

FILED  
Court of Appeals  
Division I  
State of Washington  
1/23/2018 2:42 PM

No. 77179-5-I      No. 97325-3

---

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

KIMBERLY J. GERLACH, individually,

Respondent,

v.

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

Appellants.

---

BRIEF OF APPELLANTS

---

Pauline V. Smetka, WSBA #11183  
Helsell Fetterman LLP  
1001 Fourth Avenue #4200  
Seattle, WA 98154-1154  
(206) 292-1144

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii-iv
A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR .....	1
(1) <u>Assignments of Error</u> .....	2
(2) <u>Issues Pertaining to Assignments of Error</u> .....	3
C. STATEMENT OF THE CASE.....	4
D. SUMMARY OF ARGUMENT .....	11
E. ARGUMENT .....	13
(1) <u>The Trial Court Erred in Its Treatment of Issues         Associated with RCW 5.40.060</u> .....	13
(a) <u>The Trial Court Abused Its Discretion in             Curtailing Expert Testimony on the Physical             Effects of Gerlach’s Extreme Intoxication</u> .....	14
(b) <u>The Evidence of Gerlach’s .238 BAC             Should Have Been Heard by the Jury</u> .....	19
(c) <u>The Trial Court Erred in Instructing the             Jury on Gerlach’s Voluntary Intoxication</u> .....	24
(2) <u>The Trial Court Erred in Basing Any Duty Cove         Owed to Gerlach on the RLTA</u> .....	26
(3) <u>The Trial Court Erred in Excluding Dr. Wickizer’s         Testimony on the Reasonable Value of Gerlach’s         Medical Expenses</u> .....	33
F. CONCLUSION.....	37
Appendix	

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Aspon v. Loomis</i> , 62 Wn. App. 818, 816 P.2d 751 (1991), <i>review denied</i> , 118 Wn.2d 1015 (1992).....	30
<i>Bingaman v. Grays Harbor Cmty. Hosp.</i> , 103 Wn.2d 831, 699 P.2d 1230 (1985).....	35
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	22
<i>Davis v. Baugh Indus. Contractors, Inc.</i> , 159 Wn.2d 413, 150 P.3d 545 (2007).....	16
<i>Dexheimer v. CDS, Inc.</i> , 104 Wn. App. 464, 17 P.3d 641 (2001).....	30
<i>Farah v. Hertz Transporting, Inc.</i> , 196 Wn. App. 171, 383 P.3d 552, <i>review denied</i> , 390 P.3d 332 (2016).....	23
<i>Faust v. Albertson</i> , 167 Wn.2d 531, 222 P.3d 1208 (2009).....	20
<i>Figuracion v. Rembrandt Realty Trust</i> , 188 Wn. App. 1022, 2015 WL 3759291, <i>review denied</i> , 184 Wn.2d 1016 (2015).....	32
<i>Geschwind v. Flanagan</i> , 121 Wn.2d 833, 854 P.2d 1061 (1993).....	13-14, 19, 20
<i>Geise v. Lee</i> , 84 Wn.2d 866, 529 P.2d 1054 (1975).....	29
<i>Gonzalez-Mendoza v. Burdick</i> , 175 Wn. App. 1038, 2013 WL 3477281 (2013).....	18
<i>Hansen v. Friend</i> , 118 Wn.2d 476, 824 P.2d 483 (1992).....	22
<i>Hayes v. Wieber Enterprises, Inc.</i> , 105 Wn. App. 611, 20 P.3d 496 (2001).....	35, 36, 37
<i>Hue v. Farmboy Spray Co., Inc.</i> , 127 Wn.2d 67, 896 P.2d 682 (1995).....	24
<i>In re Detention of West</i> , 171 Wn.2d 383, 256 P.3d 302 (2011).....	24
<i>In re Marriage of Katare</i> , 175 Wn.2d 23, 283 P.3d 546 (2012), <i>cert. denied</i> , 568 U.S. 1090 (2013).....	17
<i>Iwai v. State</i> , 129 Wn.2d 84, 915 P.2d 1089 (1996).....	29
<i>Johnson v. Miller</i> , 178 Wn. App. 1045, 2014 WL 129263 (2014).....	32
<i>Johnston-Forbes v. Matsunaga</i> , 181 Wn.2d 346, 333 P.3d 388 (2014).....	17-18
<i>Landis &amp; Landis Const. LLC v. Nation</i> , 171 Wn. App. 157, 286 P.3d 979 (2012), <i>review denied</i> , 177 Wn.2d 1003 (2013).....	33

<i>Lian v. Stalick</i> , 106 Wn. App. 811, 25 P.3d 467 (2001).....	30
<i>Lian v. Stalick</i> , 115 Wn. App. 590, 62 P.3d 933 (2003).....	31
<i>L.M. v. Hamilton</i> , 200 Wn. App. 535, 402 P.3d 870 (2017).....	18
<i>Martini v. Post</i> , 178 Wn. App. 153, 313 P.3d 473 (2013).....	32
<i>Morgan v. Johnson</i> , 137 Wn.2d 887, 976 P.2d 619 (1999).....	14
<i>Mucsi v. Graoch Assocs. Ltd. P’ship No. 12</i> , 144 Wn.2d 847, 31 P.3d 684 (2001).....	28, 29
<i>Patterson v. Horton</i> , 84 Wn. App. 531, 929 P.2d 1125 (1997).....	34, 35
<i>Peralta v. State</i> , 187 Wn.2d 888, 389 P.3d 596 (2017).....	14, 20
<i>Philippides v. Bernard</i> , 151 Wn.2d 376, 88 P.3d 939 (2004).....	17
<i>Ponce v. The Mountaineers</i> , 190 Wn. App. 1048, 2015 WL 6684507 (2015), <i>review denied</i> , 185 Wn.2d 1019 (2016).....	18
<i>Pruitt v. Savage</i> , 128 Wn. App. 327, 115 P.3d 1000 (2005).....	31
<i>Riedel v. Middendorf</i> (Kitsap Cty. Cause No. 15-2-00745-1).....	34
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010).....	19
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010).....	23
<i>Sisley v. Seattle School Dist. No. 1</i> , 171 Wn. App. 227, 286 P.2d 974 (2012), <i>review denied</i> , 176 Wn.2d 1015 (2013).....	21
<i>Sjorgen v. Properties of Pac. NW LLC</i> , 118 Wn. App. 144, 75 P.3d 592 (2003).....	31
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	35
<i>State v. Allery</i> , 101 Wn.2d 591, 682 P.2d 312 (1984).....	17, 34
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 713 (2000).....	34
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	34
<i>State v. Vermillion</i> , 112 Wn. App. 884, 51 P.3d 188 (2002).....	34
<i>Stevens v. Gordon</i> , 118 Wn. App. 43, 74 P.3d 653 (2003).....	23
<i>Taylor v. Bell</i> , 185 Wn. App. 270, 340 P.3d 951 (2014), <i>review denied</i> , 183 Wn.2d 1012 (2015).....	18
<i>Torgeson v. Hanford</i> , 79 Wash. 56, 139 P. 648 (1914).....	34
<i>Tucker v. Hayford</i> , 118 Wn. App. 246, 75 P.3d 980 (2003).....	31
<i>Veit ex rel. Nelson v. Burlington Northern Santa Fe Corp.</i> , 171 Wn.2d 88, 249 P.3d 607 (2011).....	19
<i>Wade v. Hulse</i> , 110 Wn. App. 1062, 2002 WL 398502, <i>review denied</i> , 147 Wn.2d 1021 (2002).....	30
<i>Wash. State Physicians Ins. Exch. v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	19
<i>Wright v. Miller</i> , 93 Wn. App. 189, 963 P.2d 934 (1998), <i>review denied</i> , 138 Wn.2d 1017 (1999).....	32

<i>Young v. Caravan Corp.</i> , 99 Wn.2d 655, 663 P.2d 834, <i>opinion amended by</i> 672 P.2d 1267 (1983) .....	20
---	----

Federal Cases

<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923) .....	34
<i>Pinckney v. Smith</i> , 484 F. Supp. 2d 1177 (W.D. Wash. 2007) .....	32

Statutes

RCW 5.40.060 .....	<i>passim</i>
RCW 5.40.060(1).....	22
RCW 46.61.502 .....	20
RCW 46.61.502(1).....	19
RCW 59.18 .....	1
RCW 59.18.030(25).....	29
RCW 59.18.030(27).....	29
RCW 59.18.060 .....	30

Rules and Regulations

ER 402 .....	33
ER 403 .....	22, 33
ER 611(a).....	23
ER 611(a)(1) .....	24
ER 702 .....	16, 33
ER 703 .....	16
ER 704 .....	16

Other Authorities

5B Karl B. Tegland, <i>Wash. Practice Evidence</i> (5th ed.) .....	17
<i>Restatement (2d) of Property</i> § 17.6.....	12, 31, 32
<i>Restatement (Second) of Torts</i> § 343 (1965).....	29
WPI 16.03 .....	25
WPI 16.04 .....	25
WPI 16.05 .....	25

A. INTRODUCTION

In the early morning hours of October 27, 2012, after a night of heavy drinking to the point that Kimberly Gerlach's blood alcohol level ("BAC") was .238, almost three times the legal limit, Gerlach fell from outside her boyfriend's second-story apartment unit ("Apartment 1202") at the Cove Apartments in Federal Way, owned by Cove Apartments L.L.C. and managed by Weidner Property Management LLC ("Cove") to the walkway below. Gerlach does not remember what happened that night, and no one saw where she initiated her fall or knows what she was doing in the moments preceding the fall.

The trial court, however, erred in addressing the issues of any duty owed by Cove under the Residential Landlord Tenant Act, RCW 59.18 ("RTLTA") and Cove's entitlement to a defense under RCW 5.40.060 that exonerates a defendant from any liability if the plaintiff was under the influence of alcohol and the plaintiff was more than 50% at fault. As for the latter, the trial court erred in its evidentiary decision and instructions on the law. A new trial is necessary here.

The trial court also abused its discretion in excluding the expert testimony of Dr. Thomas Wickizer on the reasonable value of the medical expenses Gerlach incurred.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its April 10, 2017 order denying Cove's motion for partial summary judgment.

2. The trial court erred in entering its June 8, 2017 order on plaintiff's motions in limine.

3. The trial court erred in excluding the testimony of Dr. Frank Vincenzi and limiting the testimony of Dr. Michael Carhart on the effect of Gerlach's intoxication.

4. The trial court erred in excluding the testimony of Dr. Thomas Wickizer on the reasonable value of the medical services Gerlach incurred.

5. The trial court erred in giving Instruction 13 to the jury.

6. The trial court erred in giving Instruction 14 to the jury.

7. The trial court erred in giving Instruction 15 to the jury.

8. The trial court erred in giving Instruction 16 to the jury.

9. The trial court erred in giving Instruction 20 to the jury.

10. The trial court erred in failing to give Cove's proposed instruction number 18.

11. The trial court erred in failing to give Cove's proposed instruction number 19.

12. The trial court erred in failing to give Cove's proposed instruction number 20.

13. The trial court erred in failing to give Cove's proposed instruction number 21.

14. The trial court erred in refusing to give Cove's proposed instructions on Gerlach's intoxication.

15. The trial court erred in giving Instruction 22 to the jury.

16. The trial court erred in using the Special Verdict Form.

17. The trial court erred in entering its judgment on the jury's verdict on July 28, 2017.

(2) Issues Pertaining to Assignments of Error

1. Where there was evidence that the plaintiff here had a BAC of .238 at the time she fell from an apartment balcony, did the trial court err in limiting expert testimony on the effects of her intoxication and in excluding evidence of Gerlach's level of intoxication where that was relevant to Cove's RCW 5.40.060 defense, and then compounded the error by representing to the jury that the parties had stipulated to the evidence on Gerlach's intoxication, when that was untrue? (Assignments of Error Numbers 2-3, 17).

2. Did the trial court err in instructing the jury on Cove's RCW 5.40.060 defense, refusing to disclose the existence of the defense to the jury as the WPI instructions on that defense require? (Assignments of Error Numbers 9-14, 17).

3. Did the trial court err in concluding that Cove owed a duty to Gerlach, a non-tenant, under the RLTA and instructing the jury on an RLTA duty of care in this case? (Assignments of Error Numbers 1, 5-8, 16-17).

4. Did the trial court err in excluding expert testimony on the reasonableness of medical expenses incurred by Gerlach? (Assignments of Error Numbers 4, 15-17).

C. STATEMENT OF THE CASE

On the night of October 26, 2012, and into October 27, 2012, Gerlach went out drinking with friends including her then-boyfriend, Nathan Miller. CP 1180. At some point during the night, she made her way to Miller's nearby apartment with her friend, Brodie Liddell. *Id.* Miller and another friend, Colin Liddell, did not go straight to the apartment but instead went to a convenience store to buy beer and cigarettes. CP 1181.

Once Gerlach and Brodie<sup>1</sup> arrived at Miller's apartment building, Brodie stayed outside to smoke a cigarette while Gerlach continued upstairs. *Id.* Brodie was standing outside on the ground level and facing away from the apartment as he smoked his cigarette. *Id.* He admitted that he did not see Gerlach enter the apartment. *Id.* He also did not see her standing on the apartment balcony. *Id.* After seeing Gerlach walk upstairs, the next time Brodie saw her was as she was falling midair before landing on the walkway below. *Id.*

Gerlach's fall and the ensuing commotion woke one of the

---

<sup>1</sup> Brodie Liddell and Colin Liddell are referred to by their first names for purposes of clarity; no disrespect is intended.

neighbors, Wendy Rafael. *Id.* When Rafael came outside to investigate, she observed Gerlach lying unresponsive on the ground. *Id.*

When Brodie called 911 to report Gerlach's accident, he was audibly intoxicated and confused. *Id.* It took several minutes for him to communicate the address to the operator. *Id.* Throughout the course of the call, the operator repeatedly asked Brodie the same questions and urged him to focus and respond to her. *Id.* Finally, with Rafael's help, Brodie was able to relay the address to the operator. *Id.*<sup>2</sup>

At some point during the 911 call, Miller arrived on the scene. *Id.* He was understandably shocked and panic-stricken at the sight of his then-girlfriend lying unconscious on the ground; he exclaimed to Rafael: "Why did you do it? I was right behind you!" CP 1181-82. He also stated to Rafael that Gerlach must have been trying to climb over the railing because she did not have the apartment key. CP 518-19, 1182.<sup>3</sup>

Within minutes, South King Fire and Rescue and the Federal Way Police Department arrive at the scene. *Id.* Officer Gabriel Castro began

---

<sup>2</sup> The trial court refused to allow the introduction of the 911 tape or the transcript into evidence, CP 1552-53, or for impeachment. Ex. 136-37; RP 2322-27.

<sup>3</sup> The trial court refused to allow Rafael to relate Miller's excited utterance to the jury. CP 1552. However, evidencing its less than even handed approach to the evidence, the court permitted Colin our objection to testify that Brodie told him at the scene that he saw Gerlach leaning on the balcony railing, as an excited utterance. RP 1485-88. It also allowed statements made by Brodie at the scene to officers to come in as excited utterances. RP 1433-39.

the police investigation by taking photographs of Gerlach lying on her back with the railing next to her. Ex. 139. Gerlach's vital signs were taken at 2:12 and again at 2:18, and then King County Medic One took over and transported her from the scene to the ambulance and then to Harborview Medical Center. Ex. 135, 138, 140-41.

Despite having retrograde amnesia and not remembering anything that happened the night of her accident, Gerlach claimed that she fell over and off of the balcony of Apartment 1202. CP 1182. More specifically, she alleged that she entered Miller's apartment, went out on the balcony, and leaned against the balcony railing, causing it to give way. CP 1183. She pointed to the existence of rot in the cap to which the railing is secured and alleged that the rot was the sole proximate cause of her fall. *Id.*

However, Gerlach's version of events was disputed below. There was evidence that Gerlach never entered the apartment. Despite it being the middle of the night and dark, the lights were off in the balcony, RP 3005, 3059, and the balcony sliding glass door was closed when emergency personnel arrived at the scene. RP 3060, 3062-64. In addition, when Gerlach was found unconscious by the emergency personnel, she was still wearing her coat, scarf, and purse. Ex. 139; RP 2384, 3005-06. Gerlach's landing position and injuries were inconsistent with a fall from

the position she claims to have been in (*i.e.* standing on the balcony and leaning against the railing). Miller testified that he and Gerlach often leaned against the railings. RP 2407-09. Additionally, Miller told Rafael that Gerlach did not have the key to the apartment. CP 519.

As for Gerlach's claim that her fall was caused by rot in the cap to which the railing was secured, her expert witness, Mark Lawless, testified that it is prudent for a landlord like Cove to inspect balcony railings once a year, RP 2186-89, which is exactly what Cove management did in this case. Ex. 119, 125.<sup>4</sup> Miller reviewed the apartment upon moving in. Ex. 112. There is no evidence that Cove actually knew of the rot in the cap or elsewhere on Apartment 1202's balcony.

Cove contended that Gerlach was attempting to climb into the balcony from the outside in the moments preceding the fall. CP 1186. Dr. Carhart explained why Gerlach's version of events was inconsistent with her landing position and the injuries she sustained – that Gerlach was attempting to climb into the balcony from the outside walkway. RP 2997-98, 3000-01.<sup>5</sup>

---

<sup>4</sup> Lawless did not review maintenance records relating to Cove. RP 2163-64. Nor did he review Weidner's actual 2011-12 preventative maintenance schedule. RP 2172.

<sup>5</sup> Miller's on-scene exclamation "Why did you do it? I was right behind you," and the fact that he told a neighbor that he thought Gerlach had been trying to climb onto the balcony because she did not have a key also support Cove's position.

Gerlach filed the present action in the King County Superior Court on October 22, 2015. CP 1-8. The case was assigned to the Honorable Richard F. McDermott for trial.

Cove moved for summary judgment on the duty owed by Cove as a landlord under the RLTA. CP 43-240. Gerlach resisted that motion with respect to claims arising under the lease agreements and as to the RLTA duties. CP 294-304.<sup>6</sup> Gerlach largely did not contest that she was not a tenant, but instead asserted that Cove “waived” her non-tenant status by accepting some payments directly from her. CP 296-97. Cove’s Crystal Hammond testified this was not unusual. CP 668. The trial court granted Cove’s motion as to Gerlach’s theory of recovery arising out of the lease agreement but denied the motion as to any RLTA claims on April 10, 2017. CP 676-77.

Gerlach moved to strike Cove’s affirmative defenses, including her comparative fault, and to exclude any evidence of her intoxication, a motion aggressively opposed by Cove. CP 305-53, 778-858. The trial court denied the motion as to comparative fault generally in a May 16, 2017 order. CP 882-83. However, the trial court also precluded Dr. Carhart from testifying on the effects of alcohol on Gerlach’s actions, stating: “Dr. Carhart is permitted to testify but his testimony is limited to

---

<sup>6</sup> Gerlach did not contest dismissal of her lease contract claim. CP 295.

areas within his expertise. Specifically, he will not be allowed to testify as to speculation about the effects of consumption of alcohol on the actions of the plaintiff.” CP 883. The court then asked for further briefing on voluntary intoxication, stating:

The court wants to give the parties advance notice on the issue of the plaintiff’s consumption of alcohol but prior to entering a ruling, the court invites additional briefing taking into consideration the rules of evidence and RCW 5.40.060. The Court believes that some mention of the presence of alcohol may be required but that the guidelines for its use must be established to prevent speculation and undue prejudice. Therefore, the parties are invited to electronically submit additional briefing on this issue no later than noon, May 25, 2017.

CP 883. Cove submitted supplemental briefing. CP 916-25.

Both parties filed extensive motions in limine, CP 938-1175, and the court entered extensive orders on both motions. CP 1539-56. Gerlach argued that Dr. Wickizer’s testimony on the reasonableness of medical bills should be excluded. RP 160-70. The parties argued extensively about the admission of Gerlach’s BAC results. RP 219-44. The court indicated its initial inclination to let in this evidence, RP 219-20, 228, but not to allow “speculation” about the effect of Gerlach’s intoxication, RP 220-21, even though both Dr. Carhart and Dr. Vincenzi testified that her intoxication profoundly affected her actions at the balcony. CP 782-83. Then, the trial court indicated it would exclude Gerlach’s BAC results, RP

620-26, reaffirming its earlier limitation on the Carhart testimony, and extending the limitation to Dr. Vincenzi. CP 1553.<sup>7</sup> However, the court later concluded the BAC results were admissible but expert testimony on their meaning would be limited. RP 1329-33. The trial court granted Gerlach's motion in limine that barred the testimony of Dr. Thomas Wickizer on the reasonable value of the medical expenses Gerlach incurred. CP 1547; RP 169-70.<sup>8</sup>

Belatedly, after the court's ruling on the BAC results, Gerlach's counsel surfaced the idea of a stipulation that she was under the influence in lieu of the admission of the BAC results themselves. RP 1335-36. Cove never agreed to such a stipulation designed to forestall admission of Gerlach's BAC results. RP 1550-60. The trial court accepted Gerlach's stipulation and barred the BAC results or any Vincenzi testimony whatsoever; the court limited Carhart's testimony as well. RP 1560-64.<sup>9</sup>

---

<sup>7</sup> Cove made an offer of proof as to Dr. Vincenzi's testimony. RP 1529-44.

<sup>8</sup> The court subsequently instructed the jury in Instruction 22 that the reasonable value of Gerlach's medical specials was \$205,793.78. CP 1882-83.

<sup>9</sup> That stipulation severely restricted the scope of witness examination. *E.g.*, RP 2400-04, 2715-18. The trial court deemed Dr. Carhart's testimony on the BAC results to be "speculative." CP 1553. Cove made an offer of proof on Dr. Carhart's testimony regarding the biomechanical impact of Gerlach's extreme intoxication. RP 2973-80.

The trial court also barred defense counsel from playing the portion of Gerlach's deposition in which she *admitted* that she was drunk when she fell. RP 2716-21. The court foreclosed testimony from Nate Miller on Gerlach's intoxication. RP 2400-04. Both Liddell brothers testified that they did not observe or know precisely how much

The court then told the jury that “the parties” had agreed to a stipulation that Gerlach was intoxicated. RP 2799-2800. The court indicated that it would correct that misstatement, upon being advised of it by Cove’s counsel. RP 2946-47. It then refused to do so. RP 3361-63.

After extensive argument on the issue, RP 986-1007, the trial court compounded its evidentiary error on the RCW 5.40.060 by instructing the jury on Gerlach’s voluntary intoxication in general terms only in Instruction 20, CP 1225, refusing to give Cove’s instructions on voluntary intoxication based on WPI instructions that informed the jury of the RCW 5.40.060 defense. CP 1223-26.

The jury had numerous questions of the court. CP 1891-99. However, the jury returned a verdict in Gerlach’s favor against Cove finding damages in the amount of nearly \$3.8 million, reduced by her 7% comparative fault, for a total verdict of \$3.53 million plus costs. CP 1888-90. The trial court entered a judgment on that verdict on July 28, 2017 from which this timely appeal ensued. CP 1900-08.

#### D. SUMMARY OF ARGUMENT

The trial court erred in its treatment of Cove’s statutory defense under RCW 5.40.060. The court improperly restricted expert testimony

---

alcohol Gerlach consumed, RP 2629, 2752, making the BAC results even more crucial as the only reliable indicator of Gerlach’s actual level of intoxication.

on the effect of Gerlach's extreme intoxication on her behavior. It precluded the jury from knowing her BAC was .238, even affirmatively misrepresenting the existence of a stipulation. It compounded the error of its evidentiary decisions by improperly instructing the jury on the defense, choosing not to utilize the WPI instructions pertinent to the defense, keeping the jury from knowing the provisions of the statutory defense. The trial court's decisions added up to an effective deprivation of Cove's statutory defense.

The trial court erred in concluding that Cove owed a duty to Gerlach, a non-tenant, arising out of the RLTA. It denied summary judgment to Cove on that issue and improperly instructed the jury on Gerlach's remedies against Cove. This Court has never expressly adopted the *Restatement (2d) of Property* § 17.6, nor has any Washington court applied it to non-tenants. The trial court specifically ruled that Gerlach had no contractual remedies against Cove under the lease for Apartment 1202 because she was a non-tenant.

The trial court also abused its discretion in excluding the expert testimony of Dr. Thomas Wickizer on the reasonable value of the medical expenses that Gerlach incurred. Wickizer's testimony met the criteria for the admissibility of expert testimony under ER 702-04, and his testimony was relevant to the jury's decisionmaking on damages.

E. ARGUMENT

(1) The Trial Court Erred in Its Treatment of Issues Associated with RCW 5.40.060

Gerlach's voluntary intoxication is a defense to any claim she may have against Cove. In 1986, the Legislature first established what amounts to a contributory fault standard for those who seek damages resulting from their own voluntary intoxication. RCW 5.40.060 now states in pertinent part:

...it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

Our Supreme Court has confirmed in numerous decisions that the statute is designed to afford defendants a "complete defense" to any action in which the plaintiff was under the influence of alcohol, that intoxication was a proximate cause of the plaintiff's harm, and the plaintiff was more than 50% at fault. In *Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d

1061 (1993), the Court applied the statute to a passenger in a car, noting no ambiguity in the statute’s clear language and observing: “We are obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh.” *Id.* at 841. Similarly, in a case involving a girlfriend’s assault and battery claim against her boyfriend, the Court stated: “the legislature has chosen to curtail the rights of certain intoxicated persons by enacting RCW 5.40.060.” *Morgan v. Johnson*, 137 Wn.2d 887, 896, 976 P.2d 619 (1999). Recently, in *Peralta v. State*, 187 Wn.2d 888, 389 P.3d 596 (2017), the Court reaffirmed the broad sweep of the statute in applying it to an intoxicated pedestrian struck by a WSP vehicle while she was on the road, noting yet again that the statute affords a “complete defense.” *Id.* at 897.

The trial court here erred in limiting testimony on the effect of Gerlach’s intoxication, excluding evidence of Gerlach’s extreme level of intoxication, and instructing the jury on the significance of RCW 5.40.060.

(a) The Trial Court Abused Its Discretion in Curtailing Expert Testimony on the Physical Effects of Gerlach’s Extreme Intoxication

The trial court abused its discretion in restricting the testimony of Cove’s experts, Dr. Michael Carhart and Dr. Frank Vincenzi, on the effect of Gerlach’s extreme intoxication on her decisionmaking in connection with her fall. Dr. Carhart was prepared to testify on the biomechanical

effects of Gerlach's fall. CP 520-36. His credentials are extensive. CP 521-23. In addition to his testimony on whether Gerlach's fall occurred as a result of a rail breaking or her attempting to climb into a window, he would have testified additionally:

Consumption of alcohol places individuals at a higher fall risk. Studies have demonstrated that relative to sober individuals, individuals that have a blood alcohol content of 0.06 and 0.10% have decreased stability, display movement pattern changes related to the level of alcohol ingestion, and have impaired adaptation to perturbations. Further studies have shown diminished psychomotor performance, including increased reaction time. Based on Ms. Gerlach's blood alcohol concentration at the time of the subject incident, she likely had diminished stability, psychomotor functioning, reaction time performance, and ability to manage complex motor tasks, such as trying to maneuver over a railing. Per Ms. Wendy Rafael's declaration, Ms. Gerlach may have climbed over the railing on previous occasions without incident. In my opinion, Ms. Gerlach's intoxication would have led to differences in movement patterns and forces while performing tasks with which she had previous experience, such as climbing over a railing.

CP 528-29.

Similarly, Dr. Vincenzi was qualified to testify. RP 1530. He was prepared to testify on the effect of Gerlach's extreme intoxication. CP 508-13, 932-37. He concluded that her intoxication more probably than not caused her fall because such an extreme level of intoxication "impaired her ability to recover from an impending fall and thus contributed to the tragic outcome." CP 512, 936. Her judgment and

psychomotor function were adversely impacted by her intoxication. CP 511, 935.

At trial, the jury was not permitted to consider Dr. Vincenzi's testimony at all, and Dr. Carhart was allowed to present only very limited testimony.

Washington law on the admissibility of expert testimony is set forth in three core rules. ER 702 generally establishes when expert testimony may be utilized at trial:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 704 authorizes an expert to testify on an ultimate fact issue the trier of fact must resolve:<sup>10</sup>

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ER 703 allows an expert to base his or her testimony on facts received before the hearing in the case and may even include facts not otherwise admissible:

The facts or data in the particular case upon which an

---

<sup>10</sup> An expert may testify on an ultimate issue for the trier of fact so long as the expert does not render a legal conclusion. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007) (expert could testify to "hazardous condition" and existence of "zone of danger" in tort case).

expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Since *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), Washington has employed a three-part test to determine if expert testimony is admissible: (1) is the witness qualified to testify as an expert? (2) is the expert's theory based on a theory generally accepted in the scientific community? and (3) would the testimony be helpful to the trier of fact? *Accord, Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). While trial courts are afforded wide discretion in applying this test, *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013), Washington appellate courts have reversed trial court exclusion of expert testimony.

Our courts recognize that ER 702-05 express a liberal policy favoring the admissibility of expert testimony.<sup>11</sup> *Johnston-Forbes v.*

---

<sup>11</sup> As Professor Tegland stated:

The Evidence Rules reflect the widely-held view that a reasoned evaluation of the facts is often impossible without the proper application of scientific, technical, or specialized knowledge. Expert testimony is expressly permitted under Rule 702, and the normal rules requiring a witness to avoid opinionated testimony and to testify from firsthand knowledge are modified to accommodate the testimony of the expert.

5B Karl B. Tegland, *Wash. Practice Evidence* (5th ed.) at 39.

*Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014) (expert testimony on biomechanical forces admissible). See also, *Gonzalez-Mendoza v. Burdick*, 175 Wn. App. 1038, 2013 WL 3477281 (2013) (biomechanical forces expert testimony admissible); *Taylor v. Bell*, 185 Wn. App. 270, 286-87, 340 P.3d 951 (2014), review denied, 183 Wn.2d 1012 (2015) (trial court erred in excluding testimony of law professor who was not licensed in Washington although he had extensive experience on multi-jurisdictional corporate practice); *Ponce v. The Mountaineers*, 190 Wn. App. 1048, 2015 WL 6684507 (2015), review denied, 185 Wn.2d 1019 (2016) (expert testimony on industry custom in winter recreation industry); *L.M. v. Hamilton*, 200 Wn. App. 535, 402 P.3d 870 (2017) (trial court properly admitted testimony of biomechanical engineer on the natural forces of labor in a malpractice claim against a midwife).

The trial court improperly limited this expert testimony. Under the liberal interpretation given by our courts to the admission of expert testimony, the testimony of Drs. Carhart and Vincenzi on the effect of Gerlach's extreme intoxication on her behavior should have been admitted. This evidence was plainly relevant to how Gerlach fell, but more critically, it was highly relevant as to whether her intoxication was a proximate cause of her fall and injuries and the percentage of fault attributable to her own conduct, the key elements of an RCW 5.40.060

defense. The trial court erred in excluding this testimony.

(b) The Evidence of Gerlach's .238 BAC Should Have Been Heard by the Jury<sup>12</sup>

The trial court refused to allow Cove to present evidence of Gerlach's *extreme* intoxication at the time of her injury. Her .238 BAC far exceeded the applicable legal limitation for drinking and driving. RCW 46.61.502(1).

First, nothing in RCW 5.40.060 restricts or excludes evidence of a plaintiff's alcohol consumption, intoxication, or BAC. This is because the Legislature *specifically* determined that where a defendant asserts this affirmative defense – that a plaintiff was intoxicated and that intoxication was a proximate cause of her injuries – such evidence *must* be admitted in order to prove the defense.

No appellate case has determined that a court may limit a defendant's use of BAC results to document a plaintiff's intoxication in an RCW 5.40.060.<sup>13</sup> Indeed, where a plaintiff sues a commercial liquor

---

<sup>12</sup> Washington appellate courts generally review evidentiary decisions for an abuse of discretion, *Veit ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011), but a court abuses its discretion if its ruling is manifestly unreasonable or is based on untenable grounds or reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). An incorrect application of the law, as here, necessarily constitutes an abuse of discretion. *Wash. State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

<sup>13</sup> In *Geschwind*, for example, both the plaintiff's and the defendant's intoxication were before the jury in determining whether the plaintiff's intoxication was a proximate cause of his injury and whether plaintiff was more than fifty percent at fault.

provider for overserving a patron, our courts now permit admission of the overserved patron's BAC at the time of her/his injury. *Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009). There, the Court specifically found that BAC results were corroborating evidence on the question of whether a person was apparently intoxicated, the test for a cause of action against a commercial seller of alcohol by third persons harmed by the drunk. *Id.* at 543 ("BAC evidence is relevant as corroborative and supportive of the credibility of first hand observations.").<sup>14</sup> It should be no different here as such evidence would be supportive of the fact that Gerlach was intoxicated, a point on which Cove had the burden of proof under RCW 5.40.060<sup>15</sup> and additionally relevant on the point that Gerlach

---

The defense introduced evidence of the plaintiff's 0.17% BAC result to prove proximate cause and comparative fault, and the jury found the plaintiff to be 70% at fault, barred from any recovery under RCW 5.40.060. 121 Wn.2d at 837. The evidence of plaintiff's intoxication and BAC level was presented in *Geschwind* not only as to whether the plaintiff was intoxicated, but also as to whether the plaintiff's intoxication proximately caused the injury, and to determine the plaintiff's percentage of fault, if any. The issue of contributory negligence is one for the jury. *Young v. Caravan Corp.*, 99 Wn.2d 655, 661, 663 P.2d 834, *opinion amended by* 672 P.2d 1267 (1983). Limiting Cove to arguing only that Gerlach was "intoxicated" without allowing Cove to present evidence as to the degree of her intoxication and its effect on her actions, effectively deprived Cove of the statute's defense. In *Peralta*, a case where the plaintiff admitted in requests for admissions that she was under the influence and the trial court so instructed the jury, the WSP nevertheless presented additional evidence of Peralta's intoxication. 187 Wn.2d at 900 n.6.

<sup>14</sup> Gerlach's counsel mistakenly argued to the trial court that BAC results were inadmissible in overservice cases. RP 225-26. The trial court adopted counsel's misinterpretation of *Faust*. RP 620-26.

<sup>15</sup> As the Supreme Court noted in *Peralta*, to establish that the plaintiff was under the influence of intoxicating liquor at the time of the accident, the defendant must meet the definition in RCW 46.61.502 that specifically requires proof that the plaintiff's

was so intoxicated that she fell off the balcony due to her own physical limitations, rather than any defect in Cove's balcony.

Moreover, there is no basis in the Evidence Rules to restrict or limit the presentation of evidence of plaintiff's intoxication and whether it was a proximate cause of her injuries. Evidence of intoxication was central to one of Cove's defenses in this case, and any potential "prejudice" to Gerlach that the introduction of such evidence entails is precisely what the statute contemplates and intends. The Legislature effectively determined as a matter of public policy that Gerlach's intoxication, the extent of her intoxication, and the effect of her intoxication on her actions that night are probative of the statutory defense,<sup>16</sup> and such evidence should have been presented to the jury. Where evidence is probative of a central issue in the case, the danger of any unfair prejudice substantially outweighing that probative value of the evidence is minimal. *Sisley v. Seattle School Dist. No. 1*, 171 Wn. App. 227, 286 P.2d 974 (2012), *review denied*, 176 Wn.2d 1015 (2013).

ER 403 allows a court to exclude evidence *only* where it is so unfairly prejudicial as to substantially outweigh the evidence's probative

---

BAC exceeded 0.08%. 187 Wn.2d at 894. This plainly made Gerlach's BAC results *relevant* here.

<sup>16</sup> Simply put, in creating the defense in RCW 5.40.060, the Legislature made clear that the evidence of a defendant's intoxication, both its existence *and* its degree, are fully relevant.

value. Under ER 403, the relevance of the evidence sought to be admitted is assumed. *Carson v. Fine*, 123 Wn.2d 206, 222, 867 P.2d 610 (1994). Further, the fact that the evidence may be prejudicial to a party is not enough to warrant its exclusion. It is important to recognize that “nearly all evidence will prejudice one side or the other in a lawsuit.” *Id.* at 224 (emphasis added).

Proximate cause and percentages of fault under RCW 5.40.060(1) are questions for the jury. *Hansen v. Friend*, 118 Wn.2d 476, 484, 824 P.2d 483 (1992). Cove’s evidence of Gerlach’s voluntary intoxication, both documentary and testimonial, also bore on the proof of the elements of the intoxication defense. RCW 5.40.060 required Cove to prove Gerlach’s intoxication, that her intoxication was a proximate cause of her injuries, and that plaintiff was more than fifty percent at fault for the injuries. RCW 5.40.060(1). Cove therefore should have been allowed to present full evidence of Gerlach’s intoxication, its degree and its effect, as both are central to proving the elements of the intoxication defense and contributory negligence more generally. The level of Gerlach’s intoxication, not just the fact that she was at or above 0.08% BAC, is highly relevant to the central issues in this case. There were no grounds present to limit or restrict Cove’s presentation of intoxication evidence, and it was a question of fact for the jury whether Gerlach’s alcohol

consumption and resulting severe intoxication were a proximate cause of her injuries, and if so, to what degree.<sup>17</sup> That evidence, by its nature and given the defense of RCW 5.40.060, was not *unfairly* prejudicial within the meaning of ER 403.

Similarly, the trial court could not rely on ER 611 to exclude the BAC results, as Gerlach contended below. ER 611(a) grants a court authority to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence in order to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. This rule generally allows a trial court to “exercise reasonable control over the orderly presentation of argument and evidence.” *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010). The cases interpreting ER 611 generally pertain to the matter of questioning by counsel or the scope of cross examination. *See generally, Stevens v. Gordon*, 118 Wn. App. 43, 74 P.3d 653 (2003) (the court has broad discretion to permit leading questions and will not be reversed absent abuse of that discretion); *Farah v. Hertz Transporting, Inc.*, 196 Wn. App. 171, 383 P.3d 552, *review denied*, 390 P.3d 332 (2016) (the

---

<sup>17</sup> That the jury might be more inclined to find that at 0.238% BAC Gerlach’s intoxication was a proximate cause of her injuries and that her overall fault exceeded 7% based on such evidence only confirms the prejudice of the trial court’s decision to Cove.

court properly sustained objections to counsel's repeatedly posing questions on cross examination that were argumentative and mischaracterized the evidence); *In re Detention of West*, 171 Wn.2d 383, 256 P.3d 302 (2011) (the court has discretion to limit cross examination of an expert on issues beyond the scope of direct examination of the expert, where the scope of cross examination should be limited to the issues raised on direct).

Further, the rule actually mandates that a court must exercise reasonable authority to make the interrogation and presentation of evidence effective for the ascertainment of the truth. ER 611(a)(1). The restriction on Cove's presentation of evidence of Gerlach's alcohol consumption and intoxication, and the resulting effects on her actions and decision making, only impeded the jury's ability to ascertain the truth in this matter.

In sum, the trial court erred in excluding Gerlach's BAC results.<sup>18</sup>

(c) The Trial Court Erred in Instructing the Jury on Gerlach's Voluntary Intoxication<sup>19</sup>

---

<sup>18</sup> As noted *supra*, the trial court compounded this error when it told the jury that *the parties* stipulated to the fact that Gerlach was intoxicated when there was *no such stipulation*.

<sup>19</sup> Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. On appeal, this Court reviews errors of law in jury instructions *de novo*, and an instruction's erroneous statement of the applicable law is reversible error where it prejudices a party. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

Rather than give the WPI instructions on the RCW 5.40.060 defense requested by Cove, CP 1532-38, the trial court gave a single instruction on the statutory defense, Instruction 20 (*see* Appendix), CP 1225, and it is an incorrect statement of the law on a plaintiff's voluntary intoxication under RCW 5.40.060. Cove was entitled to an instruction like the ones it proposed (*see* Appendix) that advised the jury of the significance of Gerlach's voluntary intoxication under the statute. The trial court refused to give those instructions. RP 3513-14. For example, WPI 16.03 discloses the existence of the defense to the jury, as did Cove's proposed instruction 18. CP 1223. Similarly, WPI 16.04 defines for the jury proof of being under the influence of alcohol, as did Cove's proposed instruction 19. CP 1224. WPI 16.05 defined being under the influence, as did Cove's proposed instruction 20. CP 1225. The trial court's failure to give these specific WPI instructions on the RCW 5.40.060, or similar instructions derived from the statute or case law,<sup>20</sup> effectively deprived Cove of the opportunity to argue to the jury the statutory defense in RCW 5.40.060.

---

<sup>20</sup> *See, e.g.*, Cove's proposed instruction 21 and supplemental instructions. CP 1226, 1749-50. Cove offered those proposed supplemental instructions after the trial court decided to allow Gerlach's admission that she was under the influence. The court declined to explain the significance of the admission by those instructions. RP 1792-93, 2785-87.

Instruction 20 did not accurately reflect RCW 5.40.060, nor did it give the jury the necessary legal grounds upon which to base its decision. When coupled with the trial court's restrictions on the testimony of its expert witnesses and the exclusion of Gerlach's BAC results, the trial court severely hobbled Cove's presentation of this defense. This was prejudicial error.

(2) The Trial Court Erred in Basing Any Duty Cove Owed to Gerlach on the RLTA

Gerlach's complaint claimed that she was owed a duty of care by Cove arising out of Cove's obligations to Miller, its tenant, under the RLTA. CP 2. When Cove moved for partial summary judgment to dismiss any such claim, the trial court erred in denying Cove's motion. CP 676-77.<sup>21</sup> In particular, the trial court erred in concluding that an action for damages could arise out of an alleged violation of the RLTA, particularly as to a person who was not a tenant.<sup>22</sup> The trial court so instructed the jury in Instruction 13. CP 1873. Cove objected to it. RP 3487-89, 3511. The trial court compounded its error by instructing the

---

<sup>21</sup> The trial court, however, granted Cove's motion for summary judgment arising out of her allegation that Cove breached its contract with her, *i.e.*, the lease agreement. CP 676.

<sup>22</sup> The trial court asserted in denying Cove's motion that "although the Plaintiff did not sign the lease and was technically not a 'tenant,' the warranty of habitability of the RLTA as contained in RCW 59.18.060 applies to the Plaintiff." CP 677.

jury that a landlord could be liable in tort to third persons for violation of statutes and codes. The trial court instructed the jury on Cove's potential exposure to negligence based on statute in Instructions 15 and 16. CP 1875-76. That liability was only predicated on RLTA landlord obligations, however. *Id.*

First, Gerlach was not Cove's tenant. She never signed a written lease agreement with Cove; only Miller did so. On May 1, 2009, Miller entered into a lease agreement with Cove Apartments to rent Apartment 1202. His lease agreement was for one adult (himself). He paid a separate fee for Gerlach's black lab, which he expected she would bring with her when she visited. CP 159-60, 163-83. The next year, on May 1, 2010, Miller signed a new lease agreement with Cove to rent Apartment 1202. His lease agreement was for himself and one dog. CP 160, 185-202. His 2011 lease, signed on December 27, 2010, was again for himself and one pet. CP 160, 203-21. On September 1, 2011, Miller signed a lease with Cove for Apartment 1202, again, for himself and the dog. CP 160-61, 222-40. This was the lease agreement in effect at the time of Gerlach's fall.

That lease expressly stated and required that Miller would be the *only* person to occupy Apartment 1202:

The apartment is leased to the resident for occupancy solely

by 1 adults (age 18 and over) and 0 minors, consisting of... Nathan Miller and resident further agrees not to sublet any portion of the apartment, and not to keep any roomer, or boarders or any other way increase the occupancy of the apartment beyond that specified herein... No person is permitted to occupy the premises unless authorized by the lease agreement.

CP 222. The terms of the lease agreement were never modified to include Gerlach as a tenant. CP 161. She never made an application to reside at the Cove Apartments. *Id.* She never signed a lease agreement with Cove. *Id.* Gerlach and Miller conceded that neither of them remember ever telling Cove management that Gerlach was living in Apartment 1202. CP 53, 59-60, 61-62, 66. Gerlach generally received all of her mail at her parents' house. CP 52-53, 57-58. On one occasion, Cove received a package addressed to Gerlach at Miller's address. CP 70-71. When Cove's former community director, Doris Johnson, asked Miller whether Gerlach was living with him, Miller denied it and said she had her own place. CP 53, 71. The police report from the night of the accident listed Gerlach's address as her parents' address. CP 53, 73.

In sum, the record was clear that Gerlach was not a Cove tenant, as the trial court determined in denying her contractual relief as a matter of law.

In general terms, landowners are not guarantors of safety for persons on their property. *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12,*

144 Wn.2d 847, 859-60, 31 P.3d 684 (2001); *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996); *Geise v. Lee*, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975). In cases based on common law premises liability, landowners owe their tenants and other invitees a common law duty of care. *Musci*, 144 Wn.2d at 855-56 (citing *Restatement (Second) of Torts* § 343 (1965)) (emphasis added).<sup>23</sup> But the question of whether a landlord owes a duty in tort arising out of the RLTA is not clear under Washington law. For example, the RLTA itself does not specifically afford a non-tenant any right to relief in tort.

The trial court correctly discerned on summary judgment that Cove did not breach a lease agreement with Gerlach, an agreement that did not exist. CP 676-77.<sup>24</sup> However, it erred in broadly applying the remedies of the RLTA to a non-tenant like Gerlach.

The RLTA defines a tenant as “any person who is *entitled to occupy a dwelling unit* primarily for living or dwelling purposes *under a rental agreement.*” RCW 59.18.030(27) (emphasis added).<sup>25</sup> The RLTA

---

<sup>23</sup> The trial court instructed the jury on Cove’s exposure to premises liability in Instructions 13 and 14. CP 1873-74.

<sup>24</sup> Gerlach did not even contest this. CP 295.

<sup>25</sup> A “rental agreement” is defined as “all agreements which establish or modify the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit.” RCW 59.18.030(25).

provides a tenant various remedies for problems associated with the tenant's premises. RCW 59.18.060. Moreover, this Court concluded in *Aspon v. Loomis*, 62 Wn. App. 818, 816 P.2d 751 (1991), *review denied*, 118 Wn.2d 1015 (1992), that the landlord's duties are exclusively articulated in the RLTA and because it was not expressly referenced in the RLTA, a tenant could not recover for burns incurred from brushing up against a hot pipe in a common area; insulation of pipes was not a landlord duty in RCW 59.18.060.

In *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 17 P.3d 641 (2001), Division III held that a tenant injured by a garage door striking him was limited in his remedies under the RLTA itself to those set forth *in the RLTA itself*. *Id.* at 471. A tenant was not entitled to monetary damages for a violation of the RLTA. *Id.* at 472. The court reversed a judgment for a tenant where the trial court instructed the jury that a tenant could recover damages for the landlord's failure to comply with the RLTA. *Id.* at 471. *See also, Wade v. Hulse*, 110 Wn. App. 1062, 2002 WL 398502, *review denied*, 147 Wn.2d 1021 (2002).

In *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001), a split Division III addressed the question of the remedies afforded a tenant injured in a case involving a fall on steps outside the tenant's apartment. That court noted that the RLTA did not create a generally actionable duty

on the part of the landlord to keep the premises fit for habitation; rather, the landlord's duties were limited to those set forth in RCW 59.18.060. *Id.* at 816. But, the court expanded common law relief available to a tenant, however, by adopting the *Restatement (2d) of Property* § 17.6.<sup>26</sup> Subsequently, on remand, in *Lian v. Stalick*, 115 Wn. App. 590, 62 P.3d 933 (2003), Division III reaffirmed its adoption of the *Restatement* standard establishing liability for landlords if they breach an implied warranty of habitability or duty imposed by statute or regulation, effectively making RLTA violations actionable in tort through the back door and overriding its own decision in *Dexheimer*. *See also, Tucker v. Hayford*, 118 Wn. App. 246, 257-58, 75 P.3d 980 (2003) (tenants who became sick from contaminated well could sue landlords under the RLTA).

Division II declined to apply *Lian's* analysis in a case involving an injury to a non-tenant occurring in a dark staircase, a common area, in *Sjorgen v. Properties of Pac. NW LLC*, 118 Wn. App. 144, 149-50, 75 P.3d 592 (2003), and in a case involving a personal injuries actions by a non-tenant, a roller blader injured by a falling garage door. *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005). The *Pruitt* court noted

---

<sup>26</sup> Under § 17.6, a landlord may be liable in tort to the tenant or third parties if the landlord has notice of a defective condition on the premises, fails to repair it, and the condition breaches an implied warranty of habitability or a duty created by statute or administrative code.

that the *Lian* court “was not asked to decide, and did not decide, whether the implied warranty of habitability should be extended to persons other than the tenant.” *Id.* at 332. The court declined to adopt § 17.6 of the *Restatement* as to non-tenants:

Although this section recommends extending the warranty to third persons other than the tenant, it has not been adopted in this state. Neither party cites or discusses the authorities, if any, on which it is based. Neither party identifies or discusses any of the competing policy considerations that should be considered and addressed when deciding whether to extend the warranty of habitability to third persons other than the tenant. Given this paucity of briefing on what might be a significant question, we decline to address that question in this case.

*Id.* See also, *Johnson v. Miller*, 178 Wn. App. 1045, 2014 WL 129263 (2014) (declining to extend § 17.6 to non-tenants).<sup>27</sup>

This Court has never adopted § 17.6 of the *Restatement* generally as the applicable standard, nor has it ever applied that provision to a non-tenant like *Gerlach*.<sup>28</sup> It should not do so now.

---

<sup>27</sup> Division II has applied § 17.6 to tenants, *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013), but it has been exceedingly careful to do so, essentially on a case-by-case basis. *Figuracion v. Rembrandt Realty Trust*, 188 Wn. App. 1022, 2015 WL 3759291, review denied, 184 Wn.2d 1016 (2015) (affirming summary judgment in landlord’s favor for radiator burns to tenant’s daughter, holding landlord owed no actionable duty).

<sup>28</sup> A federal district court observed in *Pinckney v. Smith*, 484 F. Supp. 2d 1177 (W.D. Wash. 2007) that there is even a split of the divisions of the Court of Appeals on what qualifies as “unhabitable” under the RLTA for purposes of an implied warranty of habitability. In *Wright v. Miller*, 93 Wn. App. 189, 200-01, 963 P.2d 934 (1998), review denied, 138 Wn.2d 1017 (1999), this Court affirmed the dismissal of a claim for damages arising out of a fall down a stairwell lacking a guardrail because the lack of a guardrail

The RLTA was designed to regulate the contractual relationships between Washington landlords and tenants. It was not intended to create a basis for non-tenants to recover damages in tort. Gerlach had ample grounds under common law premises liability principles against which to proceed against Cove. The trial court should have granted summary judgment to Cove on the RLTA and should not have instructed the jury in Instructions 13-16 based on the RLTA.<sup>29</sup>

(3) The Trial Court Erred in Excluding Dr. Wickizer's Testimony on the Reasonable Value of Gerlach's Medical Expenses

Gerlach moved *in limine* to exclude the testimony of Dr. Thomas Wickizer on the reasonableness of Gerlach's medical expenses on the basis for ER 402, 403, and 702. CP 945-52. Cove opposed that part of her motions *in limine*. CP 1338-42. The trial court excluded Dr. Wickizer's testimony. CP 1547; RP 169-70. This was error.

Just as the trial court abused its discretion in excluding key testimony by Drs. Vincenzi and Carhart, it abused its discretion in

---

did not render the premises "uninhabitable." *But see, Landis & Landis Const. LLC v. Nation*, 171 Wn. App. 157, 286 P.3d 979 (2012), *review denied*, 177 Wn.2d 1003 (2013) (rodent infestation).

<sup>29</sup> Those instructions were prejudicial to Cove. While Cove has not challenged the trial court's other instructions on its duty to Gerlach, the jury found liability against Cove on an undifferentiated basis as between Gerlach's theories of negligence. CP 1888. This Court cannot know if the reason for the jury's decision was common law premises liability or the incorrect statements of law found in Instructions 13-16.

excluding Dr. Wickizer's testimony.<sup>30</sup> There is little question that Dr. Wickizer's testimony met the *Allery* test, as liberally construed in Washington. He was well-qualified. CP 1404-35.<sup>31</sup> His theory is not novel, but is recognized in the scientific community.<sup>32</sup> Ultimately, his testimony would have been helpful to the jury.

Central to Dr. Wickizer's testimony is the fact that a plaintiff in a negligence case may recover only the *reasonable value* of medical services received, not merely the total of all bills paid. *Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997) (citing *Torgeson v. Hanford*, 79 Wash. 56, 58-59, 139 P. 648 (1914)). This is because medical bills are not inherently or presumptively reasonable: "medical

---

<sup>30</sup> Dr. Wickizer prepared an extensive report. CP 1379-1403.

<sup>31</sup> Dr. Wickizer has served as an expert witness regarding the reasonableness of medical expenses in other cases, as Gerlach acknowledged below. CP 945. Indeed, Washington courts have permitted Dr. Wickizer's expert testimony because it meets the applicable evidentiary standards and is helpful to the fact-finder. CP 1437-43. *See also*, *Riedel v. Middendorf* (Kitsap Cty. Cause No. 15-2-00745-1) Order on Plaintiff's Motion to Exclude Testimony of Tom Wickizer entered on October 31, 2017.

<sup>32</sup> Testimony which does not involve new methods of proof of new scientific principles from which conclusions are drawn is not considered novel and need not be subjected to the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) test. *State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747 (1994) (holding that the *Frye* test did not apply to computer programs that were "nothing more than sophisticated record-keeping systems"); *State v. Vermillion*, 112 Wn. App. 884, 862, 51 P.3d 188 (2002) (electronic tracking device not based on any new methods of proof of new scientific theory; *Frye* test did not apply); *State v. Roberts*, 142 Wn.2d 471, 520, 14 P.3d 713 (2000) (blood splatter analysis was not based on any new methods of proof or new scientific principles and was not subject to *Frye* test). Dr. Wickizer's testimony is rooted in basic, well-established economics. CP 1387-1401. Dr. Wickizer's testimony is not the sort of testimony to which *Frye* applies because his testimony does not involve new methods of proof or new scientific principles.

records and bills are relevant to prove past medical expenses *only if supported by additional evidence* that the treatment and the bills were both necessary and reasonable.” *Id.* at 543 (emphasis added). Therefore, “the plaintiff must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills.” *Id.* The trial court’s decision deprived the jury of relevant evidence on the reasonableness of her medical expenses.<sup>33</sup> *Patterson* has never been overruled.

Below, Gerlach cited *Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 20 P.3d 496 (2001) in support of her position that Dr. Wickizer’s testimony should be stricken because such testimony was irrelevant. CP 949-50. There, the issue was whether a defendant should have been allowed to present testimony on the discrepancy between the amounts billed by a plaintiff’s treating physician and the amounts accepted by the physician’s payment in full. 105 Wn. App. at 615. Although the court excluded evidence that the physician accepted what plaintiff’s insurance company paid as payment in full, the court expressly stated that the question was not how much is ultimately paid but rather “whether such sums *requested* for medical services are reasonable.” *Id.* at 616 (emphasis added). The court stated that defendant “could have challenged the

---

<sup>33</sup> Constitutionally, the jury must weigh the evidence and determine the facts, including the amount of damages. *See, e.g., Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 646-47, 771 P.2d 711 (1989); *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985).

reasonableness of [plaintiff's] medical bill by presenting testimony that the charges were unreasonable.” *Id.* Although plaintiff’s physician stated his bill was reasonable, the court noted that the defendant presented no evidence to the contrary. *Id.* Plainly, Cove would have presented contrary evidence.

Gerlach presented evidence from Dr. Lowell Finkleman claiming her medical expenses were reasonable. RP 1358-72. It was misleading for the jury, and unfairly prejudicial to Cove that Gerlach was permitted to present such testimony in a vacuum without rebuttal. Dr. Wickizer’s report demonstrated that he has extensive knowledge of and experience evaluating the cost of medical services. CP 1380-81. He could speak authoritatively on the reasonable cost of medical services and how the charges billed to Gerlach compare to charges for like services. CP 1404-35. Dr. Wickizer’s testimony would have helped the jury evaluate the reasonableness of Gerlach’s medical bills by providing the jury with a comprehensive understanding of how medical billing works and a comparative analysis of the cost of medical services.

Dr. Wickizer was not offering testimony on what was charged versus what was paid. CP 1387-1401. The *Hayes* court recognized that a defendant may challenge the reasonableness of medical bills by presenting testimony that the charges were unreasonable; that is precisely what Cove

intended to do. *Hayes*, 105 Wn. App. at 616.

The trial court erred in excluding Dr. Wickizer's testimony.

F. CONCLUSION

Gerlach's injuries were ultimately the result of two negligent decisions she made: The first was her ill-considered decision to climb over into the balcony of one of Cove's second-story apartment units from the outside walkway. The second was her decision to do so while heavily intoxicated.

The trial court deprived Cove of a fair trial by frustrating its presentation of its RCW 5.40.060 defense, mischaracterizing its duty to Gerlach, and depriving it of key evidence of the reasonable value of her medical expenses. This Court should reverse the trial court's judgment and order a new trial. Costs on appeal should be awarded to Cove.

DATED this 23d day of January, 2018.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Pauline V. Smetka, WSBA #11183  
Hellsell Fetterman LLP  
1001 Fourth Avenue #4200  
Seattle, WA 98154-1154  
(206) 292-1144

Attorneys for Appellants  
The Cove Apartments LLC and  
Weidner Property Management LLC

# APPENDIX

Instruction 13:

A landlord is liable for damages proximately caused by a condition on the rented property if it is in violation of:

- (1) An implied warranty of habitability or
- (2) The condition was dangerous, and violated one or more of the following statutory duties:
  - (A) [To] maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition endangers or impairs the health or safety of the tenant;
  - (B) [To] maintain the structural components, including but not limited to roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable.
- (3) The landlord was aware of the condition or had a reasonable opportunity to discover the condition; and
- (4) The landlord failed to exercise ordinary care to repair the condition.

CP 1873.

Instruction 14:

A condition on a property rented violated the implied warranty of habitability when it creates an actual or potential safety hazard to a tenant or to the tenant's invitees, including guests.

CP 1874.

Instruction 15:

Administrative Rules provides that:

(1) “The owner of the premises shall maintain the structures and exterior property in compliance with these requirements, except as otherwise provided for in this code....”

(2) “All exterior property and premises shall be maintained in a clean, safe and sanitary condition.”

(3) “All accessory structures, including detached garages, fences and walls, shall be maintained structurally sound and in good repair.”

(4) “The exterior of a structure shall be maintained in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare.”

(5) “The following conditions, shall be determined as unsafe and shall be repaired or replaced to comply with the International Building Code or the International Existing Building Code as required for existing buildings:

...

3. Structures or components thereof that have reached their limit state.”

(6) “Every handrail and guard shall be firmly fastened and capable of supporting normally imposed loads and shall be maintained in good condition.”

CP 1875.

Instruction 16:

The violate, if any, of an administrative rule, is not necessarily negligence, but may be considered by you as evidence in determining negligence.

CP 1876.

Instruction 20:

A person who becomes voluntarily intoxicated is held to the same standard of care as one who is not so affected. The intoxication of the plaintiff at the time of the occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.

CP 1880.

Instruction 22:

It is the duty of the Court to instruct you as to measure of damages. By instructing you on damages the Court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then, you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by negligence of the defendants.

If you find for the plaintiff your verdict must include the following undisputed items:

Past Medical Expenses: **\$205,793.78**

In addition you should consider the following past economic damages elements:

The reasonable value of necessary non-medical expenses that have been required to the present time.

In addition, you should consider the following future economic damages elements:

The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future; and

The reasonable value of earnings, and earning capacity lost to the

present time and with reasonable probability to be lost in the future.

In addition you should consider the following non-economic damages elements:

The nature and extent of the injuries;

The disability, disfigurement, loss of enjoyment of life experienced and with reasonable probability to be experienced in the future; and

The pain, suffering, anxiety, emotional distress, humiliation, and fear, both mental and physical, experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions

CP 1882-83.

Defendants' Proposed Number 18:

It is a defense to an action for damages for personal injuries that the person injured was then under the influence of alcohol or any drug, that this condition was a proximate cause of the injury, and that the person injured was more than fifty percent at fault.

CP 1223.

Defendants' Proposed Number 19:

A person is under the influence of alcohol or any drug if, as a result of using alcohol or any drug, the person's ability to act as a reasonably careful person under the same or similar circumstances is lessened in any appreciable degree.

CP 1224.

Defendants' Proposed Number 20:

If you find that, within two hours after the occurrence causing injury, the alcohol concentration in a person's blood was 0.08 or more, then the person was under the influence of alcohol.

If you find that, within two hours after the occurrence causing injury, a person had an alcohol concentration of less than 0.08 in her blood, then it is evidence that may be considered with other evidence in determining whether the person was under the influence of alcohol.

CP 1225.

Defendants' Proposed Number 21:

To establish the defense that the person injured was under the influence, the defendant has the burden of proving each of the following propositions:

First, that the person injured was under the influence of alcohol or any drug at the time of the occurrence causing the injury;

Second, that this condition was a proximate cause of the injury;  
and

Third, that the person injured was more than fifty percent at fault.

If you find from your consideration of all the evidence that each of these proposition has been proved, then this defense has been established.

CP 1226.

Defendants' Proposed Supplemental Instruction:

To establish the defense that the person injured was under the influence, the defendant has the burden of proving each of the following propositions:

First, that the person injured was under the influence of alcohol or any drug at the time of the occurrence causing the injury; *Plaintiff admits this element.*

Second, that this condition was a proximate cause of the injury;  
and

Third, that the person injured was more than fifty percent at fault.

If you find from your consideration of all the evidence that each of these propositions has been proved, then this defense has been established.

CP 1750.

Defendants' Proposed Supplemental Instruction:

A person is under the influence of alcohol or any drug if, as a result of using alcohol or any drug, the person's ability to act as a reasonably careful person under the same or similar circumstances is lessened in any appreciable degree.

"Appreciable" is defined as meaning capable of being perceived or noticed.

CP 1749.

RCW 59.18.060:

The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular:

(1) Maintain the premises to substantially comply with any applicable

code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition endangers or impairs the health or safety of the tenant;

(2) Maintain the structural components including, but not limited to, the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable;

(3) Keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident;

(4) Provide a reasonable program for the control of infestation by insects, rodents, and other pests at the initiation of the tenancy and, except in the case of a single-family residence, control infestation during tenancy except where such infestation is caused by the tenant;

(5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy;

(6) Provide reasonably adequate locks and furnish keys to the tenant;

(7) Maintain and safeguard with reasonable care any master key or duplicate keys to the dwelling unit;

(8) Maintain all electrical, plumbing, heating, and other facilities and appliances supplied by him or her in reasonably good working order;

(9) Maintain the dwelling unit in reasonably weathertight condition;

(10) Except in the case of a single-family residence, provide and maintain appropriate receptacles in common areas for the removal of ashes, rubbish, and garbage, incidental to the occupancy and arrange for the reasonable and regular removal of such waste;

(11) Provide facilities adequate to supply heat and water and hot water as reasonably required by the tenant;

(12)(a) Provide a written notice to all tenants disclosing fire safety and

protection information. The landlord or his or her authorized agent must provide a written notice to the tenant that the dwelling unit is equipped with a smoke detection device as required in RCW 43.44.110. The notice shall inform the tenant of the tenant's responsibility to maintain the smoke detection device in proper operating condition and of penalties for failure to comply with the provisions of RCW 43.44.110(3). The notice must be signed by the landlord or the landlord's authorized agent and tenant with copies provided to both parties. Further, except with respect to a single-family residence, the written notice must also disclose the following:

- (i) Whether the smoke detection device is hard-wired or battery operated;
  - (ii) Whether the building has a fire sprinkler system;
  - (iii) Whether the building has a fire alarm system;
  - (iv) Whether the building has a smoking policy, and what that policy is;
  - (v) Whether the building has an emergency notification plan for the occupants and, if so, provide a copy to the occupants;
  - (vi) Whether the building has an emergency relocation plan for the occupants and, if so, provide a copy to the occupants; and
  - (vii) Whether the building has an emergency evacuation plan for the occupants and, if so, provide a copy to the occupants.
- (b) The information required under this subsection may be provided to a tenant in a multifamily residential building either as a written notice or as a checklist that discloses whether the building has fire safety and protection devices and systems. The checklist shall include a diagram showing the emergency evacuation routes for the occupants.
- (c) The written notice or checklist must be provided to new tenants at the time the lease or rental agreement is signed;

(13) Provide tenants with information provided or approved by the department of health about the health hazards associated with exposure to indoor mold. Information may be provided in written format individually to each tenant, or may be posted in a visible, public location at the dwelling unit property. The information must detail how tenants can

control mold growth in their dwelling units to minimize the health risks associated with indoor mold. Landlords may obtain the information from the department's web site or, if requested by the landlord, the department must mail the information to the landlord in a printed format. When developing or changing the information, the department of health must include representatives of landlords in the development process. The information must be provided by the landlord to new tenants at the time the lease or rental agreement is signed;

(14) The landlord and his or her agents and employees are immune from civil liability for failure to comply with subsection (13) of this section except where the landlord and his or her agents and employees knowingly and intentionally do not comply with subsection (13) of this section; and

(15) Designate to the tenant the name and address of the person who is the landlord by a statement on the rental agreement or by a notice conspicuously posted on the premises. The tenant shall be notified immediately of any changes in writing, which must be either (a) delivered personally to the tenant or (b) mailed to the tenant and conspicuously posted on the premises. If the person designated in this section does not reside in the state where the premises are located, there shall also be designated a person who resides in the county who is authorized to act as an agent for the purposes of service of notices and process, and if no designation is made of a person to act as agent, then the person to whom rental payments are to be made shall be considered such agent. Regardless of such designation, any owner who resides outside the state and who violates a provision of this chapter is deemed to have submitted himself or herself to the jurisdiction of the courts of this state and personal service of any process may be made on the owner outside the state with the same force and effect as personal service within the state. Any summons or process served out-of-state must contain the same information and be served in the same manner as personal service of summons or process served within the state, except the summons or process must require the party to appear and answer within sixty days after such personal service out of the state. In an action for a violation of this chapter that is filed under chapter 12.40 RCW, service of the notice of claim outside the state must contain the same information and be served in the same manner as required under chapter 12.40 RCW, except the date on which the party is required to appear must not be less than sixty days from the date of service of the notice of claim.

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, or where a tenant unreasonably fails to allow the landlord access to the property for purposes of repair. When the duty imposed by subsection (1) of this section is incompatible with and greater than the duty imposed by any other provisions of this section, the landlord's duty shall be determined pursuant to subsection (1) of this section.

1  
2  
3  
4  
5 **IN THE SUPERIOR COURT OF WASHINGTON**  
6 **FOR KING COUNTY**

7  
8 KIMBERLY J. GERLACH,

9 Plaintiff(s),

10 v.

11 THE COVE APARTMENTS LLC, et al,

12 Defendant(s).

NO. 15-2-25974-1 KNT

ORDER ON DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

(CLERK'S ACTION REQUIRED)

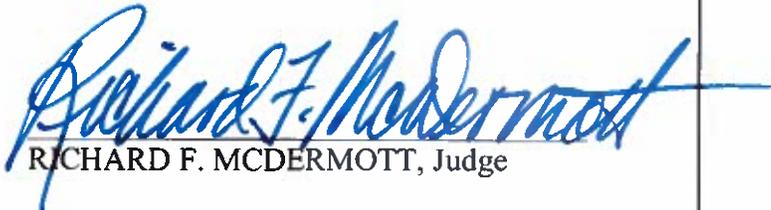
13  
14  
15 Having heard a Motion for Partial Summary Judgment by Defendant on the issues of  
16 breach of contract and violation of the Landlord Tenant Laws and having reviewed all pleadings  
17 and attachments submitted together with applicable jury instructions (WPI's) and statutes (in  
18 particular RCW 59.18.060), the court orders as follows:

- 19  
20  
21 (1) The Plaintiff's breach of contract claims are dismissed.  
22 (2) Defendant's motion to dismiss Plaintiff's claims of violation of the Landlord Tenant  
23 Laws is denied.  
24  
25

Hon. Richard F. McDermott  
King County Superior Court  
Maleng Regional Justice Center  
401 Fourth Ave. N., 2D  
Kent, WA 98032

1 (3) This Court finds that, although the Plaintiff did not sign the lease and was technically  
2 not a "tenant," the warranty of habitability of the RLTA as contained in RCW  
3 59.18.060 applies to the Plaintiff.  
4

5  
6 Signed this 10<sup>th</sup> day of April, 2017.  
7

8   
9 RICHARD F. MCDERMOTT, Judge  
10

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

The Honorable Judge Richard McDermott  
Trial Date: June 5, 2017

**FILED**  
KING COUNTY, WASHINGTON

JUN 08 2017

SUPERIOR COURT CLERK  
BY Kim Dunnett-Graham  
DEPUTY

THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

KIMBERLY J. GERLACH,

NO: 15-2-25974-1 KNT

Plaintiff,

vs.

**ORDER ON PLAINTIFF'S MOTIONS IN  
LIMINE**

THE COVE APARTMENTS, LLC, A  
Washington corporation; and WEIDNER  
APARTMENT HOMES, A Washington  
business entity, dba The Cove Apartments, and  
WEIDNER PROPERTY MANAGEMENT  
LLC, A Washington corporation, and  
WEIDNER ASSET MANAGEMENT LLC, A  
Washington Corporation,

Defendants.

THIS MATTER having come on to be heard before the Court on Plaintiffs' Motions in  
Limine her attorneys of record, *Ben F. Barcus of The Law Offices of Ben F. Barcus & Associates,  
P.L.L.C.*, and *Simon H. Forgette of The Law Offices of Simon H. Forgette*, and the defendants  
being represented by *Pauline Smetka of Hessel Fetterman, LLP* and the Court being duly  
advised does hereby enter the following Order on Plaintiff's Motions in Limine:

ORDER ON PLAINTIFF'S MOTIONS IN LIMINE - 1

Law Offices Of Ben F. Barcus  
& Associates, P.L.L.C.  
4303 Ruston Way  
Tacoma, Washington 98402  
(253) 752-4444 • FAX 752-1035

**ORIGINAL**

1 **PLAINTIFF'S PRIMARY MOTIONS IN LIMINE**

2 **5.1 EVIDENCE OF PRIOR AND/OR SUBSEQUENT UNRELATED INJURIES,**  
3 **ACCIDENTS AND/OR MEDICAL TREATMENT SHOULD BE EXCLUDED AS**  
4 **IRRELEVANT [HARRIS VS. DRAKE].**

5 Granted: \_\_\_\_\_  
6 Denied: \_\_\_\_\_  
7 Reserved: \_\_\_\_\_  
8 Limitations: \_\_\_\_\_

9 RE: prior concussions of Plaintiff – court finds generally not relevant. ~~Nature of~~  
10 ~~concussions may be irrelevant or speculative – Re: expert testimony.~~

11 Re: subsequent falling in campfire, this is not relevant to anything.

12 Re: Pre 2012 remote depression – not relevant.

13 Nature and extent of concussions may be  
14 relevant to experts depending on Plaintiff's  
15 testimony, and, therefore, the court reserves  
16 on the same.

17 **5.2 DEFENDANTS SHOULD BE PRECLUDED FROM ARGUING ACCIDENTS**  
18 **PRE-EXISTING OR SUBSEQUENT INJURIES TO THE PLAINTIFF HAVE**  
19 **CONTRIBUTED TO PLAINTIFF'S INJURIES WHEN THERE IS NO**  
20 **EVIDENCE SUPPORTING SUCH A THEORY.**

21 Granted: \_\_\_\_\_  
22 Denied: \_\_\_\_\_  
23 Reserved: \_\_\_\_\_  
24 Limitations: See Rulings on No. 5.1 above.

25 **5.3 DEFENSE MEDICAL EXAMINATIONS CANNOT BE REFERRED TO AS**  
**"INDEPENDENT"**

Granted: XX  
Denied: \_\_\_\_\_  
Reserved: \_\_\_\_\_  
Limitations: Applies to both Plaintiff and Defense Experts. Refer to Plaintiff Expert or  
Defense Expert.

1 **5.4 HYPOTHETICAL MEDICAL CONDITIONS**

2 Granted: XX

3 Denied: \_\_\_\_\_

4 Reserved: \_\_\_\_\_

5 Limitations: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6 **5.5 COLLATERAL SOURCE IS IN GENERALLY INADMISSIBLE, AND THE**  
7 **DEFENDANT CANNOT BE ALLOWED TO PRESENT INCONSISTENT**  
8 **ARGUMENTS AT TRIAL, CONTRARY TO ITS PREVIOUS ADMISSIONS.**

9 Granted: XX

10 Denied: \_\_\_\_\_

11 Reserved: \_\_\_\_\_

12 Limitations: RE: unemployment benefits – ok to inquire as to Plaintiff’s skills or lack of  
13 skills, but ~~no mention of unemployment benefits forms.~~ Ok to ask employer if they said  
14 [blank] under oath. More prejudicial than probative re unemployment compensation.  
15 “Employment Security Reptmartment” must be  
16 redacted from any evidence shown to the jury.

17 **5.6 THE COURT SHOULD EXCLUDE, PURSUANT TO ER 402, ER 403 AND ER**  
18 **702, THE PROPOSED TESTIMONY OF DEFENSE EXPERT THOMAS**  
19 **WICKIZER, PH.D**

20 Granted: XX

21 Denied: \_\_\_\_\_

22 Reserved: \_\_\_\_\_

23 Limitations: The use of Wickizer would require a change in the rules of evidence. This  
24 is too difficult for the jury to determine reasonableness of every billing. Plaintiff should  
25 not be forced to argue re: discount of insurance “breaks” in the billings.

26 **5.7 TO PROHIBIT NEGATIVE REFERENCES AS TO HOW PLAINTIFFS MIGHT**  
27 **USE THE PROCEEDS OF ANY JUDGMENT**

28 Granted: XX

29 Denied: \_\_\_\_\_

30 Reserved: \_\_\_\_\_

31 Limitations: No prejudicial arguments about how proceeds will be used.

1 by either party.  
2  
3

4 **5.8 LACK OF INSURANCE; DEFENDANT'S POCKET; INSURANCE LIMITS**

5 Granted: XX

6 Denied: \_\_\_\_\_

7 Reserved: \_\_\_\_\_

8 Limitations: Defendants made same arguments in its motions "A" and "C" - to be  
9 equally applied.  
10

11 **5.9 CIRCUMSTANCES OF HIRING COUNSEL**

12 Granted: XX

13 Denied: \_\_\_\_\_

14 Reserved: \_\_\_\_\_

15 Limitations: Defendants may inquire into the nature and  
16 extent of the relationship between Plaintiff  
17 and Plaintiff's witnesses.  
18

19 **5.10 UNDISCLOSED WITNESSES, EXHIBITS AND EVIDENCE/OPINIONS**

20 Granted: XX

21 Denied: \_\_\_\_\_

22 Reserved: \_\_\_\_\_

23 Limitations: If supported by the evidence. Both sides must talk about this outside the  
24 presence of the jury.

25 If something is presented during trial that  
was not produced in discovery, its admission  
will be decided by the court outside the  
presence of the jury.

**5.11 FAILURE TO CALL WITNESS IS INADMISSIBLE**

Granted: XX

Denied: \_\_\_\_\_

Reserved: \_\_\_\_\_

Limitations: \_\_\_\_\_

1 Applies to both Plaintiff and Defendants.

2  
3 **5.12 FAILURE TO MITIGATE**

4 Granted: XX

5 Denied: \_\_\_\_\_

6 Reserved: \_\_\_\_\_

7 Limitations: Other than use of alcohol. Defendant wants to use "use of alcohol." Dr. Murphy cannot speculate as to use of alcohol. Expert can say use of alcohol if there is a medical or scientific fact that can connect to seizures, but no more – if foundation can be laid. Plaintiff will have to have been informed re past use of alcohol after fall. Re future use, increased risk of seizures.

8  
9  
10  
11  
12  
13

*or an increased risk of early onset dementia or Alzheimer's*

14 **5.13 MENTION OF EFFECT OF TAXATION**

15 Granted: XX

16 Denied: \_\_\_\_\_

17 Reserved: \_\_\_\_\_

18 Limitations: To be applied mutually.

19  
20  
21  
22  
23  
24  
25

19 **5.14 EXCLUSION OF SETTLEMENT NEGOTIATIONS OR DISCUSSIONS AND AMOUNTS PAID**

21 Granted: XX

22 Denied: \_\_\_\_\_

23 Reserved: \_\_\_\_\_

24 Limitations: No opposition – to be applied mutually.

25

1 **5.15 INCREASE IN INSURANCE RATES/IMPACT ON TAXES OR OTHER**  
2 **INFLAMMATORY ARGUMENTS/SUGGESTIONS**

3 Granted: XX  
4 Denied: \_\_\_\_\_  
5 Reserved: \_\_\_\_\_  
6 Limitations: No opposition – applied mutually.  
7 \_\_\_\_\_  
8 \_\_\_\_\_  
9 \_\_\_\_\_

8 **5.16 REFERENCE TO THE LOTTERY**

9 Granted: XX  
10 Denied: \_\_\_\_\_  
11 Reserved: \_\_\_\_\_  
12 Limitations: \_\_\_\_\_  
13 \_\_\_\_\_  
14 \_\_\_\_\_

13 **5.17 DEFENDANT'S ER 904**

14 Granted: \_\_\_\_\_  
15 Denied: \_\_\_\_\_  
16 Reserved: XX  
17 Limitations: Must go through each exhibit . ~~The Court fails to see how Nate Miller's~~  
18 ~~lease agreements are relevant. The Plaintiff did not sign the leases.~~  
19 \_\_\_\_\_  
20 \_\_\_\_\_  
21 \_\_\_\_\_

19 **5.18 ARGUMENT THAT MONEY WILL NOT COMPENSATE FOR LOSS MUST**  
20 **BE EXCLUDED**

21 Granted: XX  
22 Denied: \_\_\_\_\_  
23 Reserved: \_\_\_\_\_  
24 Limitations: Applied mutually. Ok to say: "all we can do is award money."  
25 \_\_\_\_\_  
26 \_\_\_\_\_  
27 \_\_\_\_\_

1 **5.19 REFERENCES TO CONTINGENCY FEES MUST ALSO BE PROHIBITED**

2 Granted: XX

3 Denied: \_\_\_\_\_

4 Reserved: \_\_\_\_\_

Limitations: applied mutually.

5  
6  
7 **5.20 SUGGESTIONS THAT A VERDICT IN PLAINTIFF'S FAVOR WILL**  
8 **NEGATIVELY IMPACT DEFENDANT AND/OR THE COMMUNITY ARE**  
9 **STRICTLY PROHIBITED - "GOLDEN RULE" ARGUMENTS**

9 Granted: XX

10 Denied: \_\_\_\_\_

11 Reserved: \_\_\_\_\_

Limitations: Applied mutually.

12  
13  
14 **5.21 THE DEFENDANT SHOULD BE PRECLUDED FROM PRESENTING ANY**  
15 **EXPERT TESTIMONY WITH RESPECT TO "ON AVERAGE" THE TYPES**  
16 **OF INJURIES THE PLAINTIFFS RECEIVED SHOULD HAVE RESOLVED.**

16 Granted: \_\_\_\_\_

17 Denied: \_\_\_\_\_

18 Reserved: XX *The court will*

19 Limitations: ~~Look at Dr. Murphy's deposition. Court would like to be a little more~~  
~~concrete, and a little less theoretical.~~

20  
21 **5.22 THE DEFENSE EXAMINERS SHOULD BE PRECLUDED FROM TESTIFYING**  
22 **WITH RESPECT TO "WADDELL'S" SIGNS AND/OR FROM OTHERWISE**  
23 **COMMENTING ON THE PLAINTIFF'S CREDIBILITY.**

23 Granted: XX

24 Denied: \_\_\_\_\_

25 Reserved: \_\_\_\_\_

Limitations: ~~No physical examination of Plaintiff undertaken.~~ Dr. Zeigler has indicated that Plaintiff was not malingering, and that neuropsychological tests were valid.

1  
2  
3  
4 **5.23 JUROR QUESTIONNAIRE**

5 Granted: XX

6 Denied: \_\_\_\_\_

7 Reserved: \_\_\_\_\_

8 Limitations: The parties will work out an agreed questionnaire.

9  
10 **5.24 LIMITATION OF EVIDENCE RE: CHARACTER/PRIOR BAD ACTS – ER608**

11 Granted: \_\_\_\_\_

12 Denied: \_\_\_\_\_

13 Reserved: XX

14 Limitations: Defense will not show any pictures or Facebook with alcohol: All must be  
15 approved by the court before showing to the jury or referencing in any way. Limited to  
16 activities – no overplaying alcohol. That is more prejudicial than probative. No argument  
17 that Plaintiff is accident prone. Defense admits that there are no specific incidents of prior  
18 misconduct or criminal conviction.

*alone with no people.\**

*After court review.*

19 \* The court will allow limited photos of Plaintiff  
20 with alcohol ~~xxx~~ and only in the event that  
21 she is going to a sporting event or the like.

22 **5.25 THE COURT SHOULD EXCLUDE THE “ENHANCED” 911 CALL AND THE**  
23 **STATEMENTS OF WENDY RAFAEL, WHICH ARE TO SPECULATIVE**  
24 **HEARSAY INCLUDING ANY SPECULATION BY NATHAN MILLER WHO**  
25 **WAS NOT PRESENT AND WHO DID NOT OBSERVE PLAINTIFF’S**  
**ACCIDENT.**

26 Granted: XX

27 Denied: \_\_\_\_\_

28 Reserved: \_\_\_\_\_

29 Limitations: Wendy Rafael’s statements are hearsay and are excluded. Nate Miller is not  
30 a party, and he did not see anything – excluded too.  
31 Speculative statements are more prejudicial than probative. There is no “common scheme  
32 or plan exception.” The 9-1-1 transcript and audio ~~is~~ out.

*about Plaintiff climbing over the railing*

33 However, this evidence can be used for impeachment.

1 If the 911 audio is used for impeachment, the Court will  
2 ~~not~~ provide the transcript because the court tries really  
3 hard to help jury understand evidence. The Court has no problem  
4 **5.25.1 The Defendant's Expert Testimony (Both Mr. Carhart and Dr. Vincenzi, Ph.D Should be Excluded as it relates to Speculative Opinions Regarding**  
5 **how Alcohol or Plaintiff's Alleged Intoxication may have Impacted the**  
6 **Events of October 27, 2012.** with accuracy if used for  
7 impeachment a  
8 first discussed outside presence  
9 of jury.

6 Granted: XX  
7 Denied: \_\_\_\_\_  
8 Reserved: \_\_\_\_\_

9 Limitations: Dr. Vincenzi's testimony would be speculative and is excluded. Dr. Carhart  
10 will not be allowed to testify that alcohol in any way affected Plaintiff relating to his  
11 theory as to Plaintiff's fall. There will be no reference to Plaintiff's blood alcohol level.  
12 See Court's ruling on the record for further analysis.

12 **5.26 THE DEFENDANT SHOULD BE BARRED FROM ARGUING**  
13 **INCONSISTENTLY WITH THEIR PRIOR ADMISSIONS SET FORTH**  
14 **WITHIN THEIR ANSWER.**

14 Granted: \_\_\_\_\_  
15 Denied: XX  
16 Reserved: \_\_\_\_\_

17 Limitations: Jones vs. City of Seattle controls this issue.

18 **5.27 EVIDENCE REGARDING PLAINTIFF'S FINANCIAL CIRCUMSTANCES**

20 Granted: XX  
21 Denied: \_\_\_\_\_  
22 Reserved: \_\_\_\_\_

23 Limitations: To be mutually applied. Similar to Defense Motion "C." RE: bank records  
24 -- Alcohol is excluded. The Court is not inclined to let the bank records into evidence. An  
25 exception is Plaintiff's pre-and post-earnings, which ~~is~~ relevant. The defense will not  
argue that Plaintiff is wealthy, or "does not need the money."

Bank records can be shown to Plaintiff  
during trial for impeachment purposes.

1  
2 **5.28 FILING OF MOTION**

3 Granted: XX

4 Denied: \_\_\_\_\_

5 Reserved: \_\_\_\_\_

6 Limitations: To be mutually applied. Same as Defense Motion "G".

7  
8 **PLAINTIFF'S MOTIONS IN LIMINE RE: GOLDEN RULE; JURY  
9 NULLIFICATION; PERSONAL OPINION**

10 **5.25 DEFENSE COUNSEL MUST BE PROHIBITED FROM VIOLATING THE  
11 GOLDEN RULE**

12 Granted: XX

13 Denied: \_\_\_\_\_

14 Reserved: \_\_\_\_\_

15 Limitations: To be mutually applied.

16 **5.26 DEFENSE COUNSEL MUST BE PROHIBITED FROM ANY ATTEMPT AT  
17 JURY NULLIFICATION**

18 Granted: XX

19 Denied: \_\_\_\_\_

20 Reserved: \_\_\_\_\_

21 Limitations: To be mutually applied.

22 **5.27 DEFENSE COUNSEL MUST BE PROHIBITED FROM OFFERING HIS/HER  
23 PERSONAL OPINION**

24 Granted: XX

25 Denied: \_\_\_\_\_

Reserved: \_\_\_\_\_

Limitations: To be mutually applied.

1 \_\_\_\_\_  
2 \_\_\_\_\_  
3 \_\_\_\_\_

4 **PLAINTIFF'S MOTIONS IN LIMINE REGARDING: EXCLUSION OF PRE-**  
5 **COLLISION AND POST-COLLISION UNRELATED MEDICAL TREATMENT**  
6 **OR CONDITIONS (*Harris* Motion)**

7 **5.28 DEFENSE COUNSEL MUST BE PROHIBITED FROM PRESENTING ANY**  
8 **AND ALL PRE-AND/OR POST-INCIDENT MEDICAL RECORDS,**  
9 **TREATMENT, OR HISTORY OF ANY UNRELATED ACCIDENTS,**  
10 **INCIDENTS OR INJURIES THAT WERE NOT SYMPTOMATIC**  
11 **IMMEDIATELY PRIOR TO THE INCIDENT**

12  
13  
14

15 Granted: \_\_\_\_\_  
16 Denied: \_\_\_\_\_  
17 Reserved: XX  
18 Limitations: \_\_\_\_\_

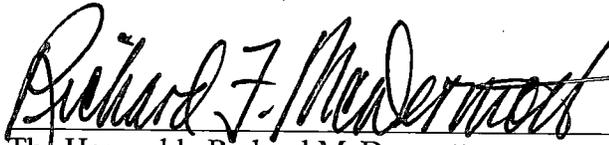
19 of \_\_\_\_\_ See Rulings to No. 5.1 above. The Court will follow the applicable Rules  
20 of Evidence. \_\_\_\_\_  
21 \_\_\_\_\_  
22 \_\_\_\_\_  
23 \_\_\_\_\_

24 **PLAINTIFF'S MOTION IN LIMINE AND SUPPORTING MEMORANDUM TO**  
25 **EXCLUDE HYPOTHETICAL/SPECULATIVE QUESTIONING OF**  
26 **WITNESSES AND TESTIMONY**

27 **5.29 NO EXPERT OPINION CAN BE EXPRESSED ON A SUBJECT WITHOUT**  
28 **PROOF OF UNDERLYING FACTUAL DATA TO SUPPORT THE OPINION.**

29 Granted: \_\_\_\_\_  
30 Denied: \_\_\_\_\_  
31 Reserved: XX  
32 Limitations: The Court will follow the applicable Rules of Evidence.  
33 \_\_\_\_\_  
34 \_\_\_\_\_  
35 \_\_\_\_\_

1 DONE IN OPEN COURT this 8<sup>th</sup> day of June, 2017.

2  
3   
4 The Honorable Richard McDermott

5 Presented by:

6  
7 \_\_\_\_\_  
8 Ben F. Barcus, WSBA No. 15576  
9 Simon H. Forgette, WSBA No. 9911  
10 Paul A. Lindenmuth, WSBA No. 15817  
11 Of Attorneys for Plaintiff

12 Approved as to Form and Content:

13 \_\_\_\_\_  
14 Pauline V. Smetka, WSBA No. 11183  
15 Of Attorneys for Defendants  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



**QUESTION NO. 3: What do you find to be the plaintiff Kimberly Gerlach's amount of damages?**

**Answer:**

**1. Past Economic Losses:**

- A) Past Medical Expenses: \$ 205,793.78
- B) Past Non-Medical Expenses: \$ \_\_\_\_\_
- C) Past Lost Earnings and Earning Capacity: \$ \_\_\_\_\_

**2. Future Economic Losses:**

- A) Future Medical Expenses: \$ \_\_\_\_\_
- B) Future Lost Earnings and Earning Capacity: \$ \_\_\_\_\_

**3. Past Non-Economic Losses:**

- A) Past Disability and Disfigurement: \$ \_\_\_\_\_
- B) Past Loss of Enjoyment of Life: \$ \_\_\_\_\_
- C) Past Pain and Suffering: \$ \_\_\_\_\_

**4. Future Non-Economic Losses:**

- A) Future Disability and Disfigurement: \$ \_\_\_\_\_
- B) Future Loss of Enjoyment of Life: \$ \_\_\_\_\_
- C) Future Pain and Suffering: \$ \_\_\_\_\_

**QUESTION NO. 4: Was the plaintiff negligent?**

Answer: ("Yes" or "No") \_\_\_\_\_

*(INSTRUCTION: If you answered "no" to Question 4, then do not answer Question 5. Sign this verdict and inform the bailiff. If you answered "yes" to Question 4, then proceed to answer Question 5.)*

**QUESTION NO. 5: Was the negligence of the plaintiff a proximate cause of injuries and/or damages to the plaintiff?**

Answer: ("Yes" or "No") \_\_\_\_\_

*(INSTRUCTION: If you answered "no" to Question 5, then do not answer Question 6. Sign this verdict and inform the bailiff. If you answered "yes" to Question 5, then proceed to answer Question 6.)*

**QUESTION NO. 6: Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury and damages. What percentage of this 100% is attributable to the plaintiff and what percentage of this 100% is attributable to the defendants? Your total must equal 100%.**

Answer:	Attributable to plaintiff:	_____	%
	Attributable to defendants:	_____	%
	TOTAL:		100%

*(INSTRUCTION: Sign this verdict form and notify the bailiff)*

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
Presiding Juror

The Honorable Judge Richard McDermott  
Hearing Date: July 25, 2017 at 9:00 a.m.  
Without oral argument

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KIMBERLY J. GERLACH, individually,  
Plaintiff,  
  
vs.  
  
THE COVE APARTMENTS, LLC, A Washington  
corporation, and WEIDNER PROPERTY  
MANAGEMENT LLC, A Washington  
corporation,  
  
Defendants.

NO. 15-2-25974-1 KNT  
  
JUDGMENT ON JURY VERDICT

- 1. Judgment Creditors: Kimberly J. Gerlach
- 2. Judgment Creditors' Attorney: Ben F. Barcus and Simon H. Forgette
- 3. Judgment Debtors: The Cove Apartments, LLC
- 4. Judgment Debtors' Attorney: Pauline V. Smetka
- 5. Principal Judgment Amount:
 

Total Jury Verdict	\$3,799,793.78
<del>(-7 percent comparative negligence) - 265,985.55</del>	
Net Total Award to Plaintiff	\$3,533,808.23
- 6. Costs Pursuant to RCW 4.84.010 (Including Statutory Attorney Fees) \$1,938.89
- 7. Interest Rate After Judgment: 6 percent

1 **JUDGMENT OF THE COURT ON JURY VERDICT**

2 THIS MATTER having come on before the Honorable Judge Richard McDermott  
3 upon Plaintiff's Motion for Entry of Judgment on the Jury Verdict entered in this matter on  
4 July 12, 2017 and the jury having entered a verdict in favor of the Plaintiff Kimberly  
5 Gerlach for a total net verdict of \$3,533,808.23 (including and totaling the amounts set  
6 forth within the Special Verdict Form of the jury herein), now therefore it is hereby  
7

8 ORDERED, ADJUDGED, AND DECREED that Statutory Costs are awarded to Plaintiff  
9 in the amount of \$1,938.89; and it is further

10 ORDERED, ADJUDGED, AND DECREED that a total judgment shall be and is hereby  
11 entered in favor of Plaintiff in the amount of \$3,535,747.12 (including costs and the net  
12 verdict), and it is further

13 ORDERED, ADJUDGED, and DECREED that Judgment entered herein shall bear  
14 interest from today's date until said Judgment is satisfied in full at the statutory rate of  
15 interest of 6 percent per annum.  
16

17 DONE IN OPEN COURT this 28<sup>th</sup> day of July, 2017.

18   
19 The Honorable Judge Richard F. McDermott  
20

21 //

22 //

23 //

24  
25

1 Presented by:

2 HELSELL FETTERMAN LLP

3 

4  
5  
6 

---

Pauline V. Smetka, WSBA #11183  
7 Lauren Parris Watts, WSBA #44064  
8 Emma Kazaryan, WSBA #49885  
*Attorneys for Defendants*

9 BEN F. BARCUS  
10 SIMON FORGETTE

11  
12 

---

Ben F. Barcus, WSBA #15576  
13 Simon H. Forgette, WSBA #9911  
*Attorneys for Plaintiff*

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Appellants* in Court of Appeals, Division I Cause No. 77179-5-I to the following parties:

Pauline V. Smetka  
Helsell Fetterman LLP  
1001 Fourth Avenue #4200  
Seattle, WA 98154-1154  
[psmetka@helsell.com](mailto:psmetka@helsell.com)  
[hsims@helsell.com](mailto:hsims@helsell.com)  
[bkindle@helsell.com](mailto:bkindle@helsell.com)

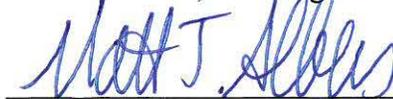
Benjamin F. Barcus  
Paul Lindenmuth  
Ben F. Barcus & Associates PLLC  
4303 Ruston Way  
Tacoma, WA 98402-5313  
[ben@benbarcus.com](mailto:ben@benbarcus.com)  
[paul@benbarcus.com](mailto:paul@benbarcus.com)  
[tiffany@benbarcus.com](mailto:tiffany@benbarcus.com)

Simon H. Forgette  
Law Offices of Simon H. Forgette, P.S.  
406 Market Street, Suite A  
Kirkland, WA 98033-6135  
[simon@forgettelaw.com](mailto:simon@forgettelaw.com)  
[denise@forgettelaw.com](mailto:denise@forgettelaw.com)

Original E-filed with:  
Court of Appeals, Division I  
Clerk's Office

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

DATED: January 23, 2018 at Seattle, Washington.



\_\_\_\_\_  
Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

**TALMADGE/FITZPATRICK/TRIBE**

**January 23, 2018 - 2:42 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 77179-5  
**Appellate Court Case Title:** Kimberly Gerlach, Respondent v. The Cove Apartments, et al, Appellants  
**Superior Court Case Number:** 15-2-25974-1

**The following documents have been uploaded:**

- 771795\_Briefs\_20180123143959D1448832\_7135.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Brief of Appellants.pdf*

**A copy of the uploaded files will be sent to:**

- ben@benbarcus.com
- bkindle@helsell.com
- carol@forgettelaw.com
- denise@forgettelaw.com
- hsims@helsell.com
- jan@forgettelaw.com
- matt@tal-fitzlaw.com
- paul@benbarcus.com
- psmetka@helsell.com
- simon@forgettelaw.com
- tiffany@benbarcus.com

**Comments:**

Brief of Appellants

---

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com

**Filing on Behalf of:** Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:  
2775 Harbor Avenue SW  
Third Floor Ste C  
Seattle, WA, 98126  
Phone: (206) 574-6661

**Note: The Filing Id is 20180123143959D1448832**