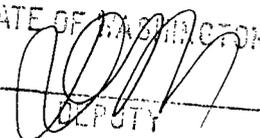


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

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

JOHN JOHNSON and JANET JOHNSON, husband and wife, and the marital
community thereof,

Appellants,

vs.

TOBIN MILLER and CRYSTAL MILLER, husband and wife, and the marital
community composed thereof,

Respondents.

APPEAL FROM SKAMANIA COUNTY SUPERIOR COURT
Honorable Brian P. Altman, Judge

BRIEF OF RESPONDENTS

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I. NATURE OF THE CASE

Defendant landlords purchased a mobile home that the prior owner was leasing to tenants. The tenants signed a new lease with defendant landlords.

Claiming he was injured during defendant landlords' tenure by alleged defects in noncommon areas, plaintiff social guest seeks to hold defendant landlords liable under an alleged common law implied warranty of habitability and the Residential Landlord-Tenant Act (RLTA). The alleged defects, however, were open and obvious, created by the tenants, or in existence but unknown to defendant landlords when they bought the property. In addition, the tenants admitted never telling the landlords about any of alleged defects, even though they conceded the landlords had repaired other problems they had reported. The trial court granted the landlords summary judgment.

II. ISSUES PRESENTED

A. Is a landlord liable under common law for defects that existed at the time the lease began where the tenants were aware of the defects but there is no showing that the landlord knew of them?

B. Is a landlord liable under common law for open and obvious defects?

C. Is a landlord liable under common law for defects caused by the tenant?

D. Is a landlord liable under common law for defects of which he had no knowledge, actual or constructive?

E. Does RCW 59.18.060 supersede any common law implied warranty of habitability?

F. Is there a third-party cause of action under the Residential Landlord-Tenant Act?

G. If so, can a third party bring a cause of action under the Residential Landlord-Tenant Act absent compliance with the Act's notice requirements?

H. Even if a third party has a cause of action under the Residential Landlord-Tenant Act, can there be recovery under the Act for a defective condition caused by the tenant, even though RCW 59.18 .060 prohibits it?

III. STATEMENT OF CASE

A. STATEMENT OF RELEVANT FACTS.

Tenants Taurus Baxter and his girlfriend, Athena "Sandy" Caldwell, rented a mobile home from Jackie Burns. (CP 309, 341, 348) There was no written rental contract. (CP 310)

Baxter and Caldwell lived at the mobile home for approximately two years with Burns as their landlord. (CP 310) Then defendants/respondents Tobin and Crystal Miller purchased the property. The Millers entered into a written rental agreement with Baxter dated August 1, 2005. (CP 38-39, 44, 310-11)

The front door to the mobile home opened out onto a partially enclosed porch. A door in one of the porch walls opened to three steps that led to a path to the driveway. (CP 41, 44) The porch stairs were illuminated by a motion sensor light. (CP 44) The front door, porch, steps, and light were in the same configuration at the time of plaintiff's accident as they were when the Millers purchased the property. (CP 41, 44)

When Baxter and Caldwell first moved into the home, the steps had handrails on both sides. (CP 41) However, at some point after defendants Miller purchased the premises, tenant Baxter removed both handrails because of their poor condition. Tenant Baxter intended to replace them himself. No one ever notified defendants Miller that the handrails had been removed. (CP 41, 318, 354) The tenants never told defendants Miller about any problems with the light or the steps either, even though the tenants admitted that when they had told the Millers of

other problems, Tobin Miller would make the repairs. (CP 52, 330, 352, 372)

One rainy evening, Sandy Caldwell's stepfather, plaintiff/appellant John Johnson, stopped by the mobile home for a visit. (CP 51, 360, 368) This was not unusual, as plaintiff was in the habit of visiting at the mobile home three or four times a month. (CP 355)

Shortly after plaintiff left, both tenants heard a thump. When they opened the door to look, they found plaintiff on the ground. He said he had slipped. Taurus Baxter did not believe plaintiff had been injured. (CP 325) Sandy Caldwell stated that although plaintiff said he ached a bit, he was all right. Plaintiff went home. (CP 326, 366)

B. STATEMENT OF PROCEDURE.

The accident occurred on November 13, 2006. (CP 41) On November 10, 2009, just before the statute of limitations expired, plaintiff sued the Millers, the landlords at the time of the accident. (CP 10-14)

The complaint alleged that there was no landing, that the stairs had no handrail, and that the stairs had insufficient lighting. There was no mention of the condition of the stairs themselves. (CP 11)

Defendants Miller moved for summary judgment. (CP 23-24, 25-39) Plaintiff opposed the motion, primarily based on the contention that

tenant Baxter was the Millers' agent. (CP 83) The trial court denied the motion. (CP 211-13)

Defendants Miller moved for reconsideration, pointing out, among other things, that the weight of authority was that a tenant is not the landlord's agent. (CP 214-27, 221-23) Defendants Miller also argued that they had no liability under the lease, common law tort principles, the Washington Residential Landlord-Tenant Act, RCW ch. 59.18, or plaintiff's *res ipsa loquitur* theory.

The trial court granted the motion in part and denied it in part. (CP 237) Most of plaintiff's claims, including the claim that the lease made the tenant the landlord's agent, were dismissed. The trial court found, however, that apart from the lease terms, there was a factual issue "whether the tenant acted in the landlord's behalf thereby imputing vicarious liability on the landlord for his alleged acts and omissions." (CP 42, 237; RP 116-17)

More discovery took place. Defendants Miller then moved for summary judgment on the sole remaining agency claim. (CP 239-40, 242-51) The trial court granted the motion. (CP 409-12) Plaintiff's motion for reconsideration was denied. (CP 434-36)

IV. ARGUMENT

On appeal, plaintiff has abandoned most of the theories he espoused below (*e.g.*, agency, *res ipsa loquitur*). He now limits his theories to an alleged common law implied warranty of habitability and the Residential Landlord-Tenant Act, RCW ch. 59.18. As will be discussed, the trial court properly granted defendant landlords summary judgment.¹

A. PLAINTIFF CANNOT RECOVER UNDER THE COMMON LAW.

1. General Common Law Landlord-Tenant Principles.

"Under Washington common law, a landlord has no duty to repair noncommon areas absent an express covenant to repair." *Aspon v. Loomis*, 62 Wn. App. 818, 826, 816 P.2d 751 (1991), *rev. denied*, 118 Wn.2d 1015 (1992). Whether defects are in common or noncommon areas is significant, because a landlord is not the possessor of noncommon areas and thus owes lesser duties with respect thereto. *See Pruitt v. Savage*, 128 Wn. App. 327, 330-31, 115 P.3d 1000 (2005).

¹ Whether the alleged defects violated any common law implied warranty of habitability or the RLTA was not at issue below. Defendant landlords reserve the right to contest those issues should this court reverse.

In this case, the entire leased premises consisted of noncommon areas. (CP 349) Further, plaintiff does not contend there was any express covenant to repair.

It has long been the common law of Washington that “a landlord generally is not liable to a tenant for personal injuries caused by a defective condition in the premises.” *Brown v. Hauge*, 105 Wn. App. 800, 804, 21 P.3d 716 (2001). While a landlord can, under certain circumstances, be liable for affirmative acts of negligence, *Rossiter v. Moore*, 59 Wn.2d 722, 725, 370 P.2d 250 (1962), plaintiff here does not claim that defendants Miller committed any affirmative acts of negligence.

The Washington Supreme Court has explained when a landlord can be liable absent an express covenant of repair or an affirmative act of negligence:

Washington common law provides that a landlord will be liable to a tenant for harm caused by

- (1) latent or hidden defects in the leasehold
- (2) that existed at the commencement of the leasehold
- (3) of which the landlord had actual knowledge
- (4) *and* of which the landlord failed to inform the tenant

Frobig v. Gordon, 124 Wn.2d 732, 735, 881 P.2d 226 (1994) (emphasis added). In general, the landlord is not responsible for conditions that

develop, or are created by the tenant, *after* possession has been transferred.
Id. at 736.

Thus, under Washington, law, a landlord generally has no duty to protect a tenant from dangers that are—

- open and obvious, *or*
- created by the tenant himself or that otherwise come into existence after the lease begins, *or*
- not known to the landlord.

Frobisg, 124 Wn.2d at 735-36; *Sjogren v. Properties of Pacific Northwest, LLC*, 118 Wn. App. 144, 148-49, 75 P.3d 592 (2003); *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 788-90, 732 P.2d 1008 (1987). Even if a defect is present when a lease begins, the landlord is not liable absent either (1) an express covenant to repair, or (2) if the defect is latent, the failure to disclose it if actually known to the landlord, but not known or reasonably discoverable by the tenant. *Shew v. Hartnett*, 121 Wash. 1, 10, 208 P. 60 (1922); *Aspon*, 62 Wn. App. at 826-27.

The foregoing rules apply to tenants. Plaintiff here was not a tenant. He was a guest—*i.e.*, either an invitee or a licensee—of the tenant. (CP 41) Compare *Mucsi v. Graoch Associates Limited Partnership No. 12*, 144 Wn.2d 847, 855, 31 P.3d 684 (2001), with *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). However, that fact does not

give him any greater rights than a tenant, because under the common law, a landlord owes no greater duty to a tenant's guests than to the tenant himself. *Charlton v. Day Island Marina,, Inc.*, 46 Wn. App. 784, 790, 732 P.2d 1008 (1987).

In short, since “[a] landowner is not a guarantor of safety—even to an invitee”, the landlord cannot be the guarantor of safety to a tenant’s guest, whether an invitee or a licensee. *See Mucsi v. Graoch Assocs. Ltd. Partnership No. 12*, 144 Wn.2d 847, 860, 31 P.3d 684 (2001).

2. Plaintiff Cannot Recover Under the Common Law.

Plaintiff complains about the absence of a landing, a nonworking porch light, the absence of hand rails along the stairs, and the slipperiness of the stairs. But given the foregoing common law principles, the trial court correctly granted summary judgment to the landlords, defendants Miller.

First, there is no dispute that the absence of a landing at the premises was (1) open and obvious, (2) in existence at the time the lease between the parties began, and (3) known to the tenant. (CP 44, 124-26) Given that plaintiff had been a frequent visitor at the mobile home (CP 46), he too undoubtedly was aware that there was no landing.

Second, as to the light, even though the record is disputed as to why it did not go on, the landlords Miller could still not be liable. If, as

tenant Taurus Baxter testified, he simply turned it off every winter (CP 315), the landlords would not be liable because the light's being off was a condition created by the tenant. And regardless of why the light was not working, the tenants knew of it, and it would have been an open and obvious condition during nighttime hours. Further, as will be discussed *infra*, regardless of the reason why the light was not working at the time, the landlords did not have the requisite knowledge, actual or constructive.

Third, the stairs had no handrails because tenant Baxter had removed them. (CP 315) This was an open and obvious condition, but even if it were not, the landlords cannot be liable under the common law, because the condition was created by the tenant.

Fourth, despite having failed to plead it, plaintiff complains about the condition of the stairs themselves. The record shows they became slippery when wet and had been that way since the tenants first moved in. (CP 331) But tenant Baxter and his girlfriend first moved into the mobile home two years *before* defendants Miller purchased the premises and became their landlords. (CP 310) The steps' condition therefore existed at the beginning of the lease with defendant Millers and was well known to the tenants. As a result, defendants Miller cannot be liable for them.

Furthermore, the record is undisputed that the tenants *never* notified defendants Miller of any of these problems. (CP 318, 330, 352,

372) As to the light, if the light was not working because tenant Baxter had turned it off, there was no evidence that the Millers knew (or for that matter, reasonably should have known) that Baxter had done so.

On the other hand, if the light was turned on but malfunctioned, there is no evidence that the landlords, defendants Miller, had the requisite knowledge, actual or constructive. Tenant Sandy Caldwell testified that the light "worked only when it wanted to," meaning that sometimes the light worked. (CP 352) There is no showing that when defendant landlords visited the premises, the light was malfunctioning. When asked whether that was something that had ever been brought to the attention of defendants Miller, she testified, "No." (CP 352)

Further, even if it had been malfunctioning (or had been turned off by tenant Baxter) during the Millers' visits, there is no showing that a reasonable person would have noticed. Tenant Caldwell testified that the landlords' visits were mostly during the day. (CP 358) A reasonable person would not notice whether a light was on or not during the day.

With respect to the handrails that tenant Baxter had removed, tenant Caldwell testified as follows (CP 354):

Q. Did either you or Mr. Baxter, to the best of your knowledge, bring this to the Millers' attention that the rails were taken down?

A. No.

Tenant Baxter confirmed that the Millers had not been notified about the handrails. (CP 318)

As to the slipperiness of the steps when wet, tenant Caldwell testified (CP 372):

Q. . . . Was this situation where you're saying "slipped," wet steps?

A. Yeah. It was a –it was a rotted wet step. The steps were rotten.

Q. Is that something that you told the Millers about?

A. No. I did not tell the Millers about it. I don't think Tory [*i.e.*, Taurus Baxter] did either.

Tenant Baxter agreed that he had not told the Millers about the slipperiness of the steps when wet. (CP 330) Further, there was no evidence that the landlords had visited when the steps were wet. That the steps may have been rotten is immaterial, since plaintiff is not claiming he fell through them, only that he slipped.

A party opposing summary judgment has the burden of coming forth with specific facts that create a genuine issue of material fact. *Smith v. Preston Gates LLC*, 135 Wn. App. 859, 863, 147 P.3d 600 (2006), *rev. denied*, 161 Wn.2d 1011 (2007). Conjecture and conclusory allegations are insufficient. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009). Plaintiff here failed to come forward with specific facts

showing that defendants Miller had the requisite knowledge, actual or constructive.

Furthermore, RCW 59.18.090 makes advance written notice a prerequisite not only to suits for “any remedy provided under this chapter or otherwise provided by law.” Common law remedies are remedies “otherwise provided by law.” The notice prerequisite to suit provided by RCW 59.18.090 would be meaningless if plaintiffs could simply ignore it. The tenants here failed to give the required notice.

Plaintiff claims the defendants Miller should nevertheless be liable because tenant Baxter was allegedly their independent contractor. But under the common law, an employer is generally not liable for the acts of an independent contractor. *Getzendaner v. United Pacific Insurance Co.*, 52 Wn.2d 61, 67, 322 P.2d 1089 (1958).

In light of this well-established common-law rule, plaintiff claims that this court should adopt RESTATEMENT (SECOND) OF TORTS §§ 419, 424 and RESTATEMENT (SECOND) OF PROPERTY § 19.1. Washington courts have not adopted section 419 or section 19.1. In any event, none of the sections, including section 424, applies.

First, plaintiff has not cited a single authority for the proposition that any of the sections apply where, as here, the alleged independent contractor is the tenant.

Second, by their very nature, these sections assume that the landlord has sufficient knowledge of a problem to engage an independent contractor to fix it. Here, the landlord did not have such knowledge.

Third, section 19.1 assumes the landlord has a duty of repair. RESTATEMENT (SECOND) OF PROPERTY § 19.1, comment a. But where, as here, the requisite knowledge is missing, or the defects are open and obvious or created by the tenant, or the defects existed when the purchasing landlord bought the property with the tenant already in place, there is no duty, assuming *arguendo* that tenant Baxter might have been an independent contractor for other problems.

Fourth, section 419 does not apply under the common law, even if tenant Baxter was an independent contractor. RESTATEMENT (SECOND) OF TORTS § 419, comment a. It applies only where there is a statutory or contractual duty of repair. *Id.* Plaintiff here does not claim there is any contractual duty and, as will be discussed *infra*, the RLTA does not apply here.

Fifth, section 424 of the RESTATEMENT (SECOND) OF TORTS does not apply in this case. That section applies only where a statute or regulation imposes the duty upon "one doing particular work" to provide safeguards or precautions for the safety of others. Section 424, comment a. Thus, the section applies where work is being done, but safety measures

are not employed. It does not apply to pre-existing conditions, such as here.

3. There Is No Common Law Implied Warranty of Habitability in Washington.

At common law there is no implied warranty of habitability. *Lian v. Stalick*, 106 Wn. App. 811, 815, 25 P.3d 467 (2001). Nevertheless, because plaintiff cannot recover under ordinary common-law landlord-tenant principles, plaintiff claims there is such a warranty. As will be discussed, the Residential Landlord-Tenant Act, RCW ch. 59.18, precludes any common law implied warranty.

The RLTA was enacted in 1973 after the "[e]xhaustive efforts" of landlord and tenant organizations and the Legislature. *State v. Schwab*, 103 Wn.2d 542, 550, 693 P.2d 108 (1985). Initially, a committee of landlord and tenant organizations, and headed by the regional director of the American Arbitration Association, spent nine months trying to come up with proposed legislation acceptable to both sides. Once the 1973 legislative session began, the landlord organization repudiated the committee's work. Only after lengthy party caucusing, prolonged debate, and an unprecedented number of proposed amendments was the RLTA enacted. See Clarke, *Washington's Implied Warranty of Habitability: Reform or Allusion?*, 14 GONZ. L. REV. 1, 11-12 (1978). It is no wonder

that the Washington Supreme Court has said, "it is hard to perceive of a more thoroughly considered piece of legislation." *Schwab*, 103 Wn.2d at 551.

By enacting the RLTA, the Legislature intended to "[r]evamp[] virtually all aspects of landlord-tenant relationship" and to "comprehensively alter existing common law rules in favor of a 'contract' approach." ESSB No. 2226, House Judiciary Committee, Report to Speaker's Office (1973 Wash. Leg. 1st Ex. Sess.). The RLTA is a "comprehensive" enactment. *Schwab*, 103 Wn.2d at 550.

Among other things, the RLTA includes a warranty of habitability, RCW 59.18.060. When the RLTA was enacted, such a remedy was not available at common law. *Lian*, 106 Wn. App. at 815. Consequently, since the RLTA's passage, Washington courts have held that a tenant can recover from the landlord under only three theories: "the rental agreement, common law, and an implied warranty of habitability *under the Residential Landlord-Tenant Act, RCW 59.18.*" *Howard v. Horn*, 61 Wn. App. 520, 522-23, 810 P.2d 1387 (1991) (emphasis added), *rev. denied*, 117 Wn.2d 1011 (1991); *Wright v. Miller*, 93 Wn. App. 189, 200, 963 P.2d 934 (1998), *rev. denied*, 138 Wn.3d 1017 (1999).

Common law remedies are not available where the Legislature has created a remedy, even if that remedy may not apply in a given situation.

See In re Parentage of M.F., 168 Wn.2d 528, 228 P.3d 1270 (2010). Since the Legislature has created a warranty of habitability, there is no common law implied warranty of habitability. *Cf. Washington Water Power Co. v. Graybar*, 112 Wn.2d 847, 774 P.2d 1199 (1989) (statute preempted common law, even absent an express preemption clause). To hold otherwise would be to ignore the Legislature's thorough study of the issue in light of the competing interests between landlords and tenants.

Foisy v. Wyman, 83 Wn.2d 22, 515 P.2d 160 (1973), did purport to adopt an implied warranty of habitability. More recently, Division I has cited *Foisy* to rule that a common law implied warranty of habitability still exists. *See Landis & Landis Constr., LLC v. Nation*, 171 Wn. App. 157, 286 P.3d 979 (2012), *petition for review pending*. But as *Howard* and *Wright* have recognized, the RLTA supersedes any common law implied warranty. Indeed, two experts in Washington property law have, post-*Foisy*, explained –

In Hawaii, Iowa, Ohio, Texas, Vermont, and Washington, however, the judge-made "implied" warranty of habitability has been entirely or largely superseded by comprehensive residential landlord-tenant statutes imposing on landlords a duty – set out in detail – to put and keep the leased premises in a habitable condition.

W. Stoebuck & D. Whitman, *THE LAW OF PROPERTY* § 6.38 at 301 (3d ed. 2000).

The RLTA had not yet been enacted when the events that gave rise to *Foisy* took place. Although *Foisy* expressly cited the newly enacted RLTA as support for its holding, it did not discuss whether the statutory warranty of habitability, RCW 59.18.060, applied in that case.

In fact, it did not. The RLTA was prospective only and thus could not have applied in *Foisy*. RCW 59.18.430; *see Washington Association of Apartment Owners v. Evans*, 88 Wn.2d 563, 564 P.2d 788 (1977) (striking down veto of RLTA section that would be codified at RCW 59.18.430).

Foisy thus stands solely for the proposition that a common law implied warranty of habitability existed to fill the void that existed *before* the RLTA became effective. *Foisy* did not address the situation where a landlord-tenant relationship is subject to the RLTA or discuss whether the RLTA's statutory warranty supersedes the common law warranty. Thereafter, *Howard* and *Wright* held that the implied warranty of habitability was available only under the RLTA. *See also Tucker v. Hayford*, 118 Wn. App. 246, 256, 75 P.3d 980 (2003) (recognizing cause of action for implied warranty of habitability under the RLTA).

Aspon v. Loomis, 62 Wn. App. 818, 816 P.2d 751 (1991), *rev. denied*, 118 Wn.2d 1015 (1992) also implicitly recognizes that the RLTA supersedes any common law implied warranty. There, a tenant brought a negligence action against the landlord for personal injuries incurred when

she tripped on a furnace burner box and fell against an uninsulated hot furnace vent pipe. After the jury returned a defense verdict, plaintiff appealed, claiming the trial court should have instructed the jury that "[a] landlord has a duty to use ordinary care to keep the premises fit for human habitation at all times during a tenancy." 62 Wn. App. at 821.

The Court of Appeals affirmed, holding that the refusal to give the instruction was proper because the implied warranty was limited to the defects set forth in RCW 59.18.060. The court held that under the common law, a landlord has no duty to repair noncommon areas absent an express covenant to repair, or unless injury was caused by a concealed, dangerous condition known to the landlord.

As *Landis* recognized, *Aspon* – citing *Foisy* – did say, "we cannot presume that the Legislature intended the act to restrict application of the implied warranty of habitability." *Landis*, 171 Wn. App. 162 (quoting *Aspon*, 62 Wn. App. at 825). But by ruling that the trial court had not erred in refusing to instruct on the landlord's duty to use ordinary care to keep the premises fit for human habitation, *Aspon* essentially rejected any common law implied warranty. The quote from *Aspon* relied upon by *Landis* was thus mere dicta. *Aspon* stands for the proposition that the RLTA governs any implied warranty of habitability.

That RCW 59.18.070 refers to "remedies otherwise provided . . . by law" means nothing. The Washington Supreme Court has recognized that "remedies otherwise provided by law" does not preserve all remedies. *See Schwab*, 103 Wn.2d at 552. Since RCW 59.18.060 overrides any common law implied warranty, any common law warranty is not a remedy provided by law.

**4. RESTATEMENT (SECOND) OF PROPERTY Section 17.6
Should Not Be Adopted in This Case.**

Plaintiff also claims that this court should adopt section 17.6 of the RESTATEMENT (SECOND) OF PROPERTY. Plaintiff first mentioned this section in response to defendant Millers' motion for reconsideration. (CP 230) This was too late.

In any event, Division III is the only Washington appellate court to have done so.² *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001). This court declined to do so in *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005), and *Sjogren v. Properties of the Pacific Northwest*, 118 Wn. App. 144, 75 P.3d 592 (2003).

² A federal district court in Washington has also done so, in reliance on the Division III cases. *Pinckney v. Smith*, 484 F. Supp. 2d 1177 (W.D. Wash. 2007). Of course, federal district court cases are not binding on this court.

Plaintiff claims that adopting section 17.6 would not expand a landlord's *duties*. But adopting section 17.6 would greatly expand a landlord's *risk* far beyond not only the common law, but also the RLTA.

For example, unlike section 17.6, the statutory implied warranty of habitability is limited to the items set forth in RCW 59.18.060. *Aspon*, 62 Wn. App. at 825; *Lian*, 106 Wn. App. at 816. Also unlike section 17.6, only a tenant can sue for breach of the statutory warranty, as will be discussed, *infra*. Adoption of section 17.6 would expand a landlord's risk far beyond RCW 59.18.060 and would amount to nothing short of impermissible judicial legislating. *See Carnation Co. v. Hill*, 115 Wn.2d 184, 189, 796 P.2d 416 (1990). The Legislature is much better equipped than the judiciary to weigh all the competing factors that should be considered (for example, the effect on rental rates and availability of reasonably priced rental housing). *See Burkhart v. Harrod*, 110 Wn.2d 381, 385-86, 755 P.2d 759 (1988).

But even if the court were to adopt section 17.6, it would be of no help plaintiff here.

First, as to duties created by statute or administrative regulation, section 17.6 is based on the assumption that violation thereof "constitutes negligence per se." RESTATEMENT (SECOND) OF PROPERTY § 17.6,

comment a. The negligence per se requirement promotes the likelihood that the legislative will will be effectuated. *Id.*

While the Legislature has made violations of statutory or regulatory rules relating to electrical fire safety and smoke alarms negligence per se, it has not done so for the alleged statutory and regulatory violations here. RCW 5.40.050. Thus, the alleged violations here cannot be negligence per se.

Second, section 17.6 does not create, but rather assumes the law already imposes, an implied warranty of habitability. *See* RESTATEMENT (SECOND) OF PROPERTY § 17.6, comment a. As discussed *supra*, there is no such warranty in common law.

Third, as to conditions that preexist the lease, section 17.6 is based on the assumption that "[o]rdinarily, the landlord will be chargeable with notice of conditions which existed prior to the time that the tenant takes possession." RESTATEMENT (SECOND) OF PROPERTY § 17.6, comment c. Here, however, the tenants were in possession two years before defendants Miller purchased the property.

Fourth, as to conditions that develop after the lease, the landlord is not liable under section 17.6 "until he has had a reasonable opportunity to remedy the condition after the tenant notifies him of it." RESTATEMENT (SECOND) OF PROPERTY § 17.6, comment c. As discussed *supra*, it is

undisputed that the tenants here never notified defendants Miller of any of the problems at issue, and that the landlords had no constructive knowledge.

In sum, even if section 17.6 were the law, it would not impose liability against landlords Miller. There is no reason this court should adopt that section in this case.

5. Even If There Were a Common Law Implied Warranty of Habitability, A Third Party Has No Cause of Action for Breach Thereof.

Even if there were a common law implied warranty of habitability, that warranty would not apply to third persons such as plaintiff. The cases plaintiff cites for the proposition that duties owed to a tenant are owed equally to guests, *Mesher v. Osborne*, 75 Wash. 439, 134 P. 1092 (1913), *McGinnis v. Keylon*, 135 Wash. 588, 238 P.631 (1925), and *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962), were decided decades before any common law implied warranty of habitability in the landlord-tenant context came into existence, even assuming *arguendo* that such a warranty still exists.

In any event, in Washington, the implied warranty of habitability is contractual in nature. *See Foisy*, 83 Wn.2d at 28 (there is implied warranty of habitability in all rental contracts”); *accord Landis*, 171 Wn. App. at 162; *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 693, 106 P.3d

258, *rev. denied*, 155 Wn.2d 1026 (2005) (action on implied warranty of habitability sounds in contract). Plaintiff here was not a party to the contract. Consequently, he has no cause of action for breach of any implied warranty of habitability. *See generally Johnson v. Scandia Associates, Inc.*, 717 N.E.2d 24 (Ind. 1999). That courts in some other states may allow third parties to sue for breach of an implied warranty is irrelevant.

Plaintiff claims that tenants are expected to have guests and that landlords are in the best position to bear the risk. But the unusual facts of this case militate against adopting a common-law implied warranty. Here, unlike the usual landlord-tenant situation, the tenants were in possession for two years prior to the landlords. The conditions complained of were all well known to the tenants, and many predated the defendant landlords' acquisition or were caused by the tenants. Furthermore, the tenants never advised their new landlords, defendants Miller, of the problems. Under these circumstances, common sense, justice, and logic favor the landlords, not plaintiff.

B. THE RESIDENTIAL LANDLORD-TENANT ACT CLAIM WAS PROPERLY DISMISSED.

Unlike Washington common law, the Residential Landlord-Tenant Act imposes upon landlords a warranty of habitability pursuant to RCW

59.18.060. This statutory warranty is limited to the types of defects specified in the statute. *Lian*, 106 Wn. App. at 816, *Aspon*, 62 Wn. App. at 825-26.

Assuming *arguendo* that there was breach of the statutory warranty or any other breach of the RLTA, summary judgment in favor of the landlords was still proper.

1. A Third Party Has No Cause of Action Under the Washington Residential Landlord-Tenant Act.

Plaintiff was not a tenant. He was the tenants' social guest. As such, he has no cause of action under the Residential Landlord-Tenant Act.

The RLTA provides the tenants may sue landlords. RCW 59.18.090. Plaintiff has not cited a single section of the RLTA that provides social guests—or any other third persons—with a cause of action for breach of that Act. Plaintiff's brief recognizes this when it observes that "*tenants* are among 'the class of persons' that the RLTA intends to protect". (Brief of Appellant's 18) (emphasis added). Plaintiff fails to point to any statutory language suggesting their *guests* are also within the protected class.

If the Legislature had intended to allow third persons to sue for damages under the RLTA, it easily could have said so. *See, e.g.*, RCW

19.86.090 (“[a]ny person” injured in his or her business or property by violation of RCW ch. 19.86 can bring Consumer Protection Act suit). It did not.

Lacking any statutory or case law that says the RLTA permits third-person causes of action, plaintiff makes the following argument:

1. Under the common law, a guest has the same rights against the landlord as the tenant;
2. The Legislature is presumed to have been aware of that common law when it enacted the RLTA;
3. Therefore, the RLTA must provide guests with a cause of action even though the Act contains no language to that effect.

This argument is meritless. Just because a guest could recover from the landlord under the common law does not mean that the Legislature intended to allow guests to recover from the landlord under the RLTA. Plaintiff's reliance on *In re Detention of Hawkins*, 169 Wn.2d 796, 801-02, 238 P.3d 1175 (2010), is inapposite. In that case, the court was determining whether polygraphs fell within the statutory phrase "an evaluation as to whether the person is a sexually violent predator." Here, in contrast, there is no language in the RLTA that could reasonably be construed to allow third persons to sue the landlord under the RLTA.

To determine whether a statute provides a private cause of action, Washington courts use the following test³:

"first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation."

Ducote v. State Department of Social & Health Services, 167 Wn.2d 697, 703, 222 P.3d 785 (2009) (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990)).

To determine whether a plaintiff is within the class for whose "especial" benefit the statute was enacted, courts primarily "look to the language of the statute to ascertain whether the plaintiff is a member of the protected class" for whom the statute was enacted. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998); accord *Ducote*, 167 Wn.2d at 703.

The Washington Residential Landlord Tenant Act says nothing about permitting third persons to bring a cause of action thereunder.

³ *Ducote* is more recent than *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998), which employed RESTATEMENT (SECOND) OF TORTS § 286 (1965). Thus, the *Ducote* test applies. *Puget Mill Co. v. Kerry*, 183 Wash. 542, 559, 49 P.2d 57 (1935). Even if section 286 applied, however, the RLTA was not intended to protect third persons, as discussed in the text herein.

However, it explicitly permits *a tenant* to bring a cause of action. RCW 59.18.090 provides:

If, after receipt of written notice, and expiration of the applicable period of time, as provided in RCW 59.18 .070, the landlord fails to remedy the defective condition within a reasonable time *the tenant* may:

(1) Terminate the rental agreement and quit the premises upon written notice to the landlord, without further obligation under the rental agreement ...;

(2) Bring an action in an appropriate court, or at arbitration if so agreed, for any remedy provided under this chapter *or otherwise provided by law*; or

(3) Pursue other remedies available under this chapter.

(Emphasis added.) Further, RCW 59.18.911 declares that the act "shall apply to landlord-tenant relationships existing on or entered into after the effective date of this act."

RCW 59.18.050 extends judicial jurisdiction over "any landlord or tenant with respect to any conduct in this state governed by this chapter, or with respect to any claim arising from a transaction subject to this chapter" In addition, after specifying a landlord's duties, including maintenance and repair duties, RCW 59.18 .060 provides:

No duty shall devolve upon the landlord to repair a defective condition under this section, nor shall any defense or remedy be available *to the tenant* under this chapter, where the defective condition complained of was caused by the conduct of such tenant, his or her family, *invitee*, or other person acting under his or her control

(Emphasis added.) Surely the Legislature would not have prohibited a tenant's recovery against a landlord for defects caused by his/her invitee, while allowing an invitee to recover against a landlord for defects caused by the invitee. A court may not presume that the Legislature intended such an absurd result. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). Yet this is the absurd result that would occur if, as plaintiff claims, guests have a cause of action under the RLTA.

Not only is plaintiff here not within the class for whose "especial benefit" the act was enacted, there is no indication of explicit or implicit legislative intent supporting a statutory remedy for him. *See Ducote*, 167 Wn.2d at 703. If anything, as the foregoing statutory provisions demonstrate, the Act implies the Legislature did not so intend.

Nor is an implied third-party cause of action consistent with the RLTA's underlying purpose. The Act's purpose was to create a comprehensive enactment "delineating the specific rights, duties, **and remedies** of both landlords and tenants." *Schwab*, 103 Wn.2d at 550, 551 (emphasis added).

The Act was passed in 1973. In the 40 years since, no court has held that third parties have a cause of action under it. Nor has the Legislature amended the Act to provide for such a cause of action.

A court cannot usurp the Legislature's power and write into a statute language that it wishes were there. *State v. Kern*, 55 Wn. App. 803, 807, 780 P.2d 916 (1989), *rev. denied*, 114 Wn.2d 1003 (1990). That is what plaintiff is asking this court to do. This court should decline.

2. Even If There Were a Third-Party Cause of Action, the Statutorily Required Notice Was Not Given.

Even if a third party could bring a cause of action under the RLTA, RCW 59.18.090 provides that before the tenant may bring an action "for any remedy provided under this chapter or otherwise provided by law" arising out of the failure to repair a defective condition, the tenant must give written notice under RCW 59.18.070. There is no dispute that no such notice was given here. In fact, there is no dispute that the tenants failed to give the landlords any notice, written or otherwise, of the alleged defects. Therefore, defendant landlords cannot be liable under the Act.

Plaintiff may complain he had no control over whether the tenants here gave notice. That argument merely reinforces that the Legislature did not intend to grant third parties the right to sue under the Act. The argument is also inconsistent with plaintiff's claim that a third-party social guest's cause of action under the RLTA derives from the tenant's cause of action. Regardless, the Legislature must have concluded that fundamental fairness required such notice.

The landlord should not be liable for defects of which he or she has had no reasonable notice or reasonable opportunity to repair. Indeed, the tenants here claim they knew about the alleged defects for a substantial period of time, but never told defendant landlords.

Plaintiff claims that the tenants were not required to give notice in compliance with RCW 59.18.070, and that constructive notice was sufficient. But as discussed *supra*, there was no constructive notice. And the cases plaintiff cites do not say what plaintiff claims.

In both *Tucker v. Hayford*, 118 Wn. App. 246, 75 P.3d 980 (2003), and *Pinckney v. Smith*, 484 F. Supp. 2d 1177 (W.D. Wash. 2007), the courts discussed the RLTA, but never mentioned the notice requirement of RCW 59.18.070. 118 Wn. App. at 256-58. The *Tucker* court's discussion of notice was applicable only to plaintiff's breach of contract and common law claims. 118 Wn. App. at 251-55. In *Pinckney*, there was no dispute that the landlord had notice of the complained of condition⁴—missing handrails, and the court's discussion of notice was confined to common law theories of recovery. 484 F. Supp. 2d at 1180.

⁴ The landlord's argument in *Pinckney* was that although she had knowledge there were no handrails, the common law required that she also have notice that that condition was dangerous. 484 F. Supp. 2d at 1180.

3. Defendant Landlords Cannot Be Liable Under the RLTA for Defects Caused by the Tenant.

RCW 59.18.060 specifically states:

No duty shall devolve upon the landlord to repair a defective condition under this section, nor shall any defense or remedy be available to the tenant under this chapter, where the defective condition complained of was caused by the conduct of such tenant

There is no dispute that the absence of the handrails was caused by tenant Baxter. In addition, if the sensor light did not work because tenant Baxter turned it off, that would be a condition caused by the tenant. Defendant landlords could not be liable for these conditions under the RLTA.

That the statute precludes defenses or remedies "available to the tenant" does not mean that those defenses and remedies are available to a third person such as plaintiff. Plaintiff claims the RLTA applies to him because it applies to tenants. If so, the defenses and remedies not available to tenants under RCW 59.18 .060 cannot be available to plaintiff. Plaintiff cannot have it both ways.

Plaintiff claims that despite RCW 59.18.060, the landlord defendant should be liable for the acts and omissions of the tenants because tenant Baxter was allegedly their independent contractor. As discussed *supra*, the RESTATEMENT (SECOND) TORTS §§ 419, 424 and the RESTATEMENT (SECOND) OF PROPERTY § 19.1 cannot apply. Even if these sections were part of Washington common law, plaintiff has cited no

authority that would allow the common law to create an exception to RCW 59.18.060.

V. CONCLUSION

Plaintiff seeks to expand the law of landlord-tenant far beyond where it has been. He seeks to extend it far beyond what the Legislature intended. The trial court properly granted defendant landlords summary judgment. This court should affirm.

DATED this 29th day of January, 2013.

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