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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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KIMBERLY J. GERLACH, individually,

Respondent,

v.

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

Appellants.

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REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii-iv
A. INTRODUCTION .....	1
B. REPLY ON STATEMENT OF THE CASE .....	2
C. ARGUMENT .....	3
(1) <u>The Trial Court Abused Its Discretion in Excluding BAC Evidence and Refusing to Instruct the Jury on an Intoxication Defense</u> .....	3
(a) <u>The Blood Test Administered by Hospital Staff Met the Standards for Admissibility</u> .....	3
(b) <u>Gerlach’s One-Sided Admission that She Was “Under the Influence” Was Not a Stipulation</u> .....	6
(c) <u>The BAC Result Was the Most Accurate Evidence of Gerlach’s Intoxication, and the Jury Was Misled By its Exclusion</u> .....	11
(d) <u>The Trial Court Erred in Excluding Expert Testimony</u> .....	13
(e) <u>The Trial Court’s Refusal to Instruct on RCW 5.40.060 Was an Abuse of Discretion</u> .....	16
(2) <u>This Court Has Never Found that the RLTA Extends Tort Liability to Non-Tenants</u> .....	17
(3) <u>Cove Had a Right to Present Evidence to Rebut Gerlach’s Evidence that Her Bills Were Reasonable</u> .....	18

D. CONCLUSION.....21

Appendix

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994).....	2
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	12
<i>Faust v. Albertson</i> , 167 Wn.2d 531, 222 P.3d 1208 (2009) .....	14
<i>Geschwind v. Flanagan</i> , 121 Wn.2d 833, 854 P.2d 1061 (1993).....	9, 16
<i>Gilmore v. Jefferson County Pub. Transp. Benefit Area</i> , ____ Wn.2d ____, 415 P.3d 212 (Wash. April 19, 2018) .....	15
<i>In re Pers. Restraint of Arnold</i> , 190 Wn.2d 136, 410 P.3d 1133 (2018).....	17
<i>Kaech v. Lewis Cty. Pub. Util. Dist. No. 1</i> , 106 Wn. App. 260, 23 P.3d 529 (2001), <i>review denied</i> , 145 Wn.2d 1020 (2002) .....	20
<i>Lundberg v. Baumgartner</i> , 5 Wn.2d 619, 106 P.2d 566 (1940) .....	9
<i>Martini v. Post</i> , 178 Wn. App. 153, 313 P.3d 473 (2013).....	17
<i>Morse v. Frank</i> , 1 Wn. App. 871, 466 P.2d 166 (1970) .....	9
<i>Patterson v. Horton</i> , 84 Wn. App. 531, 929 P.2d 1125 (1997) .....	18, 19
<i>Peralta v. State</i> , 187 Wn.2d 888, 389 P.3d 596 (2017) .....	7, 8, 16
<i>Provins v. Bevis</i> , 70 Wn.2d 131, 422 P.2d 505 (1967).....	9
<i>Purchase v. Meyer</i> , 108 Wn.2d 220, 737 P.2d 661 (1987).....	13, 14
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010).....	2
<i>Sisley v. Seattle School Dist. No. 1</i> , 171 Wn. App. 227, 286 P.3d 974 (2012), <i>review denied</i> , 176 Wn.2d 1015 (2013) .....	13
<i>State v. Charley</i> , 136 Wn. App. 58, 147 P.3d 634 (2006), <i>review denied</i> , 161 Wn.2d 1019 (2007).....	4, 5
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	8
<i>State v. Curran</i> , 116 Wn.2d 174, 804 P.2d 558 (1991), <i>abrogated on other grounds by State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997).....	4, 5
<i>State v. Donahue</i> , 105 Wn. App. 67, 18 P.3d 608, <i>review denied</i> , 144 Wn.2d 1010 (2001).....	4, 5
<i>State v. Erdman</i> , 64 Wn.2d 286, 391 P.2d 518 (1964) .....	4
<i>State v. Humphries</i> , 181 Wn.2d 708, 336 P.3d 1121 (2014) .....	7
<i>State v. Parra</i> , 122 Wn.2d 590, 859 P.2d 1231 (1993).....	7

<i>State v. Reed</i> , 2002 WL 31440166, 114 Wn. App. 1019 (2002), review denied, 148 Wn.2d 1012 (2003).....	5
<i>State v. Rodriguez-Flores</i> , 197 Wn. App. 1080, 2017 WL 714040 (2017).....	7
<i>Tennant v. Roys</i> , 44 Wn. App. 305, 722 P.2d 848 (1986) .....	4
<i>Torgeson v. Hanford</i> , 79 Wash. 56, 139 P. 648 (1914) .....	18, 19
<i>Wash. State Physicians Ins. Exch. v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	6

Federal Cases

<i>Schmerber v. Cal.</i> , 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).....	4
--	---

Statutes

RCW 5.40.060 .....	<i>passim</i>
RCW 9A.16.090.....	8
RCW 46.61.502 .....	5
RCW 46.61.502(1)(a) .....	5
RCW 46.61.502(1)(c) .....	5
RCW 46.61.506 .....	5
RCW 66.44.200 .....	14
RCW 66.44.200(1).....	15

Codes, Rules and Regulations

ER 403 .....	2, 12
ER 702 .....	20
RAP 10.3(a)(5).....	2

Other Authorities

<a href="https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2018-Press-releases-items/2018-04-24.html">https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2018-Press-releases-items/2018-04-24.html</a> .....	21
WPI 16.03 .....	16

A. INTRODUCTION

No one knows precisely how Kimberly Gerlach injured herself on the night of October 27, 2012. 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. At trial, Gerlach argued that she fell from her boyfriend's second-story apartment balcony after leaning against a defective railing. Cove Apartments LLC, managed by Weidner Property Management LLC, ("Cove") argued that after a night of heavy drinking, to the point that her blood alcohol level ("BAC") was .238, she negligently attempted to climb onto the balcony from below because she did not have a key to enter through the front door.

Despite ample evidence to support Cove's theory of the case and several expert witnesses ready to testify in Cove's defense, the trial court largely denied Cove the ability to defend itself through multiple one-sided rulings. Gerlach's response brief highlights the significant errors in law that the trial court relied on in making those rulings.

Evidence of Gerlach's BAC was admissible and its exclusion in lieu of a one-sided admission that she was merely "under the influence" materially misled the jury. The trial court erred in its instructions to the jury by refusing to instruct them regarding on the RCW 5.40.060 voluntary intoxication defense and instructing them that the Residential

Landlord Tenant Act, RCW 59.18 (“RLTA”), created a duty in tort to non-tenants. The trial court also abused its discretion by excluding the expert testimony of Dr. Thomas Wickizer, thus denying Cove the opportunity to refute the reasonableness of Gerlach’s medical expenses. These errors warrant a new trial.

B. REPLY ON STATEMENT OF THE CASE<sup>1</sup>

The following facts supported Cove’s theory of the case that while significantly intoxicated, Gerlach attempted to negligently climb over a railing to the apartment balcony rather than enter through the front door.

After a night of drinking, Gerlach separated from her boyfriend, Nathan Miller, while he went to buy more alcohol, and she went to his apartment with a friend, Brodie Liddell. CP 1181. Gerlach did not have a key to her boyfriend’s apartment. CP 519. Despite claiming that she fell while leaning against the balcony railing, nobody saw her standing on the balcony or even enter the apartment. CP 1181. Brodie Liddell was the

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<sup>1</sup> Argument in a statement of the case is improper, RAP 10.3(a)(5), yet Gerlach spends much of her statement of the case arguing legal issues, criticizing expert reports, and even citing case law for the incorrect proposition that “all facts must be viewed in the light most favorable to respondents.” Br. of Resp’t at 5 (citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994)). This appeal is not a sufficiency of the evidence challenge to a jury verdict, as was the case in *Burnside*. Rather, Cove challenges multiple pretrial and evidentiary rulings that prevented Cove from arguing its theory of the case. See Br. of Appellants at 2-4. As discussed in the opening brief and below, those rulings constituted an abuse of the trial court’s discretion because they were manifestly unreasonable. See *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010) (reversing a trial court’s discretionary decision to admit evidence under ER 403).

only one who witnessed the fall, but he saw her just before she hit the ground – he did not see her leaning against the balcony before the fall. RP 719. Gerlach herself suffered from retrograde amnesia and could not remember anything that happened the night of the accident. CP 1181; RP 2689. And the evidence showed that she never entered the apartment – the lights were off, the door was closed, and Gerlach was still wearing her coat, scarf, and purse after the fall. RP 2384, 3005-06, 3059-64; Ex. 139.

After Gerlach fell, Miller told a neighbor that Gerlach must have been trying to climb over the railing because she did not have the apartment key. CP 518-19, 1182. In fact, when he first saw her on the ground he exclaimed, “Why did you do it? I was right behind you!” CP 1181-82.<sup>2</sup>

### C. ARGUMENT

- (1) The Trial Court Abused Its Discretion in Excluding BAC Evidence and Refusing to Instruct the Jury on an Intoxication Defense
  - (a) The Blood Test Administered by Hospital Staff Met the Standards for Admissibility

Gerlach reiterates her argument made below that BAC tests

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<sup>2</sup> The trial court refused to allow the neighbor to relate Miller’s excited utterance to the jury. CP 1552. Yet, the court permitted his brother to testify, over Cove’s objection, that Liddell said at the scene that he saw Gerlach leaning on the balcony railing, as an excited utterance. RP 1485-88. This was a direct contradiction of Liddell’s sworn testimony earlier at trial that he turned and saw her “just in time to see her” land on the ground. RP 718.

administered by medical staff for medical purposes are unreliable and inadmissible. Br. of Resp't at 28-32. That is plainly wrong.

Writing in 1966, the United States Supreme Court stated: "Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Such tests are a commonplace in these days of periodic physical examination." *Schmerber v. Cal.*, 384 U.S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Thus, for over half a century, courts have routinely admitted blood alcohol tests to prove the degree to which a person is intoxicated. *See, e.g., State v. Erdman*, 64 Wn.2d 286, 288, 391 P.2d 518 (1964).

Importantly, Washington courts routinely admit BAC results from tests performed for medical purposes, over objections that they do not meet state toxicology standards. *State v. Curran*, 116 Wn.2d 174, 185, 804 P.2d 558 (1991), *abrogated on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *Tennant v. Roys*, 44 Wn. App. 305, 312, 722 P.2d 848 (1986); *State v. Donahue*, 105 Wn. App. 67, 75, 18 P.3d 608, *review denied*, 144 Wn.2d 1010 (2001); *State v. Charley*, 136 Wn. App. 58, 65, 147 P.3d 634 (2006), *review denied*, 161 Wn.2d 1019 (2007). Courts have explained that "[m]edical tests are presumed to be particularly trustworthy because the hospital relies on its staff members to competently

perform their duties when making often crucial life and death decisions.” *Tennant*, 44 Wn. App. at 312. Thus, hospital BAC results are admissible under RCW 46.61.502 as evidence – other than a state-administered BAC test – of a person’s intoxication. *Charley*, 136 Wn. App. at 65.<sup>3</sup>

Courts have also noted that the rules regarding admissibility of BAC results are less stringent in civil cases. *Donahue*, 105 Wn. App. at 75 (finding that if all blood test evidence had to conform to State toxicology standards, “evidence of a medical blood draw would never be admissible, *even in a civil case.*”) (emphasis added); *see also*, *State v. Reed*, 2002 WL 31440166, at \*3, 114 Wn. App. 1019 (2002), *review denied*, 148 Wn.2d 1012 (2003) (upholding the trial court’s decision to admit hospital BAC report for impeachment purposes because the statutory elements for BAC admissibility are only required when

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<sup>3</sup> Because hospital BAC results have long been admissible, it is not necessary to delve deep into the logic of the courts in reaching that conclusion. But in brief, a person’s alcohol intoxication may be proved in one of two ways under RCW 46.61.502. The first, is a *per se* showing that the person’s BAC is 0.08 or higher based on a blood or breath test performed pursuant to state toxicology standards. RCW 46.61.502(1)(a). The second, is a showing using other evidence that the person is “under the influence of or affected by intoxicating liquor.” RCW 46.61.502(1)(c). BAC tests performed for medical purposes are other evidence of intoxication. *Curran*; *Charley*, *supra*.

The key distinction for admissibility is who performs the test. When the State performs a test for purposes of convicting a person for a criminal charge, it must follow toxicology standards promulgated by the state toxicologist. *Charley*, 136 Wn. App. at 67 (medical test seized and retested by the State had to conform to RCW 46.61.506). But when a test is performed by medical staff for medical reasons, it is admissible as other evidence of intoxication, particularly in a civil case. *Curran*, 116 Wn.2d at 185; *Donahue*, 105 Wn. App. at 75.

“intoxication is a statutory element the State is required to prove”). This distinction makes sense, given that BAC tests in criminal cases raise constitutional concerns such as a criminal defendant’s Fifth and Sixth Amendment rights. But in the civil context “[a]ny challenge to the reliability goes to the weight rather than the admissibility of the [hospital BAC] test which can be addressed in the cross examination.” *Tennant*, 44 Wn. App. at 314.

To the extent the trial court relied on this argument in excluding the BAC evidence, the trial court abused its discretion by misapplying the law.<sup>4</sup> Hospital BAC tests are presumed reliable and admissible, especially in civil actions. Concerns regarding state toxicology standards simply do not apply to a civil case where the State is not involved, and a hospital performed the BAC test for medical purposes. The trial court seemed to understand this when it initially ruled that the BAC evidence was admissible. RP 219-20, 228, 1329-33. But later the court changed its mind when Gerlach’s counsel proposed a “stipulation” that she was under the influence. That decision warrants reversal.

(b) Gerlach’s One-Sided Admission that She Was “Under the Influence” Was Not a Stipulation

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<sup>4</sup> An incorrect application of the law necessarily constitutes an abuse of discretion. *Wash. State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Gerlach argues that Cove was not prejudiced by the trial court's refusal to admit evidence of her BAC because of a "stipulation" that she was under the influence allowed Cove to "fully present[] its theory of the case." Br. of Resp't at 23, 26-27. Not true. Gerlach misrepresents what happened at trial and ignores how important the BAC evidence was to Cove's theory of the case.

There simply was no "stipulation" that Gerlach was "under the influence" the night she was injured. "[A] stipulation is an agreement between the parties to which there must be mutual assent." *State v. Parra*, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993).<sup>5</sup> The "stipulation" in this case was an entirely one-sided proposal by Gerlach's counsel after the trial court indicated that it was admitting the BAC evidence. RP 1335-36. Cove never agreed to the "stipulation" and vigorously opposed her one-sided admission in lieu of BAC evidence. RP 1550-60.

Gerlach wrongfully cites *Peralta v. State*, 187 Wn.2d 888, 900-01, 389 P.3d 596 (2017) for the notion that her one-sided admission to being under the influence is appropriate in this case. Br. of Resp't at 26 n.3.

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<sup>5</sup> The authorities cited by Gerlach to support her stipulation argument involved mutual stipulations and not one-sided admissions. Br. of Resp't at 25-26 (citing *State v. Humphries*, 181 Wn.2d 708, 712, 336 P.3d 1121 (2014) ("[T]he parties informed the court that they had agreed to stipulate that Humphries had been convicted of a 'serious offense.'"); *State v. Rodriguez-Flores*, 197 Wn. App. 1080, 2017 WL 714040, at \*1 (2017) (explaining that "the prosecutor and defense counsel...both affirmed" that the stipulation was accurate)). These authorities have no bearing on the case at hand.

*Peralta* involved an admission made during discovery being used against a defendant over the defendant's objection at trial. The Supreme Court wisely found that the defendant could not admit to being intoxicated, only to have that evidence excluded later. *Id.* at 904. That is not the case here where Gerlach is seeking to introduce an admission during trial that she was "under the influence" and nothing more, over Cove's objection that it wished to prove she was severely intoxicated with a BAC of .238. Cove was entitled to prove its affirmative defense, including her degree of intoxication, especially where her level of fault was at issue.

The trial court's error in allowing a one-sided stipulation in lieu of BAC evidence materially prejudiced Cove. Cove was barred from arguing the degree to which Gerlach was intoxicated, where the degree to which she was intoxicated was a key issue in the case. Washington courts have long held that when a person's intoxication is at issue, the degree to which a party is intoxicated is vitally important for the jury to consider. For example, in criminal law, a defendant's voluntary intoxication may be taken into consideration in determining whether the defendant acted with a required mental state, such as intent. RCW 9A.16.090. In *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987), the Supreme Court explained that the key question is the degree to which a defendant is intoxicated:

A person can be intoxicated and yet still be able to form the

requisite mental state, or he can be so intoxicated as to be unconscious...it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state.

*Id.* at 891. Likewise, in a civil case, the jury must consider the degree of a plaintiff's intoxication and the effect it had on the apportionment of fault between multiple actors. *See, e.g., Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993) (BAC of passenger and driver were relevant to apportioning negligence for passenger's injury in drunken driving accident); *Morse v. Frank*, 1 Wn. App. 871, 872, 466 P.2d 166 (1970) (driver's .28 BAC test was relevant to apportioning fault to passenger who chose to ride with the obviously drunk driver).

Here, under RCW 5.40.060, the question is not merely whether a plaintiff was intoxicated. Rather, the jury had to determine to what degree the intoxication proximately caused her injuries. RCW 5.40.060. Gerlach points this out in her brief, arguing that the jury was properly instructed that it "may consider Gerlach's intoxication in finding her negligent" and "the degree of negligence expressed as a percentage...will furnish the basis by which the court will apportion damages." Br. of Resp't at 25. Yet she fails to explain how Cove could fully present its case regarding the degree of Gerlach's negligence when it could not argue the degree to which she was intoxicated. Limiting Cove to arguing only that Gerlach

was “under the influence” without allowing Cove to present evidence as to the *degree* of that intoxication and its effect on her actions effectively deprived Cove of the statute’s defense.

In fact, the mere stipulation to being “under the influence” fundamentally misled the jury. Any lay person can understand that there is a difference between a BAC of .08, the *per se* threshold for driving under the influence, and .238, or severe intoxication. Even courts have long recognized, “[I]ntoxication...is a broad and relative term. It embraces varying degrees of insobriety from ‘under the influence of intoxicants’ to ‘dead drunk.’” *Provins v. Bevis*, 70 Wn.2d 131, 137, 422 P.2d 505 (1967) (cited by *Morse, supra*) (discussing the since repealed host-guest statute); *see also Lundberg v. Baumgartner*, 5 Wn.2d 619, 627, 106 P.2d 566 (1940) (“To be ‘under the influence’ of liquor is one thing, but to be so drunk as to necessitate [police intervention] is something quite different.”).

By merely referring to Gerlach as “under the influence” the jury was misled and could never fully learn her degree of intoxication. The trial court compounded this error by refusing to admit other evidence regarding her degree of intoxication, such as testimony from her boyfriend and her own admission during her deposition that she was “drunk.” RP 2400-04, 2715-19. The trial court also incorrectly told the jury that “the

parties” had agreed to a stipulation that Gerlach was intoxicated. RP 2799-2800. Cove was denied the opportunity to meaningfully defend itself despite credible evidence – and expert opinions from Dr. Carhart and Dr. Vincenzi – to support its theory that Gerlach’s severe intoxication proximately caused her injuries.

(c) The BAC Result Was the Most Accurate Evidence of Gerlach’s Intoxication, and the Jury Was Misled By its Exclusion

The BAC result was the best evidence regarding Gerlach’s alcohol consumption. Gerlach cites trial testimony for the proposition that “[Cove] fully presented its theory of the case, questioning numerous witnesses about Gerlach’s alcohol consumption.” Br. of Resp’t at 23 (citing RP 1496-97, 2353-54, 2554-55). But those citations show just how important the BAC results were where the witnesses could not recall or would not testify to important details five years after the incident.

One of the friends out with Gerlach the night of the incident could not remember how long they were out or what the group drank; when asked if Gerlach was drinking he could only answer “I know we all had a drink.” RP 1496-97. When asked if Gerlach was drinking, her boyfriend Nate Miller answered, “I can’t speak for sure, because I didn’t – I don’t remember a moment I saw her, but I would guess that she was.” RP 2353. Miller could not recall his own level of intoxication that night. RP 2354.

Brodie Liddell, the friend who was nearby when Gerlach fell, testified that he “[did] not remember” whether Gerlach was drinking that night and denied that he was drinking “pretty heavily” himself. RP 738-39, 756.<sup>6</sup> And the officer at the scene of the accident could not “remember well enough” to testify why he wrote that Gerlach had been drinking in his report. RP 2554-55.

This testimony shows that Cove could not fully present its theory of the case and, in fact, the stipulation materially misled the jury. Gerlach’s .238 BAC conflicted with the witnesses’ statements that she had “a drink” or that her own boyfriend could not say “for sure” whether she was drinking at all. Rather, she was *severely* intoxicated, approximately three times the legal limit for driving. It could also show that the entire group was drinking more heavily than they admitted or could remember. That could affect the credibility of the eyewitness testimony. This was material evidence for the jury to consider.

Gerlach argues that the BAC number was pejorative or prejudicial. “[A]ll evidence will prejudice one side or the other in a lawsuit. Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial.” *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994).

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<sup>6</sup> The trial court excluded audio from the 911 call made by Brodie Liddell, even for impeachment purposes. CP 1552-53; RP 2322-27.

As discussed *supra*, courts in Washington routinely admit BAC evidence, especially in civil cases, where intoxication is an issue. 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.3d 974 (2012), *review denied*, 176 Wn.2d 1015 (2013).

Here, the jury not only had to determine whether Gerlach was intoxicated, but it also had to determine to what extent the intoxication was a proximate cause of Gerlach's injury. RCW 5.40.060. Thus, there was no danger of unfair prejudice when her severe intoxication was a central issue to Cove's defense.

(d) The Trial Court Erred in Excluding Expert Testimony

As discussed in Cove's opening brief, the trial court abused its discretion in excluding testimony from Cove's experts Dr. Carhart and Dr. Vincenzi. Br. of Appellants at 14-19. Gerlach makes this error in law clear as she cites *Purchase v. Meyer*, 108 Wn.2d 220, 226, 737 P.2d 661 (1987), for the proposition that BAC evidence cannot be used as evidence to opine how intoxication may have affected a person's behavior. Br. of Resp't at 33. That holding, arising out of torts against commercial liquor

sellers for over-service liability (RCW 66.44.200),<sup>7</sup> was modified by the Supreme Court in *Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009). There, the Court specifically found that BAC results are admissible in that they corroborate other evidence regarding a person's intoxication.

Here, there was ample evidence of Gerlach's intoxication. First and foremost, Gerlach admitted she was under the influence. Her friends also admitted she was drinking. CP 1700. The police report noted a "strong odor of intoxicating liquor from the area" where Gerlach was laying on the ground. CP 1701. Her boyfriend, who had been drinking with her, was "extremely intoxicated," *id.*, as was her friend who was near her when she fell. *Id.* The BAC evidence corroborated this evidence of her intoxication and was relevant on the point that Gerlach was so intoxicated that she fell off the balcony due to her own physical limitations, rather than any defect in Cove's balcony. The BAC evidence, along with Dr. Carhart and Dr. Vincenzi's opinions on how her severe intoxication likely impaired her cognitive abilities and motor functioning should have been admitted.

This case is also distinguishable from *Purchase* in that it does not

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<sup>7</sup> Section (1) of RCW 66.44.200 reads, "No person shall sell any liquor to any person apparently under the influence of liquor."

involve over-service liability. In those cases, the issue is whether the person *appears* intoxicated. RCW 66.44.200(1). Here the issue is not how Gerlach appeared, but rather how her motor functions would be impaired by severe intoxication. Even a lay person can understand that a person with a BAC of .238 would be severely impaired – after all, she was three times over the legal limit to drive a car.<sup>8</sup> But a lay person may not understand the specific effect a .238 BAC would have on Gerlach before her fall as she climbed the balcony at the Cove Apartments and during her fall as she lacked the ability to protect herself. Dr. Carhart and Dr. Vincenzi offered qualified, well-reasoned opinions on those matters, and the trial court misapplied the law in excluding them.

A recent Supreme Court case highlights the error made by the trial court. In *Gilmore v. Jefferson County Pub. Transp. Benefit Area*, \_\_\_ Wn.2d \_\_\_, 415 P.3d 212 (2018), the Supreme Court upheld a decision to exclude expert biomechanical testimony in regard to an automobile accident, where there was “other evidence for the jury to determine the severity of the impact between the vehicles including photographs of the collision and testimony from [eyewitnesses].” *Id.* slip op. at 5. This case is quite different. Here, the trial court excluded *all* evidence for the jury to determine the severity of Gerlach’s intoxication, including her specific

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<sup>8</sup> The jury, of course, never heard that she was this intoxicated.

BAC level. Not only was this decision based on errors of law as discussed *supra*, but it was manifestly unreasonable because it completely hindered Cove's right to argue its theory of the case. Gerlach's degree of intoxication and the effect it would have on her fall were central to Cove's statutory defense under RCW 5.40.060. The trial court's errors warrant reversal.

(e) The Trial Court's Refusal to Instruct on RCW 5.40.060 Was an Abuse of Discretion

In addition to the evidentiary errors discussed above, the trial court erred in refusing to instruct the jury on a voluntary intoxication defense pursuant to RCW 5.40.060 and the Washington Pattern Jury Instructions—Civil (“WPI”) 16.03. *See* Appendix. Gerlach ignores the clear direction from the WPI that this instruction should be used “if there is an issue of intoxication on the part of the person injured or killed.” *Id.* In the cases cited by the parties where the intoxication defense is an issue, trial courts have given this instruction. *See, e.g., Peralta* 187 Wn.2d at 893; *Geschwind*, 121 Wn.2d at 836. This instruction provides a legal basis for the intoxication defense, and specifically connects the idea that there is no liability when the plaintiff's intoxication was a proximate cause of the plaintiff's injury. WPI 16.03. When taken as a whole, the instructions did not allow Cove the fair opportunity to argue its case, when

this key instruction on Cove's primary defense was omitted. The trial court abused its discretion.

(2) This Court Has Never Found that the RLTA Extends Tort Liability to Non-Tenants

This Court has never held that the RLTA, an act designed to regulate the contractual relationships between landlords and tenants, creates a basis for non-tenants to recover damages in tort. Gerlach points to a case from Division II to support its position that a non-tenant can recover under the RLTA. Br. of Resp't at 41 (citing *Martini v. Post*, 178 Wn. App. 153, 171, 313 P.3d 473 (2013)). But this Court is not bound by that decision. *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018) ("one division is not bound by the decision of another division" of the Court of Appeals). As explained in Cove's opening brief, there is no reason to adopt *Martini* and extend statutory protections, such as the warranty of habitability, afforded exclusively to tenants to non-tenants who have ample grounds under common law premises liability principles to sue for their injuries. See Br. of Appellants at 26-33.

Instructions 13-16 were therefore confusing, misleading, and prejudiced Cove where the jury returned a verdict that did not differentiate between common law premises liability and liability based on a breach of the RLTA. CP 1872-74. The jury was misled by instructions referring to

habitability and other portions of the RLTA that have no bearing on a landlord's liability to a non-tenant.

(3) Cove Had a Right to Present Evidence to Rebut Gerlach's Evidence that Her Medical Bills Were Reasonable

The trial court abused its discretion by refusing to allow Cove to present evidence to rebut the reasonableness of Gerlach's medical costs. Gerlach fails to contend with the fundamental notion 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)). Thus, in every tort action where a plaintiff seeks to recover medical costs, "the plaintiff must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills." *Id.* Cove had a fundamental right to present evidence to refute Gerlach's affirmative burden to prove that her bills were reasonable. Cove intended to call Dr. Wickizer, a well-qualified expert, to testify regarding the widely accepted view that hospital bills, especially in this geographic area, are not accurate indicators of actual medical costs. The trial court should have allowed that testimony.

Gerlach makes a great deal out of her collateral source argument, Br. of Resp't at 42-46, but the trial court never cited the collateral source

rule in excluding Dr. Wickizer. RP 169-70 (oral ruling); CP 1547 (written ruling). Rather, the court prevented Cove from presenting evidence to refute Gerlach's burden to prove that her bills were reasonable because the evidence was "complicated:"

Well, I think that the ultimate issue is what is -- the plaintiff entitled to recover...reasonable expenses. So the question is how you define reasonable. It's always been that way.

It used to be that the bills would be evidence of reasonableness...

Now, everything in society is much more complicated than it ever used to be, including this kind of thing. You can make all kinds of arguments that Harborview inflates bills so that they can get enough money to be able to pay for all the free services they provide. I'm not sure how all of that works. But I'm not going to let the jury decide that. So I'm going to grant the plaintiff's motion.

RP 169.<sup>9</sup>

Here, one can see the true error made by the trial court. By its very nature, expert testimony is complicated, consisting of "scientific,

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<sup>9</sup> In offering its ruling, the trial court recognized that this issue was not a typical evidentiary decision left to the discretion of the trial court and called for review by an appellate court to offer guidance:

You can appeal me. As a matter of fact, I think that this may very well be grounds for either a revisiting by the state supreme court, but more significantly, a change in the rules of evidence or by the state legislature, because I do think that things have changed.

RP 169-70. Hospital billing practices may have changed, but the requirement that plaintiffs must prove their reasonable medical costs has not. *Patterson*, 84 Wn. App. at 543 (citing *Torgeson*, 79 Wash. at 58-59). The trial court made an error in law, thereby abusing its discretion, by refusing to allow Cove the opportunity to rebut Gerlach's burden through a qualified expert.

technical, or other specialized knowledge” and is meant to assist jurors with “subjects beyond the typical juror’s understanding.” ER 702; *Kaech v. Lewis Cty. Pub. Util. Dist. No. 1*, 106 Wn. App. 260, 276, 23 P.3d 529 (2001), *review denied*, 145 Wn.2d 1020 (2002). Expert testimony is designed to help the jury “understand the evidence or to determine a fact at issue.” ER 702. It is manifestly unreasonable to exclude an argument or an expert’s opinion because “society is much more complicated than it ever used to be.” RP 169. The trial court abused its discretion in excluding Dr. Wickizer’s testimony.

Gerlach also argues that “Dr. Wickizer based his opinion of ‘like services’ entirely on the reduced rates paid by third-party payors to Harborview, rather than on the customary charges of similarly situated health care providers.” Br. of Resp’t at 46. That mischaracterizes Dr. Wickizer’s opinion. Dr. Wickizer cited 15 academic sources supporting his opinion. CP 1403-04. These sources reflected a well-recognized “system problem” that hospital bills are inflated and vary greatly “even within a small geographic area.” CP 1385. For example, Harborview Medical Center, where Gerlach received nearly all her treatment, bills \$159,027 for a spinal fusion, while UW Medical Center bills \$86,516 for the same procedure. CP 1386.

Dr. Wickizer explained that hospital services follow different

economic rules than typical goods and services. CP 1382-83. One does not “shop around” for the most competitive price, despite the enormous variances in prices discussed above. CP 1383.<sup>10</sup> Moreover, hospitals have contracts with “multiple health plans and payers” that drastically lower the amount actually paid for medical services. CP 1384. Typically, a hospital accepts just 38 percent of its total billed charges as payment for services rendered. CP 1384-85.<sup>11</sup> This is not an overly complicated concept, just as the sticker price at a car dealership is not a reasonable value of the car, so too are hospital bills inflated beyond the reasonable value (and actual cost) of the services provided. Dr. Wickizer’s opinions would have helped the jury understand the reasonableness of Gerlach’s medical costs. Cove was entitled to present this evidence to refute Gerlach’s affirmative burden to prove the reasonable value of her medical costs.

#### D. CONCLUSION

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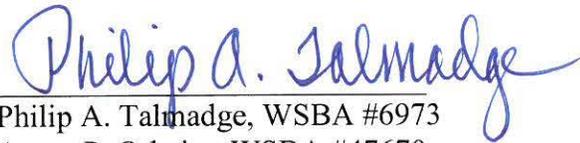
<sup>10</sup> As evidence of the system problem identified by Dr. Wickizer, the federal government has recently taken steps to curtail opaque and inflated hospital bills. On April 24, 2018, the Centers for Medicare & Medicaid Services (“CMS”) – a division of the Department of Health and Human Services – proposed a rule change aimed at “increasing price transparency,” requiring hospitals to post a list of their standard charges so consumers “can more readily compare providers.” *CMS Proposes Changes to Empower Patients and Reduce Administrative Burden*, CMS NEWSROOM, (April 24, 2018), <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2018-Press-releases-items/2018-04-24.html>. See Appendix.

<sup>11</sup> Despite accepting much less than the billed amount for services rendered, hospitals do not lose money in this system, and Dr. Wickizer was careful to include a reasonable profit margin in his analysis of Gerlach’s reasonable medical costs. CP 1399-1400.

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 and order a new trial.

DATED this 4<sup>th</sup> day of May, 2018.

Respectfully submitted,



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# APPENDIX

**6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 16.03 (6th ed.)**

Washington Practice Series TM December 2017 Update  
Washington Pattern Jury Instructions--Civil  
Washington State Supreme Court Committee on Jury Instructions

Part II. Negligence—Risk—Misconduct—Proximate Cause  
Chapter 16. Defenses

WPI 16.03 Intoxication of Person Injured or Killed—Defense

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

[This defense does not apply, however, in an action against the driver of a motor vehicle if you find that:

- (1) the driver was then under the influence of *[alcohol]* *[or]* *[any drug]*;
- (2) such condition of the driver was a proximate cause of the *[injury]* *[death]*;
- (3) the *[person injured]* *[person killed]* was also under the influence of *[alcohol]* *[or]* *[any drug]*; and
- (4) such condition of the *[person injured]* *[person killed]* was not a proximate cause of the occurrence causing the *[injury]* *[death]*.]

**NOTE ON USE**

Use this instruction only if there is an issue of intoxication on the part of the person injured or killed. Use WPI 16.04 (Under the Influence of Alcohol or any Drug—Definition), WPI 21.09 (Burden of Proof on the Issues—Intoxication Defense), and WPI 15.01 (Proximate Cause—Definition) with this instruction.

Use the bracketed second paragraph only if there is an issue of intoxication on the part of both a defendant driver of a motor vehicle and the person injured or killed. It may aid juror comprehension to use a more fact-specific term than “occurrence” in the second paragraph.

Use other bracketed material as applicable. Use the person's name instead of “person injured” or “person killed” whenever doing so will make the instruction easier to understand.

**COMMENT**

RCW 5.40.060.

RCW 5.40.060(1), enacted as part of the 1986 Tort Reform Act, states the general rule that it is a complete defense in a personal injury or wrongful death action 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.”

In 1994, the Legislature added RCW 5.40.060(2), creating an exception to that general rule:

In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, [RCW 5.40.060(1)] does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death.

By enacting RCW 5.40.060(2), the Legislature effectively abrogated the holding of *Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993), that RCW 5.40.060 can provide a complete defense in an action against an intoxicated driver for injuries to an intoxicated passive passenger.

RCW 5.40.060 applies only to cases based on fault as defined in RCW 4.22.015 and, thus, is inapplicable in an intentional tort case. *Morgan v. Johnson*, 137 Wn.2d 887, 976 P.2d 619 (1999).

*[Current as of June 2009.]*

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## CMS Proposes Changes to Empower Patients and Reduce Administrative Burden

<b>Date</b>	2018-04-24
<b>Title</b>	CMS Proposes Changes to Empower Patients and Reduce Administrative Burden
<b>Contact</b>	press@cms.hhs.gov

### ***CMS Proposes Changes to Empower Patients and Reduce Administrative Burden***

*Changes in Inpatient Prospective Payment System and Long-Term Care Hospital Prospective Payment System would advance price transparency and interoperability*

Today, the Centers for Medicare & Medicaid Services (CMS) proposed changes to empower patients through better access to hospital price information, improve patients' access to their electronic health records, and make it easier for providers to spend time with their patients. The proposed rule issued today proposes updates to Medicare payment policies and rates under the Inpatient Prospective Payment System (IPPS) and the Long-Term Care Hospital (LTCH) Prospective Payment System (PPS).

"We seek to ensure the healthcare system puts patients first," said Administrator Seema Verma. "Today's proposed rule demonstrates our commitment to patient access to high quality care while removing outdated and redundant regulations on providers. We envision a system that rewards value over volume and where patients reap the benefits through more choices and better health outcomes. Secretary Azar has made such a value-based transformation in our healthcare system a top priority for HHS, and CMS is taking important, concrete steps toward achieving it."

The policies in the IPPS and LTCH PPS proposed rule would further advance the agency's priority of creating a patient-driven healthcare system by achieving greater price transparency and interoperability – essential components of value-based care – while also significantly reducing the burden for hospitals so they can operate with better flexibility and patients have the information they need to become active healthcare consumers.

While hospitals are already required under guidelines developed by CMS to either make publicly available a list of their standard charges, or their policies for allowing the public to view a list of those charges upon request, CMS is updating its guidelines to specifically require that hospitals post this information. The agency is also seeking comment on what price transparency information stakeholders would find most useful and how best to help hospitals create patient-friendly interfaces to make it easier for consumers to access relevant health care data so they can more readily compare providers.

The proposed policies released today begin implementing core pieces of the government-wide MyHealthEData initiative through several steps to strengthen interoperability or the sharing of healthcare data between providers. Specifically, CMS is proposing to overhaul the Medicare and Medicaid Electronic Health Record Incentive Programs (also known as the "Meaningful Use" program) to:

- make the program more flexible and less burdensome,

- emphasize measures that require the exchange of health information between providers and patients, and
- incentivize providers to make it easier for patients to obtain their medical records electronically.

To better reflect this new focus, we are re-naming the Meaningful Use program “Promoting Interoperability.” In addition, the proposed rule reiterates the requirement for providers to use the 2015 Edition of certified electronic health record technology in 2019 as part of demonstrating meaningful use to qualify for incentive payments and avoid reductions to Medicare payments. This updated technology includes the use of application programming interfaces (APIs), which have the potential to improve the flow of information between providers and patients. Patients could collect their health information from multiple providers and potentially incorporate all of their health information into a single portal, application, program, or other software. This can support a patient’s ability to share their information with another member of their care team or with a new doctor, which can reduce duplication and provide continuity of care. In the proposed rule, CMS is requesting stakeholder feedback through a Request for Information on the possibility of revising Conditions of Participation to revive interoperability as a way to increase electronic sharing of data by hospitals.

As part of its commitment to burden reduction, CMS is proposing in the FY 2019 IPPS/LTCH PPS proposed rule to remove unnecessary, redundant, and process-driven quality measures from a number of quality reporting and pay-for-performance programs. The proposed rule would eliminate a significant number of measures acute care hospitals are currently required to report and remove duplicative measures across the 5 hospital quality and value-based purchasing programs. This would result in the removal of a total of 19 measures from the programs and would de-duplicate another 21 measures while still maintaining meaningful measures of hospital quality and patient safety. Additionally, CMS is proposing a variety of other changes to reduce the number of hours providers spend on paperwork. CMS is proposing this new flexibility so that hospitals can spend more time providing care to their patients thereby improving the quality of care their patients receive.

In sum this results in the elimination of 25 total measures across the 5 programs with well over 2 million burden hours reduced for hospital providers impacted by the IPPS proposed rule, saving them \$75 million.

For a fact sheet on the proposed rule (CMS-1694-P), please visit:

<https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2018-Fact-sheets-items/2018-04-24.html>.

To view the proposed rule (CMS-1694-P), please visit: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-08705.pdf>

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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: May 4, 2018 at Seattle, Washington.



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