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No. 97325-3

SUPREME COURT
OF THE STATE OF WASHINGTON

KIMBERLY J. GERLACH, individually,

Petitioner,

v.

THE COVE APARTMENTS LLC, a Washington corporation;
and WEIDNER PROPERTY MANAGEMENT LLC,
a Washington corporation,

Respondents.

BRIEF OF AMICUS CURIAE
RENTAL HOUSING ASSOCIATION OF WASHINGTON

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A. INTRODUCTION

The Court of Appeals was correct in determining that a landlord does not have a duty of care in tort to non-tenants arising out of the Residential Landlord Tenant Act, RCW 59.18 (“RLTA”).

The Legislature enacted the RLTA to govern the relationship between landlords and tenants. Its legislative history only confirms that it was a carefully-crafted enactment that was never intended to be a substitute for common law premises liability. In decisions since the RLTA’s enactment, this Court has confirmed that interpretation of the RLTA.

Washington’s common law of premises liability affords tenants, their guests, and others ample protection. The added duty proposed by Gerlach, adopted by the trial court, and rejected by the Court of Appeals will only create added uncertainty for landlords as to their liability for their premises, likely increases in insurance premiums, and rent increases for tenants.

This Court should affirm the Court of Appeals.

B. IDENTITY AND INTEREST OF AMICUS CURIAE RENTAL HOUSING ASSOCIATION

As noted in its motion for leave, the Rental Housing Association of Washington (“RHAWA”) is a non-profit association of over 5,300 rental

residential property owners, operators, investors, and managers. Over ninety percent of its members are owners of less than 10 residential units. The RHAWA is committed to promoting public policies that support a viable and efficient private market for affordable housing. This includes support for fair liability standards regarding premises leased by its members. RHAWA opposes the effort to make the RLTA a further basis for a duty of care in tort. That statute was never intended by the Legislature as a vehicle for the creation of duties in tort.

C. STATEMENT OF THE CASE

RHAWA adopts the Statements of the Case presented by the respondents.

D. ARGUMENT

- (1) The RLTA Contains the Remedies for the Violations of Its Provisions; the Legislature Never Intended that the RLTA Would Create a Duty of Care in Tort

RHAWA agrees with the position taken in Cove's supplemental brief at page 18 that third parties to the landlord-tenant relationship do not have an implied right of action arising out of the RLTA. Moreover, this Court has never held that *tenants* have such an implied right of action. Nor should it.

The legislative history of the RLTA, the specificity of its remedial provisions, and this Court's consistent construction of the statute all

confirm that the Legislature never intended the RLTA to be a predicate for a duty of care in tort.

In 1973, the Legislature enacted the RLTA; SSB 2226 became Laws of 1973, 1st Ex Sess., ch. 207. The RLTA was enacted that year only 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, an *ad hoc* committee of landlord and tenant organizations headed by the regional director of the American Arbitration Association, under the aegis of the Joint Interim Judiciary Committee, spent nine months trying to come up with proposed legislation acceptable to both sides. Once the 1973 legislative session began, the landlord groups repudiated the committee’s work. Only after committee hearings in both houses, lengthy party caucusing, extended debate, and numerous proposed amendments was the RLTA enacted. *Id.* at 550-51; William H. Clarke, *Washington’s Implied Warranty of Habitability: Reform or Illusion?*, 14 Gonz. L. Rev. 1, 11-12 (1978). This Court stated, “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.

Notwithstanding those legislative activities, then-Governor Evans vetoed portions of the bill in a fashion to re-shape the bill’s purpose. This Court in *Wash. State Ass’n of Apartment Ass’ns, Inc. v. Evans*, 88 Wn.2d 563, 564 P.2d 788 (1977) invalidated those attempted vetoes. The RLTA has largely remained in the form that the 1973 Legislature enacted.

The duties of a landlord are set forth in RCW 59.18.060. The remedies available to a tenant for a landlord’s breach of such duties set forth in RCW 59.18.060 are set forth in RCW 59.18.090:

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, in which case he or she shall be discharged from payment of rent for any period following the quitting date, and shall be entitled to a pro rata refund of any prepaid rent, and shall receive a full and specific statement of the basis for retaining any of the deposit together with any refund due in accordance with RCW 59.18.280;
- (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.

In *Schwab*, this Court rejected the contention that a violation of the RLTA constituted a violation of the Consumer Protection Act, RCW 19.86 (“CPA”). The Court observed that *nothing* in the CPA’s legislative history or express language evidenced an intent to make the CPA applicable to landlord-tenant issues. 103 Wn.2d at 549-52. The Court concluded:

The history of that enactment shows the care exercised by the Legislature in writing the act and in delineating the specific rights, duties, and remedies of both landlords and tenants. For this reason, along with the other reasons stated herein, we decline to now expand the coverage of that act by interpretation so as to include a Consumer Protection Act cause of action.

Id. at 551. The Legislature has acquiesced in this Court’s interpretation of the RLTA for the 34 years since *Schwab*. *Soprani v. Polygon Apt. Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999) (Legislature’s failure to amend statute following a judicial decision indicates legislative acquiescence in that decision).

Similarly, *nothing* in the RLTA evidences an intent to make it a basis for personal injuries actions for damages. The RLTA is the *exclusive* basis for a tenant’s remedies for claims arising thereunder. *Aspon v. Loomis*, 62 Wn. App. 818, 823-26, 816 P.2d 751 (1991), *review denied*, 118 Wn.2d 1015 (1992). Where the Legislature opted not to

create a damages remedy in the RLTA itself, this Court should not presume to do so.

Courts in other jurisdictions have agreed that their landlord-tenant statutes do not create a duty of care in tort. For example, in *Isbell v. Commercial Investment Assoc., Inc.*, 644 S.E.2d 72 (Va. 2007), the Virginia Supreme Court held that the Virginia Residential Landlord and Tenant Act did not create a statutory cause of action allowing a tenant to recover damages for personal injuries occasioned by the breach of an act provision. That court held that statutes in derogation of the common law must be strictly construed, and, in the absence of an express provision in the Act authorizing a tort action, no such cause of action was appropriate. Rather, that Act created contractual remedies *only as between landlords and tenants*. *Id.* at 76-77. *Accord, Steward v. Holland Family Properties, LLC*, 726 S.E.2d 251 (Va. 2012) (rejecting negligence *per se* claim arising out of Virginia's landlord-tenant act).

In sum, the RLTA was carefully crafted by the Legislature to establish the relationship between landlords and tenants. It was never intended by the Legislature to supplant the law of premises liability or to create a personal injuries cause of action by tenants, let alone third parties, against landlords.

(2) Finding a Duty of Care to Arise out of the RLTA Will

Cause Confusion as to Scope of Landlord Liability and
Will Result in Higher Liability Insurance Premiums that
Will Be Passed on to Tenants in Higher Rent

In her petition for review, without significant analysis, Gerlach urges this Court to adopt the *Restatement (Second) of Property: Landlord & Tenant* § 17.6 and to afford a tenant's guest a cause of action arising out of the RLTA. Pet. at 17-20. But that argument is contradictory. The *Restatement* does not confine any duty owed solely to a tenant's guests. Rather, it allows a cause of action by a tenant or "others upon the leased property with the consent of the tenant or the subtenant." The duty is *not* confined to a tenant's guest; it would extend presumably to any invitee or licensee of the tenant, or the subtenant, supplanting the now well-defined principles of Washington premises liability law.¹

No Washington case has gone so far in extending the duty arising out of the RLTA. Where § 17.6 has formed the basis for a duty, it has been confined to tenants. *See* Cove suppl. br. at 21.

And this only makes sense. As noted *supra*, the RLTA was enacted to regulate relationships between landlords *and tenants*, not to create a new facet of premises liability law or to allow persons outside the landlord-tenant relationship to use the RLTA for a remedy the Legislature

¹ This concern is not far-fetched. In *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005), a neighbor boy rollerblading in the rental's driveway sought to invoke § 17.6. In *Sjogren v. Properties of the Pac. Nw., LLC*, 118 Wn. App. 144, 75 P.3d 592 (2003), it was a tenant's visitor who sought to invoke that argument.

did not create.

This significant, and as yet untested, expansion of landlord liability exposure will inevitably result in higher landlord liability insurance premiums that will be passed onto the tenants in the form of higher rentals. The rental housing market in Seattle alone is already expensive. Seattle rents were the 5th highest in the United States and 9th highest in the world, according to a 2017 King 5 report. <https://www.king5.com/article/money/seattle-9th-most-expensive-rent-in-the-world/408838426>. The trend is upward with the average rent for a Seattle apartment reaching \$2,221/month in 2019. <https://www.rentjungle.com/average-rent-in-Seattle-rent-trends/>.

Expansion of landlord liability will cause liability insurance rates to increase, rates that will be passed on to tenants exacerbating the already-existing housing affordability problem in many Washington cities.

(3) Tenants and Others Are Amply Protected by Existing Washington Premises Liability Law so that Finding a Duty of Care to Arise out of the RLTA Is Unnecessary

This Court need not recognize a duty in tort arising out of the RLTA on prudential grounds. Washington premises liability law affords tenants and third parties to the landlord-tenant relationship *ample* remedies for any personal injuries.

Although landlords were not liable under the common law when

the landlord turned possession of the premises over to the tenant, *Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 225, 377 P.2d 642 (1963), that harsh rule has been restricted by this Court. With regard to latent defective conditions on the leased premises, a landlord is liable for injuries to tenants and others. *E.g.*, *Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969) (landlord owes common law duty to public invited onto premises when landlord leases the premises with defect and public is injured by it); *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994) (landlord is liable to tenant and third parties for harm occasioned by latent defects on the premises existing at the time of the leasehold's creation of which the landlord had knowledge and failed to inform the tenant).

Further, a landlord owes a duty to a tenant and/or the tenant's employee/guest to repair the premises where the landlord covenanted to do so, and the landlord may be liable for injuries to tenants or the tenant's guests resulting from the improper performance of the covenanted obligations. *Mesher v. Osborne*, 75 Wash. 439, 134 P. 1092 (1913); *Estep v. Security Savings & Loan Soc.*, 192 Wash. 432, 73 P.2d 740 (1937); *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962). In *Teglo v. Porter*, 65 Wn.2d 772, 399 P.2d 519 (1965), this Court made clear that notwithstanding any lease of premises, the landlord has an *ongoing* duty

reflected in the *Restatement (Second) of Torts* § 357 to address both latent defects and conditions on the premises it covenanted to address. This Court recently reaffirmed the rule regarding a landlord's repair/maintenance covenant in *Adamson v. Port of Bellingham*, 193 Wn.2d 178, 438 P.3d 522 (2019).

A landlord owes tenants a duty of care in connection with hazards in common areas of the leased premises. *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971) (stairwells); *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996) (snow accumulated in parking lot); *Musci v. Graoch Assoc. Ltd P'ship*, 144 Wn.2d 847, 31 P.3d 684 (2001) (ice outside door of apartment complex clubhouse). *See generally*, *Restatement (Second) of Torts* § 360 (adopted in *McCutcheon*).

The broad principles of premises liability set forth in *Restatement (Second) of Torts* §§ 343, 343A adopted in *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (adopting § 343A) and *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 49-50, 914 P.2d 728 (1996) (adopting § 343) more than adequately protect tenants and others.

In sum, a duty in tort arising out of the RLTA is simply unnecessary, given the ample remedies in premises liability this Court has afforded tenants and others. Instructing juries on a duty in tort to third

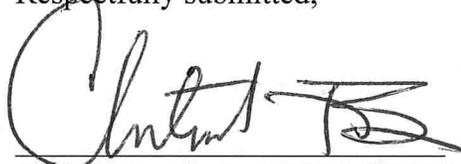
persons arising out of the RLTA, in light of the foregoing, will result in needless confusion. This Court should not trample on the Legislature's careful articulation of the specific, detailed remedies in the RLTA.

E. CONCLUSION

The Court of Appeals was correct in concluding that the violation of a provision in the RLTA does not constitute a basis for duty in tort for a landlord to a non-tenant for the reasons set forth above. This Court should affirm the Court of Appeals opinion.

DATED this 23rd day of December 23, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher Benis", written over a horizontal line.

Christopher Benis, WSBA #17972
Attorneys for Amicus Curiae
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the within and foregoing document upon the following persons:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 24th day of December, 2019, at Seattle, Washington.



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December 24, 2019 - 9:19 AM

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