation from *Meridian Minerals Co. v. King Co.*, 61 Wn.App. 195, 203, 810 P.3d 31 (1991), to support his argument. See Brief of Respondent at p. 25. He neglects, however, to include in his brief the sentence that follows that quotation, which states, "In the context of a summary judgment, unlike trial, there is no prejudice to any findings if additional facts are considered." *Meridian Minerals Co. v. King Co.*, 61 Wn.App. 195, 203, 810 P.3d 31 (1991). In that case, the trial court declined to review additional facts post-summary judgment because the presentation of that evidence was in violation of the parties' stipulation. *Id.* In sum, unlike a post-trial motion for reconsideration, for which "the court must base its decision on the evidence it already heard at trial," *Jet Boats*, 49 Wn.App. at 42, a trial court may consider additional materials in a motion to reconsider a summary judgment ruling, *Chen*, 86 Wn.App. at 192, as the Court did here.

The trial court considered Dr. Kiesel's declaration upon Abson's motion for reconsideration. CP 184. In doing so, it acted within its discretion. *Chen*, 86 Wn.App. at 192. Post was not prejudiced by the

review of additional evidence, *Id.* at 192, nor does a claim of prejudice exist in his brief. Therefore, the Court should decline Post's request to disregard Dr. Kiesel's declaration.

(3) Dr. Kiesel's Expert Testimony Meets the Standards of ER 702, 703 & 704.

The Rules of Evidence permit and encourage expert testimony where such testimony would be helpful to the trier of fact. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). Such testimony is generally necessary to establish issues regarding medical causation in areas beyond an ordinary person's lay knowledge. Rule 702 permits expert testimony in the form of an opinion. Rule 703 provides latitude for the expert to base his or her opinion on evidence made available before, or even at, the hearing, if the materials are of a type reasonably relied upon by experts in the field, regardless of whether they are admissible into evidence. Finally, ER 704 permits opinions and inferences even if they embrace the ultimate issue to be decided by the trier of fact. As is set forth in Dr. Kiesel's declaration, CP 95-96, he is qualified to testify to the matters at issue in this case.

Dr. Kiesel's opinion was based on materials created when investigating Judith Abson's death, Ms. Abson's autopsy, and Dr. Kiesel's experience, training and knowledge in forensic pathology and death scene

investigation. Under the Rules of Evidence, Dr. Kiesel's opinions are admissible. For that reason, the trial court denied Post's motion to strike and considered Dr. Kiesel's testimony on Abson's motion for reconsideration. CP 184. The trial court acted within its discretion in doing so. *Chen v. State*, 86 Wn.App. 183, 192, 937 P.2d 612 (1997). As set forth above, Dr. Kiesel's testimony created an issue of fact on proximate cause that should have defeated summary judgment. The trial court's grant of summary judgment should be reversed.

C. CONCLUSION

The trial court committed reversible error in granting Post's motion for summary judgment – despite Abson's production of expert and lay declarations establishing multiple questions of fact. Juxtaposing Abson's lay and expert opinion testimony against the standard set out in CR 56(c) illustrates that the trial court made a mistake. Moreover, because the standard of review is de novo, any and all ambiguities, inferences, or reasonable hypotheses supporting Abson's claims must result in reversal. The trial court's order granting summary judgment must be reversed, and this case remanded for trial on the merits.

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DATED this 19th day of October, 2012.

Respectfully submitted,

/s/ Anna L. Price

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THOMAS MARTINI, *et al.*

Appellants,

v.

PAUL POST,

Respondent

No. 43484-9-II

Declaration of Service

The undersigned declares and states under the penalty of perjury pursuant to the laws of the State of Washington as follows:

I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On October 19, 2012, I caused the Appellants' Reply Brief and this Declaration of Service to be filed in the above captioned matter and, on the same date, a copy of Appellants' Reply Brief to be served on counsel for Respondents, along with a copy of this Declaration of Service, in the manner indicated:

COURT CLERK WA STATE COURT OF APPEALS, DIVISION II 950 BROADWAY, SUITE 300 TACOMA, WA 98402 E-FILE: COA2FILINGS@COURTS.WA.GOV	<input checked="" type="checkbox"/> Via Legal Messenger (To be delivered 10/19/12) <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Electronic Mail/E-File
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Dated this 19th day of October, 2012.



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