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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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SHAWN D. KENSINGER and GILLIAN O. TIPPERY, as Personal  
Representatives of the ESTATE OF SUSAN MARIE WILSON,  
Deceased

Appellants,

vs.

SLOUGH INVESTMENT COMPANY, LLC,  
a Washington LLC,

Respondent.

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BRIEF OF APPELLANTS

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## **A. INTRODUCTION**

Appellants file this appeal to reverse the trial court's order granting summary judgment in favor of the Respondent, Slough Investment Company, LLC ("Slough"). In response to Slough's motion for summary judgment, Appellants provided the trial court with the declaration of a fire safety and engineering expert, as well as extensive records relating to the subsequent fire investigation, the lack of fire safety protections in the subject apartment complex, and witness testimony from the morning of the fire. This expert declaration, witness testimony, and record evidence, in and of themselves, were sufficient to create numerous genuine issues of material fact that should have precluded the entry of summary judgment. Further, in their motion for reconsideration, Appellants provided additional expert declaration and deposition testimony from a board certified forensic pathologist, which creating even more genuine issues of materials fact for the trial court to reverse its prior ruling and deny summary judgment. This expert testimony and evidence was accepted, evaluated, and considered by the trial court on reconsideration. Although a reasonable inference is sufficient to create a question of material fact, Appellants submitted direct, unequivocal expert testimony, witness testimony, and evidence to establish that Slough breached its duties as a landlord to keep leased premises safe for habitation and proximately caused Susan Wilson's death. Therefore, Appellants ask this Court to reverse the trial court's summary judgment ruling and remand this case back for trial on the merits.

**B. ASSIGNMENTS OF ERROR**

*Assignment of Error No. 1*

The trial court erred where it ruled that no issues of material fact existed and Slough Investment Company, LLC was entitled to summary judgment as a matter of law.

*Issue Pertaining to Assignment of Error No. 1*

Whether the trial court erred when it granted Respondent's motion for summary judgment even though Appellants had produced evidence and expert testimony that Respondent's failures were the causes of Susan Wilson's death, and Respondent had failed to produce conclusive and unrefuted evidence to the contrary?

*Assignment of Error No. 2*

The trial court erred where it denied Appellants' motion for reconsideration of its prior summary judgment order dismissing their claims, even though Appellants submitted additional evidence and expert testimony that reaffirmed the existence of questions of material fact.

*Issue Pertaining to Assignment of Error No. 2*

Whether the trial court erred when it denied Appellants' motion for reconsideration even though Appellants submitted additional evidence and expert testimony that created additional material issues of fact sufficient to preclude the entry of summary judgment?

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**C. STATEMENT OF THE CASE**

**1. Factual Background.**

At the time of her death, Susan Wilson lived in an apartment building in Soap Lake, Washington, owned and managed by Respondent Slough Investment Company, LLC (“Slough”). The building was a concrete block structure. The front of the building faced to the east. The building had four apartment units located side-by-side, all of which had front doors on the east-facing side of the building. The south pair of apartment units (Units 1 and 2) were separated from the north units (Units 3 and 4) by a concrete block wall to the ceiling line and a sheetrock draft stop in the attic. Each apartment contained approximately 520 square feet, each including a bedroom, kitchen, living room, and bathroom. CP at 152-53. Decedent Susan Wilson lived in Unit 1. Dennis Trusty lived next door to her in Unit 2. Unit 3 was occupied by the Gamiz family. CP at 378. And finally, Unit 4 was inhabited by a man named Tomás. CP at 379.

According to the fire investigators hired by the City of Soap Lake, during the morning hours of November 14, 2012, a fire started in Unit 2 – Mr. Trusty’s apartment – causing fire, smoke, and heat to spread through the separation wall and attic space into Unit 1, Ms. Wilson’s apartment. CP at 153-55. Unit 2 then reached a “full flashover flame,” with the fire ultimately spreading to and engulfing Unit 1. *Id.*

**a. Smoke Detectors.**

At the trial court level, Appellants submitted substantial evidence

directly establishing – and creating a well-supported reasonable inference that – none of the units in Slough’s apartment building had installed and/or operable smoke detector devices, including Ms. Wilson’s unit.

First, regarding Ms. Wilson’s apartment unit (Unit 1), Mr. Slough testified that he did not recall ever installing or testing a smoke detector in Unit 1 before Ms. Wilson moved into the unit. CP at 379-80. Mr. Slough also did not recall ever discussing the smoke detector with Ms. Wilson, including whether it functioned, prior to her occupation of the unit. *Id.* Charred remnants of a smoke detector were found in the hallway area about 10 feet from the front door during the post-fire investigation – that is, not secured to a wall or the ceiling. CP at 199. Relevant here, as discussed below, in Unit 3 – which was not structurally damaged by the fire – the only smoke detector located by investigators was in an unopened box in the hallway closet. CP at 199, 339. Of note, the layout of Unit 3 is identical to the layout of Unit 1 – Ms. Wilson’s unit. CP at 333.

Second, Mr. Trusty – who was Ms. Wilson’s immediate neighbor and the occupant of Unit 2 – testified that he did not hear any smoke detector alarms sounding off from any of the units on the morning of the fire. CP at 136. Mr. Trusty also told Soap Lake law enforcement and fire investigators that he had “never known [the smoke detector in his unit] to work” during the eleven (11) months that he had lived there. CP at 135-36. Mr. Trusty also testified that no one from Slough had ever done any sort of walkthrough with him of the apartment unit. *Id.*

Third, during the post-fire investigations of the building, it was discovered that instead of installing a functioning smoke detector in Unit 3, where Elvia Gamiz lived with her four (4) children, Slough had simply provided a smoke detector in its original and unopened box, which was located in the hallway closet of Unit 3. CP at 339. When asked about the smoke detector still being in its original box, unopened and uninstalled, Mr. Slough explained that he “could feel comfortable that he was the one that purchased it.” CP at 376. Mr. Slough also testified that he had no recollection of installing a smoke detector prior to Ms. Gamiz and her family moving in, or even checking to see whether there was a functional smoke detector in the unit at all. CP at 336, 378.

Finally, as of the day of the fire, Unit 4 did not contain any smoke detector whatsoever. CP at 198. A picture taken during the investigation shows a bracket where a smoke detector would have been installed had there been one. *Id.*

**b. Separation Walls.**

Units 1 and 2 were destroyed in the November 14, 2012 fire. CP at 266. The separation walls between Units 1 and 2 consisted of 2x4 nominal wood studs with 1/4-inch-thick wood structural panels on each surface. CP at 412. This wall was not fire-rated and had minimal, if any, fire-resistance. *Id.* According to a report by fire safety and engineering expert Adam Farnham, a licensed fire protection engineer, the wall between Unit 1 (Ms. Wilson) and Unit 2 (Mr. Trusty) had a fire resistance that was significantly

less than 25 minutes. CP at 415. Additionally, there was no draft stop in the attic between the two units. CP at 412. Finally, the building was not provided with an automatic sprinkler system. *Id.*

**c. Susan Wilson's Death.**

Based on the Grant County Coroner's autopsy and scene examination, it was determined that Ms. Wilson died of asphyxia due to the inhalation of products of combustion. CP at 165. Specifically, her death was the result of the massive amount of smoke that she inhaled before and while attempting to navigate through and escape her apartment. Her charred remains were found mere feet from her front door. CP at 488-90.

According to her next-door neighbor in Unit 2, Dennis Trusty, Ms. Wilson was generally asleep during the morning hour at which the fire began, which was around 6:00 a.m. CP at 116. Mr. Trusty also testified that Ms. Wilson always slept in her bed. CP at 143. Mr. Trusty also stated that Ms. Wilson used a walker when she was outside, but when she was in her apartment unit, she ambulated without a walker. CP at 121.

On the morning of the fire, Mr. Trusty stated that he heard Ms. Wilson yelling while he was standing just a few feet away in front of his next-door apartment unit; Ms. Wilson was screaming that she could not breathe. CP at 117-19. Mr. Trusty testified that he immediately went to Ms. Wilson's front door and noticed her door was slightly cracked open. However, he explained that by the time he reached her unit's front door, he believed that she had become unconscious because she was not responding

despite him yelling at her from immediately outside her unit. *Id.*

Ms. Wilson died alone in her apartment, blinded by and choking on thick smoke and hot air. Dr. Daniel Selove, a board-certified forensic pathologist, opined on a more probable than not basis that the heavy smoke accumulation in Ms. Wilson's apartment, and her delayed notification of the need to evacuate, was the direct cause of her death. CP at 445. Because of the amount of smoke that had collected in her apartment, Ms. Wilson would have had severely limited, if any, visibility in her unit by the time she had awoken to the hot, smoke-filled environment. *Id.* Aside from the inherent difficulties of breathing in smoke, her eyes would also have been burning with an irritating pain and the dense smoke that had pooled and likely formed an opaque cloud in her unit. *Id.* As she searched desperately for her front door, her throat and lungs increasingly filled with hot, smoky air. *Id.* Ms. Wilson was able to just barely open her front door and scream for help before falling to ground unconscious. CP at 117-18. As opined by Dr. Selove, had Ms. Wilson been awoken only moments – perhaps even less than a minute – earlier, she more likely than not would have been able to completely exit her front door, escape the fire, and survived the fire that rapidly ravaged the Slough's apartment building. CP at 446.

## **2. Procedural History.**

Shawn D. Kensinger and Gillian O. Tippery, Susan Wilson's son and granddaughter respectively, filed suit against Slough Investment Company as personal representatives of Ms. Wilson's estate for her

wrongful death, making claims for negligence under multiple breaches of the implied warranty of habitability and the RLTA. Slough filed a motion for summary judgment on all claims, arguing that it had breached no duty with respect to Ms. Wilson, and that if it had, there was no evidence creating genuine issues of material fact regarding proximate cause. The Court ruled in the Respondent's favor, despite considerable evidence and expert testimony that Slough had breached its duties under statute, regulation, code, and the implied warranty of habitability, thus proximately causing Ms. Wilson's death. CP 633-637.

Appellants then filed a motion for reconsideration, attaching thereto additional evidence. Notably, on reconsideration, Appellants' expert, Dr. Daniel Selove, a board certified forensic pathologist, opined on a more probable than not basis that Ms. Wilson's delayed notification of the fire and smoke, as well as the massive amounts of smoke that rapidly accumulated in her unit, were the direct causes of Ms. Wilson's death by the excessive inhalation of products of combustion. The Court chose to consider the Appellants' additional evidence presented on motion for reconsideration. However, the Court still ruled in Slough's favor, finding insufficient evidence establishing causation. In making this ruling, the Court gave heightened credence to Slough's speculative argument – as the moving party – that Ms. Wilson may have gone back into her apartment after having safely evacuated, supported only by the fact that Mr. Trusty claimed to have seen Ms. Wilson's door cracked. CP at 650-652. However,

in making its ruling, the trial court failed to consider any alternative explanation of Mr. Trusty's observation or to apply the correct standard for summary judgment.

**D. ARGUMENT**

**1. Standard of Review.**

The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). A motion for reconsideration is reviewed by this court under the abuse of discretion standard. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). However, where a trial court grants summary judgment and then denies a motion for reconsideration, evidence offered in support of the motion for reconsideration is properly part of an appellate court's *de novo* review. *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 675, n. 6, 911 P.2d 1301 (1996). Summary judgment is proper only where the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The court deciding a motion for summary judgment is to construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment must be denied "if the record shows any reasonable

hypothesis which may entitle the non-moving party to relief.” *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

2. **The Restatement (Second) of Property § 17.6, Adopted by This Court in *Lian I*, Provides a Tenant With a Cause of Action Where a Landlord Has Breached His or Her Duties Under the Residential Landlord-Tenant Act or the Implied Warranty of Habitability.**

Generally, at common law, a landlord had neither a duty to provide habitable rental property nor a duty to repair rental property. *Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 225, 377 P.2d 642 (1963). In 1973, concurrent with the Legislature’s passage of the Residential Landlord-Tenant Act (“RLTA”), the Washington Supreme Court abandoned this position. *Foisy v. Wyman*, 83 Wn.2d 22, 28, 515 P.2d 160 (1973). In *Foisy*, the Court recognized an implied warranty of habitability between landlord and tenant, holding that a breach of the implied warranty is a valid defense in an unlawful detainer action. *Id.* The Court explained that “[a]ny realistic analysis of the lessor-lessee or landlord-tenant situation leads to the conclusion that the tenant’s promise to pay rent is in exchange for the landlord’s promise to provide a livable dwelling.” *Id.*

Accordingly, under *Foisy* and RLTA, Washington landlords had a duty to keep the premises that they rented or leased tenants “fit for human habitation.” RCW 59.18.060. However, a breach of this and the other landlord duties enumerated in RLTA still left the tenant with only limited remedies, even where a tenant suffered injuries as a result of the landlord’s breach. In 1991, this Court held that remedies for a breach of the landlord’s

duties were limited by RLTA to: “(1) the tenant's right to repair and deduct the cost from the rent, (2) a decrease in the rent based upon the diminished value of the premises, (3) payment of rent into a trust account, or (4) termination of the tenancy.” *Howard v. Holt*, 61 Wn. App. 520, 524-25, 810 P.2d 1387 (1991) (citing RCW 59.18.110(2)). Again, in 2001, this Court affirmed that “[m]onetary damages are not available for a breach of a landlord’s duties.” *Dexheimer v. CDS Inc.*, 104 Wn. App. 464, 472, 17 P.3d 641 (2001).

However, these limitations on remedies were abandoned in *Lian v. Stalick*, where this Court adopted the position of Restatement (Second) of Property § 17.6 (1977). *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001) (“*Lian I*”). Under the Restatement (Second) of Property § 17.6, a landlord is under a duty to exercise reasonable care to remedy or repair dangerous conditions, whether existing before or arising after the tenant has taken possession, where the existence of the condition is in violation of either: (1) the implied warranty of habitability, or (2) a duty created by statute or administrative regulation. Under § 17.6, a tenant can also recover money damages for injuries caused by the landlord’s breach of either the implied warranty of habitability or RLTA. The Restatement position set forth in *Lian I* was also recently adopted by Division Two of this Court. *Martini v. Post*, 178 Wn. App. 153, 170-71, 313 P.3d 473 (2013).

To prevail on a § 17.6 claim, the tenant must show: (1) that the condition was dangerous, (2) that the landlord was aware of the condition

or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition, and (3) that the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation. *Lian v. Stalick*, 115 Wn. App. 590, 595, 62 P.3d 933 (2003) (“*Lian II*”).

Here, Defendant Slough had a duty under both the implied warranty of habitability, as well as RLTA, with regard to: (1) installing functioning smoke detectors in each of the units, ensuring their operability, and informing tenants of their obligation to maintain the smoke detectors, and (2) providing walls with the appropriate fire resistance rating. There was substantial evidence presented at the trial court level that these duties were breached and proximately caused Susan Wilson’s death. Accordingly, this case should be reversed and remanded to the trial court, so that a trial can be conducted on the remaining issues of causation and damages.

**3. Slough Breached Its Duties Under Both the Implied Warranty of Habitability and RLTA with Respect to Both: (1) the Smoke Detectors, and (2) the Separation Walls.**

All contracts for leasing premises include an implied warranty of habitability. *Foisy*, 83 Wn.2d at 28. “[T]he warranty applies 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 Association Board v. Blume Development Company*, 115 Wn.2d 506, 519-22, 799 P.2d 250 (1990)). Accordingly, the relevant inquiries in this case under the implied warranty

are whether the dangerous conditions and defects complained of – namely, the absence of installed and/or operable smoke detectors and the lack of sufficiently fire resistance rated separation walls – posed actual or potential safety hazards.

In addition to the implied warranty of habitability, RLTA sets forth a list of duties owed by a landlord to his or her tenants, chief among them, to “keep the premises fit for human habitation.” RCW 59.18.060. Additionally, under RCW 59.18.060(1), a landlord is also required to “[m]aintain the premises to substantially comply with any applicable code, statute, or regulation.” *Id.*

a. **Smoke Detectors: Slough Breached Its Duty to Provide, Install, and Ensure that There Were Operating Smoke Detectors in Each Unit, Thus Proximately Causing the Death of Susan Wilson.**

Respondent Slough had a duty under the implied warranty of habitability to ensure that there were functioning smoke detection devices in each apartment unit. Additionally, Slough had statutory duties under RLTA and RCW 43.44.110 to: (1) provide and install smoke detection devices in each unit, (2) ensure that the devices were operational upon the occupancy of each unit, and (3) inform the residents of each unit of their responsibility to maintain the devices in operational condition. Appellants provided sufficient evidence at the trial court level to show that Respondent breached these duties. And, finally, the trial court erred where it took the issue of proximate causation out of the hands of the jury, despite

considerable evidence and expert testimony creating – at a minimum – numerous genuine issues of material fact precluding dismissal.

**i. Duty.**

Slough violated its duty under the implied warranty of habitability by failing to provide functioning smoke detectors in any of the units of the subject apartment complex, including Susan Wilson’s unit. Under the implied warranty, a landlord is required to exercise reasonable care to prevent dangerous conditions that pose an actual or potential safety hazard to his or her tenants. *Lian I*, 106 Wn. App. at 818. Reasonable care is the degree of care which a reasonably prudent person would exercise in the same or similar circumstances. *Swank v. Valley Christian School*, 188 Wn.2d 663, 684, 398 P.3d 1108 (2017). Here, as supported by Washington statutory requirements, a reasonably prudent landlord should, at the very least, provide and install fully functioning smoke detectors in units that he or she intends to lease to tenants. Additionally, a reasonably prudent landlord should discuss with his or her tenants their responsibility to maintain the smoke detectors in working order. Moreover, the absence of properly installed and/or operable smoke detectors presented a dangerous condition. Slough was aware of this condition, or at least had a reasonable opportunity to discover the fact that the units were missing functioning smoke detectors prior to tenants’ occupation of the units, or throughout the tenancies when Mr. Slough made other repairs to the units. *See, e.g.*, CP at 23, 27, 45.

Not only should this degree of care be expected of a reasonably prudent landlord in the same or similar circumstances, but also, it was – and is – mandated under statute. *See* RCW 59.18.060(1), (12); RCW 43.44.110. Accordingly, Slough also failed to meet its statutory duties and obligations to Ms. Wilson and other tenants. Under RCW 59.18.060(1), a landlord is required to “[m]aintain the premises to substantially comply with any applicable code, statute, or regulations.” Furthermore, RCW 43.44.110 provides “[s]moke detection devices shall be installed in all dwelling units: [o]ccupied by persons other than the owner,” and that “[i]nstallation of smoke detection devices shall be the responsibility of the owner.” RCW 43.44.110 (1)(a), (3). RCW 43.44.110(3) also provides “[a]t the time of vacancy, the owner shall insure that the smoke detection device is operational prior to the reoccupancy of the dwelling unit.” The owner is also required to notify the tenant of his or her “responsibility to maintain the smoke detection device in operating condition.” RCW 59.18.060(12)(a).

Finally, RCW 59.18.060(12)(a) requires landlords to “[p]rovide a written notice to all tenants disclosing fire safety and protection information.” In a multifamily residential building – such as the Slough’s apartment complex – the notice must disclose all of the following: the type of smoke detection device; whether the building has a fire sprinkler system, fire alarm system, smoking policy; and whether the building has an emergency notification, relocation, or evacuation plan. RCW

59.18.060(12)(a)(i)-(vii). This information must be disclosed as either a written notice or checklist, and if a checklist is used, the checklist must include a diagram showing the fire emergency evacuation route for the occupant. RCW 59.18.060(12)(b). As discussed below, Appellants provided considerable evidence to the trial court that Slough breached these statutory duties under RLTA and RCW 43.44.110.

**ii. Breach.**

At the trial court level, Appellants presented considerable evidence that there were no properly installed or operable smoke detectors in any of the apartment units – including Susan Wilson’s unit – thereby establishing that Slough breached its duty under the implied warranty of habitability. For example, Ms. Wilson’s neighbor, Dennis Trusty, offered sworn testimony to Soap Lake law enforcement that he never heard any smoke alarms go off in the apartment complex on the morning of the fire. Of note, Mr. Trusty testified that he was able to hear Ms. Wilson’s voice from her unit, went up directly to her cracked-open front door, saw smoke in her unit, and again, testified that he never heard any smoke detector alarm go off at any point that morning. CP at 117-119, 136. Moreover, Mr. Trusty stated that during his entire occupancy, there had never been an operable smoke detector in his unit. CP at 135-136. In fact, Appellants presented direct testimony from Mr. Slough that he had no recollection of ever installing a functioning smoke detector in Ms. Wilson’s unit. CP at 379-380.

Furthermore, Appellants provided evidence that in two of the units, no smoke detectors had been installed whatsoever. During the post-fire investigation, a smoke detection device still in its original packaging was found in a hallway closet of Unit 3. CP at 339. There were no other smoke detection devices found in that apartment. *Id.* It was also discovered that Unit 4 contained no smoke detection device whatsoever. CP at 268. In sum, the absence of any installed or operable smoke detectors in Units 3 and 4 – in conjunction with Mr. Trusty’s sworn testimony that his unit also did not have an operable smoke detector and that he did not hear any smoke detector alarms go off in any unit on the morning of the fire – supports the reasonable inference that Slough failed to provide, install, and ensure that there were operable smoke detectors in *any* of the units, including Susan Wilson’s unit. CP at 268-69. This inference is particularly reasonable when the evidence is viewed in the light most favorable to the nonmoving party, here the Appellants, as required at summary judgment.

Finally, although Slough’s rental lease included a fire safety and protection information disclosure checklist pursuant to RCW 59.18.060(12)(a), there is evidence that Ms. Wilson was never provided the requisite notice and information mandated under RLTA. First, the only disclosure with a checked box pertains to the type of smoke detector device in the unit. All of the other six (6) disclosures mandated under RCW 59.18.060(12)(a)(i)-(vii) are unchecked and/or incomplete – despite having both “does have” and “does not have” boxes. CP at 330. Notably, Slough

further violates its statutory duty by failing to provide a diagram showing the fire emergency evacuation route, as required under RCW 59.18.060(12)(b). *Id.* In other words, with respect to RLTA's required fire safety and protection disclosures, Ms. Wilson's lease unequivocally establishes that Slough did not even come close to providing a completed disclosure and written notice, as required under Washington law.

This incomplete portion of Ms. Wilson's lease – by itself – provides sufficient evidence of Slough's breach of its statutory duties including that: (1) Ms. Wilson was not provided complete written notice of all fire safety and protection information required under RLTA; (2) Ms. Wilson was not provided with a fire safety diagram showing the emergency evacuation route in her unit as required under RLTA; and (3) since this critical written notice section is irrefutably – and almost entirely – incomplete, a reasonable inference can be reached that none of the mandated fire safety and protection information was reviewed with Ms. Wilson.

The same is true of the leases for Units 2 and 3: both have similarly incomplete fire safety and protection disclosure checklists and no emergency evacuation route diagram whatsoever. CP at 325, 343. Indeed, Slough did not even have a lease for Unit 4. CP at 379. Dennis Trusty also testified to Soap Lake law enforcement that Slough never did an apartment unit walkthrough with Mr. Trusty. CP at 136. Ultimately, when taken in the light most favorable to Appellants as the nonmoving party, Slough's numerous violations of statutory duties mandated under RCW 59.18.060

(12)(a) either provided direct evidence of, or create strong reasonable inferences that, Ms. Wilson was not provided the requisite notice of fire safety and protection information in her unit – including information regarding the type and maintenance of the smoke detector device – and Ms. Wilson was not provided with a diagram of an evacuation route if a fire were to occur.

In closing, facts are not considered by courts or juries in isolation. On summary judgment, the evidence presented is to be taken as a whole and construed in the light most favorable to the nonmoving party – in this case, the Appellants. *Jones* 146 Wn.2d at 300; *Bremerton Pub. Safety Ass’n v. City of Bremerton*, 104 Wn. App. 226, 230, 15 P.3d 688 (2001). The evidence presented at the trial court level, considered as a whole and in the light most favorable to Appellants, firmly establishes, or at a minimum creates numerous, strong reasonable inferences, that Respondent Slough breached its duties set forth under the implied warranty of habitability and by statute with regard to installing, providing, and ensuring that there were functioning smoke detectors in each unit, as well as failing to disclose critical and mandated safety information regarding the smoke detector, fire prevention and response, and the fire emergency evacuation route.

**iii. Causation.**

Once breach is established, a plaintiff must provide evidence of proximate cause. “Proximate cause has two elements: (1) cause in fact and (2) legal causation.” *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438,

448, 177 P.3d 1152 (2008); *Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999). Cause in fact merely requires “some physical connection between an act and an injury” and is “generally left to the jury.” *Rucshner v. ADT, Sec. Systems, Inc.*, 149 Wn. App. 665, 686, 204 P.3d 271 (2009); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 307, 151 P.3d 201, 208 (2006). Regarding legal causation, the Washington Supreme Court has noted that duty and legal causation are “intertwined.” *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). Thus, when a legal duty has been established – as in this case – the broader question of causation is usually “a question of fact for the jury, not an issue of law for the court.” *Rucshner*, 149 Wn. App. at 688 (holding that the question is for the jury despite the “legal causation” prong of proximate cause).

Cause in fact concerns “but for” consequences of an act: those events the act produced in a direct, unbroken sequence, and which would not have resulted had the act not occurred. Legal causation rests on considerations of policy and common sense as to how far the defendant’s responsibility for the consequences of its actions should extend. **The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter.**

*Taggart v. State*, 118 Wn.2d 195, 225-26, 822 P.2d 243 (1992) (citations omitted) (emphasis added); *see also Lowman v. Wilbur*, 178 Wn.2d 165, 171, 309 P.3d 387 (2013).

In this case, the question of duty and breach is well-established under Washington law and by the evidence presented to the trial court, as discussed in detail above; thus, legal causation is similarly resolved.

*Lowman*, 178 Wn.2d at 178-79. Specifically, it is well-established that Slough had a duty to exercise reasonable care with regard to dangerous and hazardous conditions in the units he leased to tenants. Slough also had a duty under RLTA and RCW 43.44.110 to: (1) provide and install smoke detection devices in each unit, (2) ensure that the devices were operational upon the occupancy of each unit, and (3) inform the residents of each unit of their responsibility to maintain the devices in operational condition. Appellants submitted substantial evidence at the trial court level which, taken as a whole, reasonably leads to the conclusion that Slough breached these duties; the question of legal causation is therefore resolved.

With legal causation established, causation then becomes a question of fact for the jury, as it is in almost all cases. *Rucshner*, 149 Wn.App. at 688; *see also Owen v. Burlington N. Santa Fe R. R. Co.*, 152 Wn.2d 780, 788, 108 P.3d 1220 (2005) (quoting *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)). Cause in fact may be decided as a matter of law only where the facts and inferences therefrom are plain and are not subject to reasonable doubt or difference of opinion. *Martini*, 178 Wn. App. at 164-65 (citing *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006)).

As discussed earlier, while the trial court improperly dismissed several of Appellants' claims based on a duty analysis, the trial court did acknowledge that "there may be a question of fact as to the smoke detector and whether they were installed." RP at 5. However, after turning to

proximate cause, the trial court incorrectly determined that there was “no information” to show that “a working fire detector would have prevented this individual’s death” to establish cause in fact. RP at 5-6. Appellants attempted to address the trial court’s inaccurate proximate cause analysis in their motion for reconsideration, which not only highlighted the sufficient record evidence supporting cause in fact, but also presented additional declaration evidence from Appellants’ expert forensic pathologist supporting this conclusion, thus creating – at a minimum – genuine issues of material fact precluding dismissal. CP at 429-42. Despite accepting and considering this entire evidentiary foundation for cause in fact on reconsideration, the trial court nevertheless denied Appellants’ motion for reconsideration. CP at 682.

The trial court’s ruling on reconsideration largely centered on hypothetical questions it perceived regarding potential alternate explanations regarding cause in fact; however, as noted above, at summary judgment, all facts and evidence must be viewed in the light most beneficial to the non-moving party, and moreover, a plaintiff need not prove cause in fact to an absolute certainty. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). It is sufficient for the plaintiff to present evidence that would “allow a reasonable person to conclude that the harm more probably than not happened in such a way that the moving party should be held liable.” *Little*, 132 Wn. App. at 781 (citing *Gardner*, 27 Wn.2d at 808–09). In addition, the evidence presented may also be circumstantial so long as it

affords room for “reasonable minds to conclude that there is a greater probability that the conduct relied upon was the [cause in fact] of the injury than there is that it was not.” *Hernandez v. W. Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969).

iv. **Causation: Cause in Fact Established Through Expert Testimony.**

Appellants presented considerable evidence and expert testimony at summary judgment and on reconsideration establishing – and creating numerous genuine issues of material fact – that an operable smoke detection device in Susan Wilson’s unit would have prevented her death. To begin, Appellants’ expert forensic pathologist, Dr. Daniel Selove, provided extensive deposition and declaration testimony supporting this cause in fact conclusion. Dr. Selove is a board certified forensic pathologist who reviewed and analyzed extensive records and information in this case including but not limited to: medical examiner and autopsy records/photographs; investigative records, interviews, reports, and photographs regarding the subject fire; consultations and medical literature regarding the impact of the smoke on human physiology, cognition, and physical function; and Ms. Wilson’s medical records. CP at 443-50. Based on his review of these and other records – as articulated in far more detail within his declaration – Dr. Selove concluded that “had Susan Wilson been notified by a smoke detector of the smoke accumulating in her apartment unit at an earlier point in time – that is, a matter of minutes, if not less than a minute, earlier – it is more likely than not that she would have been able

to navigate and exit her apartment unit and survive the structure fire and the resulting byproducts of combustion.” CP at 446. Dr. Selove further opined that: (1) Ms. Wilson’s pre-existing medical conditions did not contribute to – or expedite – her loss of consciousness and ultimate death by asphyxia and inhalation of products of combustion; and (2) there is no evidence that Ms. Wilson had any notable health problems impacting her ability to hear (*e.g.* a smoke detector alarm). CP at 446-47.

Relevant and related to his cause in fact declaration opinion, Dr. Selove provided detailed analyses and opinions regarding Ms. Wilson’s physiological response to smoke at deposition, including that: the smoke would have irritated Ms. Wilson’s eyes and made it difficult for her to see inside, and navigate her way out of, the apartment unit; as the smoke increased, Ms. Wilson’s visual impairment would also increase, thus increasingly impeding her ability to navigate out of the unit; as the smoke increased, Ms. Wilson’s difficulties breathing would also increase, thus increasing her confusion and detrimentally impacting her cognitive abilities; and as the smoke increased, Ms. Wilson would breathe in more-and-more smoke, thus increasing her chances of becoming unconscious, which she ultimately did just feet from her front door. CP at 445-46.

On Dr. Selove’s expert testimony alone, there is a sufficient evidentiary basis to conclude that if Ms. Wilson had been awoken earlier (“if not less than a minute earlier”) by an operable smoke detector alarm immediately after smoke started entering her unit, she would have had

sufficient time to navigate her unit and completely exit the front door before succumbing to – and being fatally limited by – the physiological effects of smoke accumulation in her unit. In other words, if Ms. Wilson had been awoken earlier by a smoke detector alarm, her ability to see, think, and stay conscious would have been improved due to less smoke accumulation in her unit, thus providing her the small extra window of time that she needed – according to Dr. Selove on a more probable than not basis – to successfully navigate her unit and fully exit through her front door.

Dr. Selove’s testimony also explains why Dennis Trusty testified that he heard Ms. Wilson yelling that she could not breathe, immediately went to her front door, saw that it was slightly cracked open, saw smoke accumulation, but was not able to elicit any subsequent response from Ms. Wilson: specifically, when considered in the context of Dr. Selove’s opinions about the physiological impact of smoke on Ms. Wilson, there is a reasonable and well-supported inference that by the time Ms. Wilson navigated her way to the front door of her unit, her remaining oxygen supply and physical strength only permitted her to slightly open the front door and scream before becoming unconscious, thus explaining her non-responsiveness when Mr. Trusty arrived and yelled to Ms. Wilson from her own cracked open front door just moments later. CP at 117-19.

Moreover, under Washington law, an expert witness may properly testify “as to the ultimate *factual* issue of causation.” *Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 168, 231 P.3d 1241 (2010) (emphasis in

original). “Expert opinions that help establish the elements of negligence are admissible.” *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007); ER 704. ER 704 specifically provides that experts are permitted to testify regarding issues such as cause in fact, even though those issues will generally be decided by the trier of fact. *Carlton*, 155 Wn. App. at 168; *Davis*, 159 Wn.2d at 421; ER 704 (“Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact”).

“[A]n expert opinion on an ‘ultimate issue of fact’ is sufficient to defeat a motion for summary judgment.” *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (quoting *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)); *J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994) (“In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, *precluding summary judgment*”) (emphasis added).

In most circumstances, plaintiffs are actually required to present evidence of a causal link between the defendant’s negligence and the harm to the plaintiff, *Estate of Bordon ex rel. Anderson v. State Dept. of Corrections*, 122 Wn. App. 227, 243-44, 95 P.3d 764 (2004), and this requirement is typically satisfied by expert testimony that the defendant’s negligence caused the injury. *Id.* at 244. The “necessary degree of certainty is established if the expert can testify that his or her opinion regarding

causation is more probable than not.” *Carlton*, 155 Wn. App. at 168; *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 215, 890 P.2d 469 (1995).

In sum, Dr. Selove’s detailed analysis and opinions regarding the cause in fact correlation between Ms. Wilson’s death and the smoke accumulation in her unit – which was accepted and considered by the trial court on reconsideration – creates, at a minimum, numerous genuine issues of material fact regarding how an operable smoke detection device in Ms. Wilson’s unit would have prevented her death, thus precluding summary dismissal of Appellants’ related claims under the implied warranty of habitability and RLTA.

v. **Causation: Cause in Fact Established Through Record Evidence.**

In addition to Dr. Selove’s expert testimony, Appellants presented considerable additional evidence at summary judgment that – standing alone – could also establish multiple genuine issues of material fact regarding causation. To begin, Grant County Coroner’s Office photographs show the charred remains of Ms. Wilson’s body just feet from her front door. CP at 116-18. In addition, as discussed above, Dennis Trusty offered sworn testimony to Soap Lake law enforcement in which he testified to the following facts: while standing in front of his unit – which is immediately next to Ms. Wilson’s unit – Mr. Trusty heard Ms. Wilson yelling that she could not breathe; Mr. Trusty then immediately “went back over by [Ms. Wilson’s] door to see if I could help her, but I think she might of been unconscious at that time from that smoke” – that is, just moments after

hearing her yell – and “was trying to yell back at her”; and with regard to Ms. Wilson’s front door, “I noticed it cracked open after I heard her.” CP at 117-119. During this same interview, Mr. Trusty also testified that: Ms. Wilson was generally asleep during the early-morning hour at which the fire began; she generally slept in her bedroom; she could ambulate in her apartment unit without a walker; and as previously noted, Mr. Trusty did not hear any smoke detector alarm go off on the morning of the subject fire. CP 116, 121, 136, 143.

Based on this evidence, the following reasonable inference can be reached, which establishes cause in fact between Ms. Wilson’s death and the lack of an operable smoke detector in her unit: Ms. Wilson was asleep in her bedroom when the fire began; she was awoken by smoke accumulating in her apartment unit; through the smoke, she attempted to ambulate and navigate her way out of the unit; she reached her front door handle, was able to open the door slightly, and yelled for help; and tragically, before Mr. Trusty arrived at her front door just moments later, Ms. Wilson had lost consciousness and fell onto the ground, therefore becoming unresponsive, and died in the position in which her body was found just feet from her front door. When considered in conjunction with Dr. Selove’s testimony, the conclusion can also be reached that if Ms. Wilson had been awakened just minutes – or a minute – earlier, she would have had sufficient time and physiological capacity to completely exit the front door of her unit and survive the fire.

In closing, Appellants have provided considerable evidence and expert testimony to support a finding of proximate cause with respect to Ms. Wilson's death and how her death could have been prevented by an operable smoke detection device. Cause in fact is almost always an issue for the trier of fact, numerous genuine issues of material fact exist, and therefore the trial court's order of summary judgment was improper.

**b. Separation Walls: Slough Breached Its Duty to Provide Adequately Fire-Rated Separation Walls, Thus Proximately Causing the Death of Susan Wilson.**

Landlords owe a duty under the implied warranty of habitability and RLTA to exercise care in the maintenance of premises to prevent dangerous conditions that pose an actual or potential safety hazard to tenants. Additionally, under RLTA, landlords are required to maintain premises up to standards set by all applicable codes. Here, Slough breached these duties by failing to provide separation walls with an adequate fire-rating, which would have hastened the spread of smoke into Ms. Wilson's unit. As a result, the subject fire and resultant smoke spread quicker than it would have had Slough exercised ordinary care. Due to these failures, smoke accumulated in Ms. Wilson's unit at an accelerated rate, consequently not leaving her sufficient time to navigate and exit her unit, and thus directly and proximately causing her death from asphyxiation due to having inhaled massive amounts of smoke.

**i. Duty.**

To begin, under the implied warranty of habitability, a landlord is

required to exercise reasonable care to prevent dangerous conditions that pose an actual or potential safety hazard to his or her tenants. *Lian I*, 106 Wn. App. at 818. Reasonable care is the degree of care which a reasonably prudent person would exercise in the same or similar circumstances. *Swank*, 188 Wn.2d at 684. Here, the absence of separation walls that are sufficiently fire resistant is both an actual and potential safety hazard to tenants. This conclusion is resoundingly confirmed and discussed at length by fire safety and engineering expert, Adam Farnham, PE, CSP, IAAI-CFI, CP at 414-16. Landlords therefore have a duty under the implied warranty of habitability to provide separation walls between dwelling units that reasonably delay the spread of fire and smoke.

Additionally, under RCW 19.27, WAC 51-50-003, and the codes referenced therein, landlords – at the time of this incident – were required to provide tenants with separation walls with at least a one-hour fire rating. Furthermore, under the Soap Lake Building Code, the walls were required to have at least a 30-minute fire rating.

As previously discussed, under RLTA, landlords are required to “[m]aintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation.” RCW 59.18.060(1). The legislature passed the State Building Code, codified in 19.27 RCW, to “promote the health, safety, and welfare of the occupants or users of buildings and structures and the general public by the provision of building codes throughout the state.” RCW 19.27.020. Pursuant to this purpose, the

legislature and the State Department of Enterprise Services adopted the International Building Code (“IBC”) to take “effect in all counties and cities” of Washington. RCW 19.27.031; WAC 51-50-003. At the time of the subject apartment complex fire in Soap Lake, and Ms. Wilson’s resulting death, the 2012 IBC was in effect.<sup>1</sup>

Under the 2012 IBC, walls separating dwelling units in the same building, walls separating sleeping units in the same building, and walls separating dwelling or sleeping units from other occupancies in the same building were to be constructed as “fire partitions” in accordance with IBC § 708. IBC § 708.3 provided that “[f]ire partitions shall have a *fire-resistance rating* of not less than 1 hour.” Accordingly, under the IBC – which, again, is the building code adopted in Washington that governs the construction of apartments – a fire partition is to be provided between dwelling units. This fire partition is required to have a minimum fire resistance rating of one hour. CP at 402-403, 412-416.

Finally, the Soap Lake Building Code (“SLBC”) also adopts the IBC for use within the city of Soap Lake. Soap Lake Municipal Code § 15.20.020 (A)(1). Additionally, the Soap Lake Building Code adopts the Uniform Code for the Abatement of Dangerous Buildings. Soap Lake Municipal Code § 15.20.020 (B)(1). The Uniform Code for the Abatement of Dangerous Buildings defines structures which are to be deemed “dangerous buildings” in § 302. Uniform Code for the Abatement of

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<sup>1</sup> Since then, the International Building Code of 2015 has taken effect. See WAC 51-50-003; see also CP at 402-403, 412-416.

Dangerous Buildings § 302. Under that section, any building or structure which contains in any non-supporting part less than 50 percent, or any supporting part less than 66 percent, of the fire-resistant qualities required by law is considered a “dangerous building.”

**ii. Breach.**

At the trial court level, Appellants presented evidence that the building in question violated the aforementioned standards set by statute, administrative code, and municipal code, as well as the implied warranty of habitability. Indeed, not only do these breaches constitute violations of applicable code, statute, and regulation, but the lack of adequately fire-rated separation walls is a dangerous condition that poses a clear safety hazard.

Notably, fire safety and engineering expert, Adam Farnham, submitted a report based on the evidence in this case, including the investigative reports, findings, and photographs prepared on behalf of the City of Soap Lake. CP at 412-416. Mr. Farnham’s report establishes that the separation walls between Units 1 and 2 were insufficiently fire-rated under RCW 19.27, WAC 50-51-003, Soap Lake Municipal Code, and the IBC. CP at 415. His report also establishes that the building was considered a “dangerous building” under the Soap Lake Municipal Code and the Uniform Code for the Abatement of Dangerous Buildings. *Id.*

As discussed in Mr. Farnham’s report, the IBC lists a baseline fire-resistance rating of 25 minutes for a wall constructed with 3/8-inch thick wood structural panels on framing members installed 16 inches on-center

or less. CP at 414. Here, the separation wall between the dwelling units of the subject building was constructed from 1/4-inch thick wood structural panels – in other words, even less thickness than the IBC’s exemplary baseline, and therefore even more susceptible to a potential fire. Stated differently, according to Mr. Farnham’s report, the separation wall in the subject building was constructed from panels with a mere one-third (1/3) the thickness of the IBC’s exemplary baseline wall for which a 25-minute fire-rating was mandated. Therefore, Mr. Farnham opines that the separation walls in the subject building had a fire-resistance rating significantly less than 25 minutes. CP at 415.

Furthermore, under RCW 19.27.031, WAC 51-50-003, and the IBC, the subject building was required to have a separation wall that was constructed as a fire partition with a one-hour fire-rating. CP at 413. According to Mr. Farnham’s report, the separation wall between Units 1 and 2 had a fire resistance rating that was less than 50% of that rating – that is, far below the minimum requirements under statute and code. Accordingly, Slough was in breach under his statutory duties under those provisions to provide separation walls in his units with an adequate and requisite fire-rating.

Defendant Slough’s apartment complex was also considered a “dangerous building” under the Uniform Code for the Abatement of Dangerous Buildings and the Soap Lake Building Code. CP at 415. Under the Uniform Code for the Abatement of Dangerous Buildings and the Soap

Lake Building Code, any building which does not have the fire-resistant qualities of newly constructed buildings of like character in the same location is considered a “dangerous building.” Under the applicable statutes, regulations, and codes, a new building in the same area that was to be used from the same purpose – namely, rental housing – would be required to have a fire-resistance rating of no less than one hour. *Id.* According to Mr. Farnham’s expert analysis, the separation walls between Unit 1 and Unit 2 in the subject apartment complex had a fire-resistance rating that was significantly less than 25 minutes, and therefore far less than 50% of the fire-resistant qualities of a new building of a like character in the same location. Accordingly, under the Soap Lake Building Code, the building was a “dangerous building.” *Id.* In allowing residents, such as Ms. Wilson, to reside in this “dangerous building,” Slough was in violation of its statutory and code-mandated duties, as well as the implied warranty of habitability.

Finally, Slough’s violations of statute, regulation, and code unequivocally establish a breach of Slough’s duty to exercise reasonable care to prevent dangerous conditions that pose an actual or potential safety hazard to his tenants. The landlord’s duty under the Restatement (Second) of Property § 17.6, according to *Lian II*, is to exercise ordinary care to repair a dangerous condition where he or she either is aware of the dangerous condition’s existence or had a reasonable opportunity to discover its existence. *Lian II*, 115 Wn. App. at 825. Here, it is uncontested that Slough

was “not unfamiliar” with codes requiring separation walls to be fire-rated to prevent the rapid spread of structure fires. CP at 393. Additionally, Mr. Slough acknowledged that he was aware of the concept and purpose for fire-rated walls, and stated that if he could go back and do things differently, he would have put in a fire wall. CP at 393-394.

Here, there is no question that the walls were insufficiently fire-rated under RLTA, WAC 51-50-003, IBC, and the Uniform Code for the Abatement of Dangerous Buildings. In allowing these numerous dangerous conditions to exist – and worse, for permitting residents to reside in a building afflicted with these conditions – Slough failed to exercise ordinary care to prevent or repair the dangerous condition. Under the § 17.6 analysis, the question is therefore whether Mr. Slough reasonably could or should have undertaken to check whether the separation walls in his building were sufficiently fire-rated in the exercise of reasonable care. *See Lian II*, 115 Wn. App. at 825; *Martini*, 178 Wn. App. at 169. Based on Slough’s own testimony – in conjunction with Mr. Farnham’s testimony regarding both the safety significance of properly fire-rated separation walls, as well as the clearly deficient nature of the subject separation walls – the answer is yes.

Notably, Slough testified that he was aware of the purpose for fire-rated walls; was familiar with the Soap Lake building code but was unsure as to the fire rating construction requirements; acknowledged that not having a 30-minute fire wall could endanger the life of tenants; was aware of general fire rating construction standards at the time of the construction

of his personal residence in 2007; and ultimately admitted that “I could have put in a firewall” to have prevented the fire spreading from Unit 2 to Unit 1 where Ms. Wilson resided. CP 391-394.

Taking this testimony and evidence into consideration, there is a sufficient basis to conclude that a reasonably prudent landlord in the same circumstance with the same level of knowledge would therefore have, at a minimum, taken actions to ensure that his or her leased property contained fire-rated separation walls in compliance with the standards set forth under state and local statutes and codes. To find that Slough could not reasonably have inspected the separation walls in the building it owned to ensure that they were safe and did not present potential danger or harm would be to condone a landlord’s substantial indifference to the safety of its tenants.

Under the implied warranty of habitability, a landlord has the duty to act reasonably to prevent dangerous conditions in rental units. Had the Sloughs been exercising reasonable care to prevent dangerous conditions, they would have inspected the fire-resistant qualities of the building prior to leasing the space to tenants. This failure to discover this unsafe condition does nothing to alleviate their duty under the implied warranty. Moreover, the question of whether a duty is breached is a question of fact for the jury, and accordingly, should be preserved for trial. *Hertog*, 138 Wn.2d at 275.

Slough breached its duties under the implied warranty of habitability by providing a dwelling unit to Ms. Wilson subject to numerous unreasonably dangerous conditions and safety hazards related to

inadequately fire-rated and fire-resistant separation walls. Slough also breached landlord duties listed in RLTA, WAC 51-50-003, IBC, Uniform Code for the Abatement of Dangerous Buildings, and the Soap Lake Municipal/Building Code. As discussed in greater detail below, due to these failures, Ms. Wilson lost precious minutes in which she could have evacuated her flame and smoke-engulfed apartment unit and survived.

**iii. Causation.**

As noted earlier, once duty and breach have been shown, a plaintiff must provide evidence of proximate cause. “Proximate cause has two elements: (1) cause in fact and (2) legal causation.” *Hill*, 143 Wn. App. at 448; *Hertog*, 138 Wn.2d at 282-83. Regarding legal causation, the Washington Supreme Court has noted that duty and legal causation are “intertwined.” *Hartley*, 103 Wn.2d at 779. In fact, “legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter.” *Taggart*, 118 Wn.2d at 225-26.

Here, as discussed at length above, a landlord’s duty to provide sufficiently fire rated walls between dwelling units is imposed under the implied warranty of habitability, as well as numerous codes and statutes, including RLTA, WAC 51-50-003, IBC, the Uniform Code for the Abatement of Dangerous Buildings, and the Soap Lake Municipal Code. With these duties owed unquestioned established, legal causation is similarly resolved with respect to separation walls.

With legal causation established, causation then becomes a question

of fact for the jury, as it is in almost all cases. *Rucshner*, 149 Wn.App. at 688; *see also Owen*, 152 Wn.2d at 788 (quoting *Ruff*, 125 Wn.2d at 703). Here, Dr. Daniel Selove opined on a more probable than not basis that, if Ms. Wilson had been provided just a few more minutes - “if not less than a minute” – more to react to the smoke accumulating in her apartment unit and navigate out of her apartment unit, on a more probable than not basis, she would have been able to completely exit her apartment unit and survived the fire. CP at 445. Mr. Farnham also concluded that the separation wall between Unit 1 and Unit 2 was not adequately fire-rated or fire-resistant, and thus was substantially out of compliance with WAC, RLTA, the Uniform Code for the Abatement of Dangerous Buildings, and the Soap Lake Municipal Code. CP at 415.

Ultimately, Appellants presented considerable evidence and expert testimony at summary judgment and on reconsideration establishing – and creating numerous genuine issues of material fact – that a properly fire-rated and fire-resistant separation wall in Susan Wilson’s unit would have prevented her death. Specifically, based on this extensive evidence and expert opinion, the following well-established reasonable inferences can be reached, which evince cause in fact between Ms. Wilson’s death and the lack of a properly fire rated separation wall: the fire that began in Unit 2 (Dennis Trusty’s unit) quickly spread through the wall and attic space between Unit 2 and Unit 1 (Ms. Wilson’s unit); the quick spread of this fire and resultant smoke was due to the lack of a properly fire-rated and fire-

resistant separation wall; as the fire quickly spread towards and above Unit 1, smoke quickly began to accumulate in Ms. Wilson's unit; due to the rapid accumulation of smoke, Ms. Wilson was forced to navigate through an extremely opaque and dense smoky environment, which severely limited not only her vision, but also her ability to breathe; and due to this rapid accumulation and spread of smoke in her unit – which was advanced by the improperly fire-rated separation walls – Ms. Wilson had neither the requisite oxygen-filled air nor physiological capacity to completely exit her front door, and therefore collapsed and lost consciousness immediately after cracking open her front door and screaming.

Stated differently, the evidence and expert testimony presented to the trial court supports the reasonable cause in fact inference that had Ms. Wilson's separation wall been properly fire-rated and fire-resistant, the fire would not have spread as rapidly into Unit 1; smoke would not have accumulated as rapidly in Unit 1; the air in Ms. Wilson's unit would have been both more oxygen-rich and less opaque due to the decreased accumulation of smoke; and therefore, Ms. Wilson would have been able to more easily and readily navigate her unit and completely exit the front door – both in terms of physiological capacity and the time that she would have been provided due to the increased oxygen supply. As discussed at length above, Appellants therefore provided sufficient evidence and expert testimony to create numerous genuine issues of material fact regarding causation between the improperly fire-rated separation walls and Ms.

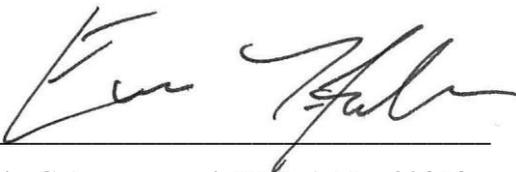
Wilson's death, thus precluding summary dismissal. Based on this same evidence, expert testimony, and analysis – as set forth herein with regard to both smoke detectors and separation walls – Slough is similarly liable under common law, and Appellants' common law claims were also improperly dismissed. *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994).

**E. CONCLUSION**

For the foregoing reasons, Plaintiffs have provided more-than-sufficient evidence and expert testimony to support all elements of their claims against Defendant Slough – both at summary judgment and on reconsideration. The trial court therefore erred where it granted the Respondent's motion for summary judgment on all claims. The trial court also abused its discretion when it denied Appellants' motion for reconsideration in which Appellants provided expert testimony establishing that, on a more probable than not basis, had Ms. Wilson been notified earlier – even less than a minute earlier – of the smoke accumulating in her apartment unit, she would have been able to navigate and completely exit her apartment, thus surviving the fire. Ultimately, the trial court erred when it weighed facts and evidence in favor the moving party, made findings not supported by the records, and granted summary judgment in favor of Slough. For the reasons stated above, the Court should reverse the trial court's summary dismissal of these claims and remand this case for a trial on the merits.

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Dated this 13<sup>th</sup> day of December, 2017, in Seattle, Washington.

By  \_\_\_\_\_

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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

SHAWN D. KENSINGER and GILLIAN O. TIPPERY, as Personal Representatives of the ESTATE OF SUSAN MARIE WILSON, Deceased;

Plaintiffs,

v.

SLOUGH INVESTMENT COMPANY, LLC, a Washington LLC,

Defendant.

No. 354873

DECLARATION OF SERVICE FOR BRIEF OF APPELLANTS

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 December 13<sup>th</sup>, I caused to be filed and served with the Clerk of the Court of Appeals, Division III, the Opening Brief of Appellant in this matter, along with this Declaration of Service, on the following individuals in the manner indicated:

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THOMAS J. COLLINS, ESQ. MERRICK, HOFSTEDT, & LINDSEY, P.S. 3101 WESTERN AVENUE, SUITE 200 SEATTLE, WA 98121	OF APPEALS [X] VIA EMAIL [ ] VIA FACSIMILE [ ] VIA U.S. MAIL
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Dated this 13<sup>th</sup> day of December, 2017.

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