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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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KIMBERLY J. GERLACH, individually

Respondent,

vs.

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

Appellants.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE RICHARD McDERMOTT

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

Following an evening with friends during which she had dinner and drank alcohol, Respondent Kim Gerlach walked to the rental apartment she shared with her fiancé in a large apartment complex owned by appellant Cove Apartments, LLC and managed and maintained by appellants Weidner Property Management LLC (collectively “Weidner”). According to witnesses, including police and fire department responders, Gerlach stepped on to the second floor balcony of the apartment and leaned on the railing. The railing supports were corroded and screwed into badly rotted wood that caused the railing to give way. Gerlach fell head first onto the cement walkway one story below. The railing landed next to her.

Balcony railings need to be safe for everyone, whether they’ve been drinking or not. Gerlach admitted that she was under the influence of alcohol when the railing failed. In closing argument, Weidner repeatedly reminded the jury that Gerlach was intoxicated. Weidner’s “defense,” based on the opinion of its reconstruction expert, was that Gerlach was trying to climb over the railing from the exterior of the balcony when the railing failed. The jury, having been instructed to consider Gerlach’s voluntary intoxication in assigning

her comparative fault, attributed 93% of the fault to Weidner and 7% to Gerlach.

Weidner cannot establish any prejudicial error in this four-week trial. Given Gerlach's admission that she was intoxicated, the trial court did not abuse its discretion in excluding a hospital blood alcohol test that lacked the statutory foundation for admissibility in court proceedings. Neither did the trial court abuse its discretion in excluding expert testimony that did no more than tell the jury that Gerlach's intoxication likely impaired her judgment – a matter of common knowledge that Weidner argued throughout trial and that the jury clearly accepted in attributing comparative fault to Gerlach.

Weidner's argument that the trial court erred in instructing the jury of a landlord's implied and statutory warranty of habitability under the Residential Landlord Tenant Act is similarly without merit. The jury found Weidner liable under a general verdict that, as proposed by Weidner, did not distinguish between the common law and the RLTA, and Weidner concedes there was substantial evidence to find Weidner in breach of its common law duty to Gerlach, an admitted invitee. Finally, the trial court did not abuse its discretion in excluding expert testimony inviting the jury to consider collateral

source evidence in assessing whether Gerlach's medical expenses were reasonable. This Court should affirm the judgment.

## **II. RESTATEMENT OF ISSUES**

1. Overwhelming evidence supports the jury's verdict that Weidner negligently failed to inspect, repair and replace rotten wooden balcony railings, causing Gerlach to fall when she leaned or climbed on her apartment's balcony railing. The jury found Weidner 93% responsible and that Gerlach, who admitted to being intoxicated, was 7% responsible for her devastating head injuries. Did the trial court abuse its discretion in refusing instructions telling the jury the legal consequence of Gerlach's comparative fault when the trial court properly instructed the jury to consider Gerlach's voluntary intoxication in allocating fault and allowed the jury to allocate fault to Gerlach based on her admitted intoxication?

2. Did the trial court fairly exercise its discretion in its evidentiary rulings concerning Gerlach's intoxication by 1) excluding a hospital's blood alcohol report, which was not performed to statutory standards, in light of Gerlach's admission that she was intoxicated, 2) excluding the testimony of Weidner's pharmacology expert about the effects of intoxication, a matter of common

knowledge, and 3) limiting an accident reconstructionist's testimony to the area of his expertise?

3. Did the trial court commit reversible error in instructing the jury on a landlord's implied and statutory warranty of habitability under the Residential-Landlord Tenant Act when Weidner did not propose a special verdict, substantial evidence supports the jury's unchallenged finding that Weidner breached its common law duty to an invitee to maintain the premises in a reasonably safe condition, and, in any event, the warranty of habitability informs a landlord's duty to all persons who could reasonably be expected to use the premises, not just to its tenant?

4. Did the trial court abuse its discretion in excluding expert testimony challenging the reasonableness of Gerlach's medical treatment based on inadmissible collateral source evidence?

### **III. RESTATEMENT OF THE CASE**

#### **A. Restatement of Facts.**

Gerlach suffered a catastrophic head injury after falling head first onto a cement walkway from her apartment's balcony when the balcony railing, severely compromised by rot, gave way at an apartment building owned and maintained by Weidner. Weidner's statement of facts is at odds with the jury's verdict and the

overwhelming evidence that Gerlach's fall would have been averted had Weidner regularly inspected and maintained its balconies, contrary to the rule that in an appeal from a judgment entered after trial all facts must be viewed in the light most favorable to respondents. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). This restatement recites the facts that support the jury's verdict.

**1. Weidner was aware of wood rot problems with balcony railings at the Cove Apartments before Gerlach was injured.**

The Cove Apartments is a complex of 32 rental apartment buildings constructed in 1987. The buildings are all two stories high and built of wood. The complex is surrounded by trees and vegetation. (CP 1489)

Weidner has owned and operated the Cove since it purchased the complex from Prometheus Real Estate Group in 2010. (RP 1231) Prior to closing on its purchase of the Cove, Weidner received two inspection reports from Prometheus describing ongoing problems with wood rot of balconies and balcony railings at the Cove. (RP 1233-41; Exs. 24, 25) Weidner commissioned a third study of the complex, which revealed that every single building at the Cove had areas of wood rot. (RP 1241-42; Ex. 28)

When Prometheus owned the Cove, it was “common” for balcony railings to be replaced because of wood rot. Prometheus had required the Cove’s manager Doris Johnson to replace a number of balcony railings each year, causing Johnson to inspect and discover which railings were compromised. But while Prometheus inspected balcony railings and had a focused preventive maintenance plan, Weidner did not, and Johnson, who stayed on as Weidner’s manager, discontinued her safety inspections of railings in 2010, after Weidner purchased the Cove. (RP 876-79, 979)

As Weidner’s manager, Johnson understood that repairs to balcony railings should take precedence over other areas, recognizing the potential for serious injury if second floor balcony railings were screwed into rotten wood. Johnson understood the safety issues involved. (RP 842, 875) But Weidner replaced balcony railings because of wood rot only on an “as needed” basis, when their deteriorated condition became obvious. (RP 841-42, 877)

Weidner had actually done some wood rot repairs to the stairway and railing area immediately below Gerlach’s unit 1202 balcony prior to her injury, but Johnson testified this did not cause her concern regarding Gerlach’s balcony railing. (RP 960-61) Johnson claimed she inspected unit 1202, but had no memory of the

inspection, and Weidner did not produce and Johnson could not find any document confirming that she, or any other Weidner employee, had inspected unit 1202 prior to Ms. Gerlach's injury. (RP 954-55, 3185) Given the rotten condition of the wood securing the balcony railing outside unit 1202, Johnson conceded that an inspection, which would have included pushing or pulling on the railing, would have revealed that the railing was loose. (RP 955-57)

Neither Johnson nor any other Weidner representative advised Gerlach, her fiancé or other Cove residents about the wood rot compromising balcony railings at the Cove. (RP 892)

**2. Ms. Gerlach was severely injured when her balcony railing at The Cove failed due to wood rot.**

On October 26, 2012, Kim Gerlach, age 28 and weighing between 130 and 135 pounds, was living with her fiancé Nate Miller in Cove unit 1202. (RP 2309) That evening, Gerlach, Miller and their friends, the brothers Brodie and Colin Liddell, went out in the neighborhood of the Cove for dinner and drinks. They were on foot. They drank at two establishments, after which Gerlach and Brodie walked back to the Cove while Miller and Colin stopped at a convenience store. (RP 712-13)

At trial, 4-1/2 years after the accident, Brodie recalled that he decided to smoke a cigarette on the ground floor below unit 1202 and that Gerlach went upstairs to the apartment. (RP 715) The next thing he could recall was Gerlach falling head first:

Well, after a few minutes, I was standing there and I heard a snap from up above at their – on their deck, and I looked, turned and looked, because it was pretty loud, and I saw Kim falling head first.

(RP 716) Brodie told his brother Colin, who arrived on the scene shortly after Gerlach fell, that Gerlach had been leaning on the handrail when it gave way:

He told me that he – Kim had gone up upstairs and he was downstairs. He was smoking and he was going to go up as soon as he was finished, and at that time Kim came down and the handrail came down.

...

He said she was leaning on the handrail and she came down with the handrail.

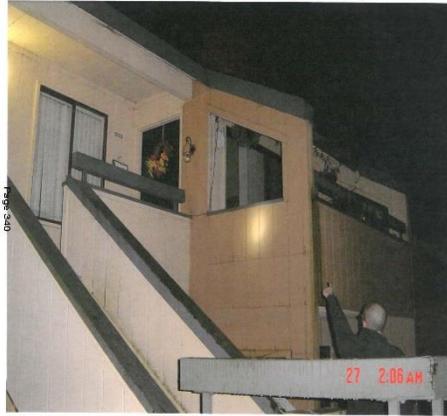
(RP 1487-88) The jury considered Brodie's excited utterances made contemporaneously to others at the accident scene (RP 1435), an evidentiary decision that is unchallenged on appeal. (*see* App. Br. 2-3)

Investigating police officer Gabriel Castro confirmed that Brodie consistently stated that Gerlach had leaned over the balcony railing of apartment 1202 before falling. (RP 1437, 1439, 1458)

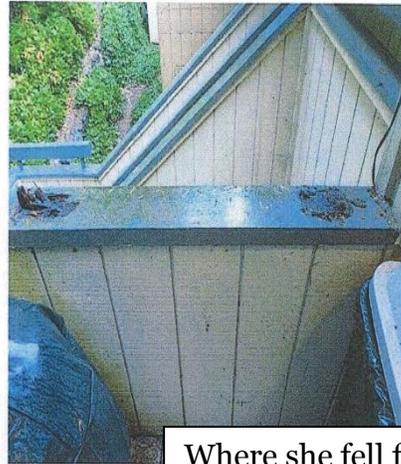
Referring to his report of the incident, Officer Castro concluded that “the railing failed to support Gerlach’s weight and snapped off.” (RP 1459; Exs. 135, 138)

South King Fire and Rescue Captain Jeff Bellinghausen also responded to the scene of Gerlach’s fall. In his Medical Incident Report, he noted that Gerlach was “... said to have been leaning over the rail and fell....” (RP 2542) The notes of the Fire Department dispatcher stated that witnesses at the scene reported “... female leaned against a rail and it broke causing her to fall....” (RP 2551-52; Ex. 140) Weidner also has not challenged the admission of the first responders’ reports or testimony in its appeal.

As shown by the following photographs, the defective balcony railing for unit 1202 was a rectangular wood 4 x 6 beam. The 4 x 6 railing was kept in place by two vertical metal supports with flanges. (Ex. 54, App. A ;RP 2084-85) The bottom of each metal support was screwed into the top of a wooden bulkhead that formed the perimeter of the balcony, which rose about 3 feet from the balcony surface to form the height of the balcony railing. The screws had rusted (Ex. 54, App. A) and the wooden support was badly rotted:



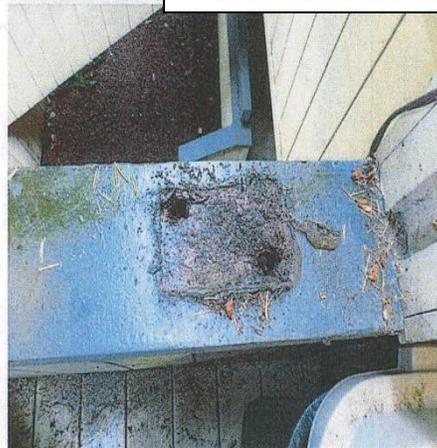
(CP 340)



Where she fell from



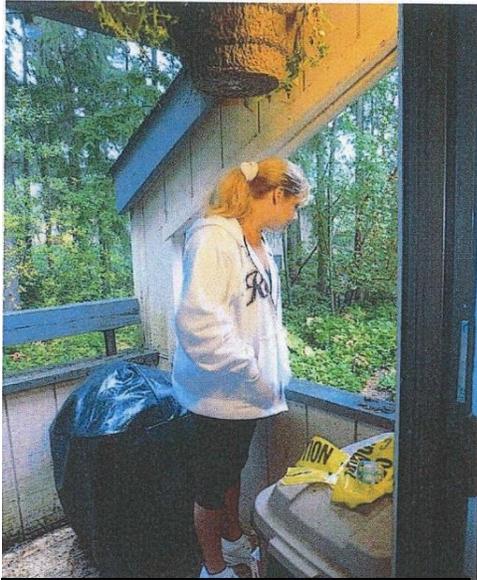
(CP 256)



Where the beam was attached

(CP 638, Ex. 36)<sup>1</sup>

<sup>1</sup>Weidner's manager Johnson conducted an investigation and took photographs, which she captioned, the day after Gerlach's injury. (Ex. 36; CP 626, 628, 638, 640 and 644; RP 835) Johnsons captions, depicted here, are verbatim, but have been enlarged for legibility.



Where she was standing

(CP 644; Ex. 36)<sup>2</sup>



The Beam that was detached from fall

(CP 640; Ex. 36)

Gerlach was unconscious and unresponsive when the paramedics arrived. Because of the seriousness of her head injury, she was taken by fire department aid car to Harborview Hospital. Gerlach, who was close to death, was admitted with a traumatic brain injury, having suffered multiple skull fractures, brain hemorrhage and brain swelling that necessitated brain surgery and temporary removal of a portion of her skull. (RP 1381-90)

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<sup>2</sup> The left photo depicts Johnson's determination where Gerlach had been standing before the balcony gave way and the direction she fell, a conclusion Johnson maintained for the duration of her employment with Weidner. (RP 838-40)

In the course of Gerlach's trauma care, Harborview performed a blood screening test for various substances including alcohol. There was no evidence that Harborview's alcohol test conformed to the requirements of the state toxicologist. (§ IV.B.1, *infra*)

**B. Procedural History.**

Gerlach filed this action on Oct. 22, 2015, asserting claims of negligence based on Weidner's common law duty to invitees and its implied and statutory warranty of habitability under the Residential Landlord Tenant Act. (CP 1-8) The Honorable Richard McDermott ("the trial court") presided over a jury trial spanning four weeks.

**1. The trial court excluded evidence of Gerlach's blood alcohol level and a defense toxicologist.**

Gerlach never denied that she had been drinking before she was injured. Given that the hospital test had not been done to the statutory standards required for admissibility of BAC tests, and the possibility of confusing or prejudicing the jury with speculative evidence, the trial court struggled with the admissibility of Gerlach's intoxication, changing its ruling several times. (*See, e.g.*, CP 883; RP 219-20, 620-26, 1332) When the trial court finally decided it would admit Gerlach's BAC, Gerlach offered to admit that she was under the influence of intoxicating liquors. (RP 1355, 1556-57) The trial court agreed not to admit Gerlach's BAC based upon her admission of

intoxication because its prejudicial effect far outweighed its probative value and instructed the jury that “Gerlach was under the influence of intoxicating liquor at the time of the accident.” (RP 1560, 2799-2800)

In an offer of proof, Weidner’s toxicologist, Dr. Vincenzi, testified that anyone with Gerlach’s blood alcohol level would be severely impaired. Dr. Vincenzi did not offer an opinion about what Gerlach did or did not do as a result of her intoxication. (RP 1528-36) The trial court ruled that Dr. Vincenzi’s testimony regarding “how the plaintiff was acting immediately before she fell” was entirely speculative. (RP 1562) The trial court excluded Dr. Vincenzi’s testimony, ruling that in light of Gerlach’s admission that she was intoxicated, the probative value of Dr. Vincenzi’s testimony regarding the effect of Gerlach’s intoxication was outweighed by the potential to mislead the jury. (RP 1560-61)

**2. The trial court allowed the defense accident reconstructionist to testify to his theory that Gerlach was climbing on the railing before it gave way, excluding testimony concerning how alcohol may have affected her.**

Before trial, Gerlach moved to exclude the testimony of Michael Carhart, Ph.D. on the issue of Gerlach’s comparative fault. (CP 620, 882, 973-74) Dr. Carhart opined that Gerlach was attempting to climb onto the balcony from the exterior side of the

railing and that the balcony railing gave way because of “higher loads” created by Gerlach’s intoxicated condition. (RP 2978-79)

The trial court allowed Dr. Carhart to testify about his reconstruction and his theory that the railing could not tolerate the additional “load” placed on it by Gerlach’s purported attempt to climb over it, but prohibited him from speculating about the effects of Gerlach’s alcohol consumption and whether her intoxication supported his theory:

Dr. Carhart is permitted to testify but his testimony is limited to 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; RP 1563)

In the defense offer of proof, Dr. Carhart, stated that if his climbing-from-the-outside scenario was accepted, Gerlach’s intoxication would have reduced her inhibition and increased her propensity to fall. (RP 2978-80) Like Dr. Vincenzi, Dr. Carhart could not otherwise opine as to what Gerlach did or did not do as a result of her intoxication. (RP 2973-80)

Dr. Carhart’s accident reconstruction was inconsistent with the contemporaneous statements, the first responders’ reports, and Weidner’s own investigation conducted by its manager Johnson and

documented in her photos (pp 10-11, *supra*). Investigating Officer Castro testified that he had found no evidence in his investigation that Gerlach was trying to climb over the balcony railing. (RP 1457-58) Fire Department Captain Bellinghausen testified that there was nothing in his or other fire department documents indicating that Gerlach was trying to climb onto the balcony from the exterior. (RP 2553-54) When Weidner's attorney suggested during Dr. Carhart's testimony that there were "... statements in that incident report that are consistent with your opinion..." the trial court told the jury "to disregard Dr. Carhart's testimony about other evidence supporting his opinions. There is no other admissible evidence supporting Dr. Carhart's opinions other than his own analysis and conclusions and what you have heard in court." (RP 3149-50)

The jury considered two alternative animations that Dr. Carhart prepared because he did not know which foot Gerlach would have started with or where she would have placed her hands. (RP 3117) In both animations, Gerlach begins to rotate when the balcony railing breaks loose, but stops rotating mid-fall in violation of the laws of physics. Dr. Carhart had to stop Gerlach's rotation in order for her to strike her head in a manner consistent with her skull fracture and brain injury. (Exs. 60-63; RP 3126-35) In both Dr.

Carhart's reconstructions of the "climbing-on-the-railing" scenario, the balcony railing breaks loose before Gerlach begins to fall.

- 3. The trial court excluded testimony of a defense damages expert who would have testified that the amount Gerlach was billed for medical expenses exceeded Medicare and insurer reimbursement rates.**

Weidner offered the testimony of Dr. Thomas Wickizer that the amount Gerlach's healthcare providers actually billed was not reasonable because it exceeded the amounts reimbursed by insurers and Medicare. (*See* CP 1379-1401) The trial court found Dr. Wickizer's testimony confusing and prejudicial and excluded it. (RP 168-70)

- 4. The trial court instructed the jury that Weidner owed Gerlach a duty of care under the common law and the Residential Landlord/Tenant Act. The special verdict form, without exception, did not distinguish between the claims.**

The trial court instructed the jury that Weidner owed Gerlach the common law duty owed to an invitee by an owner and occupier of land. (Instr. Nos. 10-12, CP 1870-72) Weidner concedes these instructions were proper. (App. Br. 33)

Prior to trial, the trial court had ruled that Weidner owed Gerlach the same duty to maintain her apartment in a habitable

condition that it owed her fiancé, the signator under the lease, under the Residential Landlord Tenant Act:

(1) This Court finds 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) Consistent with that ruling, the trial court instructed the jury that Weidner owed Gerlach a duty of care under the RLTA, including the duty to refrain from creating “an actual or potential safety hazard,” and to use ordinary care to discover and repair a dangerous condition that violates health and safety regulations. (Instr. Nos. 13-15, CP 1873-75) The trial court also instructed the jury under RCW 5.40.050, that a violation of a statute or regulation may be considered evidence of negligence. (Inst. 16, CP 1876)

The trial court gave the jury a general verdict form that simply asked whether the defendants were negligent, whether such negligence, if any, was a proximate cause of Gerlach’s damages, whether Gerlach was negligent, and the percentage of fault:

QUESTION NO. 1: Were either or both of the defendants negligent?

QUESTION NO. 2: Was the negligence of one or both of the defendants a proximate cause of injuries and/or damages to plaintiff?

(CP 1888)

Weidner, having proposed these very questions in its proposed verdict form, did not except to either of these questions and did not propose a special verdict form that would have differentiated between the common law and warranty of habitability theories. (CP 1233; RP 3512) Weidner concedes on appeal that it “has not challenged the trial court’s . . . instructions” that it owed Gerlach a common law duty of care as an invitee. (App. Br. 33, n.29) Weidner similarly concedes that “Gerlach had ample grounds under common law premises liability principles” and has not challenged the jury’s finding that Weidner breached that duty of care. (App. Br. 33)

**5. Weidner did not contest the defective condition of the railing but argued that Gerlach was negligent when she climbed over the balcony railing while intoxicated. The jury allocated 93% fault to Weidner and 7% to Gerlach.**

In closing argument, Weidner relied on Dr. Carhart’s reconstruction to argue that Gerlach was trying to climb over the balcony railing from the outside when the railing gave way. (RP 3626-33) Weidner reminded the jury of Gerlach’s “admission to being intoxicated,” told the jury that “you have been instructed that she was intoxicated that night,” and that Gerlach’s voluntary intoxication impaired her judgment, and caused her to “climb[] over in a state when she was . . . compromised.” (RP 3639, 3641-43)

Citing the trial court's instructions 19-21 (CP 1879-81), Weidner argued that Gerlach "put herself at risk as a consequence of being intoxicated that night. . . . Ms. Gerlach was negligent. She was voluntarily intoxicated." (RP 3641-42)

The jury agreed, returning a verdict finding Weidner 93% negligent and Gerlach 7% negligent, and awarding total damages of \$3,799,793.78. (CP 1888-90) The trial court entered judgment against Weidner for \$3,533,808.22. Weidner appeals.

#### IV. ARGUMENT

**A. The trial court allowed Weidner to fully argue its intoxication theory under instructions that accurately stated the law and allowed the jury to fairly allocate fault based on Gerlach's intoxication.**

The trial court allowed Weidner to argue that Gerlach's intoxication impaired her judgment, and instructed the jury to consider Gerlach's intoxication in determining whether she was negligent. The jury fully considered Gerlach's intoxication and accepted Weidner's theory that Gerlach was partly at fault, but allocated 93% of the fault to Weidner based on overwhelming evidence that Weidner was negligent in failing to discover and repair a rotten balcony railing that posed an unreasonable risk to life and safety. The trial court committed no prejudicial error; its instructions accurately stated the law.

Weidner's contention that the trial court erred in its "treatment of issues associated with RCW 5.40.060" (App Br. 13-14) is a ploy to evade completely the consequences of its negligence simply because the trial court failed to tell the jury that finding Gerlach more than 50% negligent would bar her recovery for her grievous injuries under the voluntary intoxication defense. But Weidner fails to explain how its proposed instructions on voluntary intoxication would have led the jury to change its finding that Weidner bore the overwhelming responsibility for Gerlach's fall.

**1. Overwhelming evidence supports the jury's verdict that Weidner negligently failed to inspect, repair and replace rotten wooden balcony railings.**

Weidner concedes the jury was correctly instructed on its common law duty of care. (App. Br. 33, n.29) Although ignoring that evidence in its opening brief, Weidner mounts (and can mount) no challenge to the overwhelming evidence that supports the jury's finding that Weidner was negligent in maintaining a condition posing a life threat to its invitees. It was undisputed that the balcony railing outside Gerlach's apartment was dangerously compromised by rot. The dispute at trial was whether the decayed railing could have withstood the weight of a 130-135 lb. adult leaning against it,

but not the force associated with an adult attempting to climb over it, as Weidner alleged and its expert Dr. Carhart testified at trial.

Weidner contended that Gerlach was negligent in attempting to climb onto her balcony while intoxicated, thus leading to the railing failing and her fall. This was, and remains, Weidner's only allegation of comparative fault and – given the undisputed fact that the railing was rotten – the only possible basis for which the jury could find that Gerlach's own negligence caused her injuries. Weidner was given every opportunity to develop its theory under instructions that accurately stated the law, and the jury considered it in allocating 7% fault to Gerlach. The jury properly found that Gerlach's comparative fault while intoxicated paled in comparison to Weidner's negligence in maintaining a balcony that was dangerously compromised by rot.

**2. The trial court properly instructed the jury to consider Gerlach's voluntary intoxication in allocating fault. Weidner was not additionally entitled to instructions telling the jury the legal consequence of its findings of comparative fault.**

The trial court instructed the jury that a person who is voluntarily intoxicated is held to the same standard of care as one who is not so affected, and that it could consider Gerlach's voluntary intoxication in determining her contributory negligence. (Inst. 20, CP

1880) This instruction accurately stated the law and allowed Weidner to argue its theory of the case. The trial court was not additionally required to instruct the jury that Gerlach's voluntary intoxication would bar her recovery if she was more than 50% at fault, nor would such an instruction have any effect on the jury's verdict.

As Weidner concedes (App. Br. 24, n. 19), jury instructions are proper if, when read as a whole, they accurately state the law, are not misleading and enable a party to fairly argue its theory of the case. *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558 (2001); *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993). The trial court's refusal to give additional instructions, or its choice of wording, is reviewed for abuse of discretion. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732-33, 927 P.2d 240 (1996). And instructional error is not grounds for reversal unless the appellant has been prejudiced. *Terrell v. Hamilton*, 190 Wn. App. 489, 502, ¶ 16, 358 P.3d 453 (2015).

Here, the trial court instructed the jury to determine whether Gerlach was guilty of contributory negligence in causing her own injury, and to determine the degree of any such contributory negligence as a percentage attributable to Gerlach. (CP 1879, 1881)

Crucially, the trial court also instructed the jury to consider Gerlach's voluntary intoxication in allocating fault to Gerlach:

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.

(Inst. 20, CP 1880) Weidner fully presented its theory of the case, questioning numerous witnesses about Gerlach's alcohol consumption (RP 1496-97, 2353-54, 2554-55), reminding the jury that Gerlach admitted she was intoxicated, (RP 3639), and arguing that Gerlach "put herself at risk as a consequence of being intoxicated that night." (RP 3641)

In arguing that the trial court was required to also instruct the jury under pattern instructions concerning voluntary intoxication taken from RCW 5.40.060, Weidner fails to identify how the court's instructions misstated the law, prevented Weidner from arguing its theory of the case to the jury or how its proposed instructions would have allowed the jury to reach a different verdict. Under RCW 5.40.060, a person's voluntary intoxication is a bar to recovering personal injury damages if that condition is a proximate cause of the injury and that person is more than 50% at fault:

[I]t 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.

No case law or other authority supports Weidner's argument that it was "entitled to an instruction . . . that advised the jury of the significance of Gerlach's voluntary intoxication under the statute" – e.g., that Gerlach's claim was barred if it found more than 50% of fault due to intoxication.

The jury's job is to find the facts. There is no requirement that the jury be informed of the legal consequences of the facts that it finds; that is the role of the court. *See Coulter v. Asten Grp., Inc.*, 135 Wn. App. 613, 626, ¶ 30, 146 P.3d 444, 450 (2006) (considering legal consequences for purposes of joint and several liability of jury's factual findings; "[t]he instructions and the verdict form directed the jury to make factual findings regarding the total damages suffered by the Coulters and the relative fault of Asten, Ernest Coulter, and other entities. But the court has the duty to determine the legal consequences of those findings."), *rev. denied*, 161 Wn.2d 1011 (2007); *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 866, ¶ 62, 313 P.3d 431

(2013) (court's role is to determine legal consequence of jury's findings in verdict).

After instructing the jury that it may consider Gerlach's intoxication in finding her negligent, the trial court properly informed the jury that its answers regarding "the degree of negligence, expressed as a percentage . . . will furnish the basis by which the court will apportion damages, if any." (Inst. 21, CP 1881) Weidner does not challenge this instruction. The trial court's refusal to additionally instruct the jury of the legal consequence of its comparative fault findings was no different than any case where the court determines the legal consequence of the jury's factual allocation of fault to the parties and others under RCW 4.22.070.

The trial court thus did not abuse its discretion in refusing to give the jury pattern instructions on voluntary intoxication, as proposed by Weidner. No party is entitled to have the jury instructed in the language of a pattern instruction, which is advisory only, and not binding authority. 6 Wash. Prac., Pattern Jury Instr. Civ. 0.10 at 3 (6th ed. 2017 update); *Univ. of Washington v. Gov't Employees Ins. Co.*, 200 Wn. App. 455, 475, ¶ 49, 404 P.3d 559 (2017). Weidner relies on *Peralta v. State*, 187 Wn.2d 888, 891, ¶ 1, 389 P.3d 596 (2017), where the plaintiff admitted that she was intoxicated and

the trial court entered judgment in favor of the defendant after the jury found that the plaintiff was more than 50% at fault. While the court there apparently instructed the jury under WPI 16.03-16.05, 187 Wn.2d at 893, ¶ 6, nothing in *Peralta* or any other case *requires* the court to use those pattern instructions – particularly where, as here, the trial court directs the jury to consider plaintiff’s admitted intoxication in assigning fault to the plaintiff.

Nor did the trial court abuse its discretion in refusing two other instructions proposed by Weidner, which provided definitions of intoxication, either based on impairment “as a result of using alcohol or any drug,” or based on “alcohol concentration in a person’s blood [of] .08 or more.” (CP 1224-25); *see* WPI 16.04 and 16.05. Because Gerlach admitted to being intoxicated,<sup>3</sup> the jury had no reason to make that factual determination, and these instructions were superfluous. *See State v. Humphries*, 181 Wn.2d 708, 714-15, ¶ 7, 336 P.3d 1121 (2014) (“When the parties stipulate to the facts that

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<sup>3</sup> Weidner complains that the trial court told the jury that the parties had “stipulated” to Gerlach’s intoxication, (App. Br. 12, 24, n.18), but that appellation was of no consequence because the trial court had the discretion to treat Gerlach’s admission as binding and did so in its instruction to the jury, as Weidner reminded the jury in closing argument. (RP 3639); *see Peralta*, 187 Wn.2d at 900-01, ¶ 22 (trial court did not abuse its discretion in instructing the jury that plaintiff had admitted to being intoxicated at time of accident).

establish an element of the charged crime, the jury need not find the existence of that element”); *State v. Rodriguez-Flores*, 197 Wn. App. 1080, 2017 WL 714040, at \*3 (2017) (unpublished) (instruction defining “school bus stop” unnecessary where defendant admitted to acts occurring within 1000 feet of school bus stop in prosecution for delivery of methamphetamine).

The trial court did not abuse its discretion in its instructions to the jury to consider Gerlach’s intoxication in allocating fault. Weidner was fully able to argue its theory that Gerlach was contributorily negligent as a result of her intoxication under the instructions given. Weidner was not entitled to and was not prejudiced by the trial court’s refusal to give superfluous pattern instructions defining intoxication and informing the jury of the legal consequence of a finding of more than 50% fault.

**B. The trial court fairly exercised its discretion in its evidentiary rulings concerning Gerlach’s intoxication.**

The trial court properly exercised its broad discretion in its evidentiary rulings – which also, in any event, caused Weidner no prejudice. The trial court has extremely broad discretion in ruling on the admissibility of opinion evidence and in balancing the probative value of evidence against its potential to unfairly prejudice the jury. *Hill v. C. & E. Const. Co.*, 59 Wn.2d 743, 746, 370 P.2d 255 (1962);

*Industrial Indemnity Co. v. Kallevig*, 114 Wn.2d 907, 926, 792 P.2d 520 (1990). This Court may affirm the trial court’s discretionary exclusion of evidence “on any proper basis within the record and [it] will not be reversed simply because the trial court gave a wrong or insufficient reason for its determination.” *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992).

The trial court correctly excluded Gerlach’s blood alcohol test because Gerlach admitted to being intoxicated and the test results were not reliable for use in judicial proceedings. Moreover, as the effects of alcohol on Gerlach’s judgment and balance were a matter of common knowledge, the trial court’s decision to exclude “expert” testimony on that subject was similarly not an abuse of discretion.

- 1. The trial court did not abuse its discretion in excluding the hospital’s blood alcohol report, particularly in light of Gerlach’s admission that she was intoxicated.**

The trial court correctly exercised its discretion in excluding a hospital blood alcohol report that failed to meet the requirements of reliability established under Washington law. It should not have been admissible even if Gerlach had not admitted to being intoxicated. But after instructing the jury that “Ms. Gerlach was under the influence of intoxicating liquor at the time of the accident,”

any marginal relevance of the blood test was far outweighed by its potential for unfair prejudice. (RP 2799)

As Weidner concedes (App. Br. 20-21, n.15), RCW 5.40.060 incorporates by reference the standards for blood and breath alcohol testing, which by statute are set by the state toxicologist:

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 [DUI].

RCW 5.40.060(1); *see State v. Peralta*, 191 Wn. App. 931, 945-46, ¶¶ 27-28, 366 P.3d 45 (2015) (proof of intoxication under RCW 5.40.060 requires proof that the plaintiff was under the influence under the standard established by RCW 46.61.502), *reversed on other grounds*, 187 Wn.2d 888, 389 P.3d 596 (2017).

In order to establish intoxication under RCW 46.61.502, a person must have “an alcohol concentration of 0.08 or higher as shown by analysis of the person’s breath or blood made under RCW 46.61.506.” RCW 46.61.502(1)(a). That statute also requires that any analysis of a person’s blood or breath be performed pursuant to standards set by the state toxicologist:

(3) Analysis of the person’s blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state

toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose.

RCW 46.61.506(3).

The statute goes on to direct the state toxicologist “to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.” RCW 46.61.506(3). In addition to setting forth the qualifications for individuals engaged in blood alcohol analysis the state toxicologist has also established rigorous “analytic procedures” in order to obtain a valid blood alcohol test, including a “control test,” a “blank test” and a “duplicate analysis that agrees within plus or minus 10 percent of their mean.” WAC 448-14-020-030.

There was no evidence that any of these conditions were met here. Arguing that BAC evidence “*must* be admitted,” (App. Br. 19) (emphasis in original), Weidner nevertheless insisted below that Gerlach’s blood draw established “conclusive proof” that she was intoxicated under RCW 46.61.502(1)(a). (CP 1533)<sup>4</sup> Weidner’s

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<sup>4</sup> In seeking reconsideration of the trial court’s evidentiary ruling excluding the unverified BAC results, Weidner relied exclusively on RCW 46.61.502(1)(a) to argue it had a “**legal right**” to conclusively establish Gerlach’s intoxication through her Harborview blood test. (CP 1533-34) (emphasis in original)

contention that “no appellate case” has limited the use of BAC results (App. Br. 19) ignores entirely RCW 5.40.060’s incorporation of the standards for measuring blood alcohol under RCW 46.61.502, .506.

In a civil action in which the defense relies on a blood alcohol test to establish the plaintiff’s per se intoxication, as Weidner did here, “there must be compliance with proper blood sampling procedures.” *Peralta*, 191 Wn. App. at 946, ¶28 (citing RCW 46.61.506). The trial court in this case certainly did not abuse its wide discretion in balancing the minimal probative value of the unverified results after instructing the jury that Ms. Gerlach had admitted to being intoxicated on the night of the accident.

As demonstrated in the voir dire of Weidner’s expert, admission of a specific blood alcohol level would have only confused the jury and resulted in a mini-trial over the science of blood testing and alcohol metabolism. (RP 1536-40) Other than misleading the jury with a pejorative but unverifiable number, Weidner cannot demonstrate any prejudice from the trial court’s exclusion of the blood alcohol test result in light of Gerlach’s admission to intoxication. Weidner extensively examined Gerlach’s companions concerning the extent and degree of their alcohol consumption before returning to the Cove. (*See e.g.*, RP 1496, 2353-69, 2629)

Weidner asserts that it was barred from arguing “the extent of [Gerlach’s] intoxication,” but in fact it was only barred from introducing an unreliable BAC test result.

**2. The trial court did not abuse its discretion in excluding the testimony of Weidner’s pharmacology expert, whose conclusions were speculative and would not assist the jury.**

The trial court correctly exercised its discretion in excluding defense expert Dr. Vincenzi, whose testimony was limited to “the effect of consumption of alcohol on a human person.” (RP 1533) “The purpose of opinion evidence is to assist the trier of the fact in correctly understanding matters not within common experience, but, in passing upon the admissibility of such testimony, the court has a duty to see that the jury is not likely to be misled.” *Hill*, 59 Wn.2d at 745. First, his conclusions on the “effect and significance” of Gerlach’s admitted intoxication were entirely speculative and without foundation; they were solely based on the unreliable hospital blood test and admittedly did not go to causation. Second, expert testimony is unnecessary on an issue that is within the common knowledge of a juror, such as the effects of intoxication. ER 702.

The trial court did not abuse its discretion in excluding Dr. Vincenzi's testimony about the level of Gerlach's intoxication, based entirely on the inadmissible blood alcohol test. *See State v. Canaday*, 90 Wn.2d 808, 814, 585 P.2d 1185 (1978) (expert testimony based on unscientific testing of breathalyzer ampoules held inadmissible). An expert's opinion regarding how alcohol may have effected an individual's behavior on any particular occasion must be based on "the way she appeared to those around her, not by what a blood alcohol test may subsequently reveal." *Purchase v. Meyer*, 108 Wn.2d 220, 226, 737 P.2d 661 (1987) (quotation omitted).

Additionally, Dr. Vincenzi's testimony was not helpful to the jury because the fact that alcohol impairs a person's judgment and coordination is a matter of common knowledge that is not beyond the understanding of the average juror. *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647, *rev. denied*, 104 Wn.2d 1026 (1985). The Court of Appeals affirmed as well within the trial court's broad discretion its exclusion of expert testimony concerning whether the defendant, who admitted consuming substantial amounts of alcohol, was intoxicated at the time of the offense and "whether the intoxication would have impaired his judgment":

Certainly the effects of alcohol upon people are commonly known and all persons can be presumed to draw reasonable inferences therefrom especially those who saw Smissaert at the critical time.

*Smissaert*, 41 Wn. App. at 815.

Similarly, here, Dr. Vincenzi offered nothing that a jury could not understand. In his offer of proof, he asserted that Gerlach's intoxication would have impaired her judgment, her balance, and inhibition against engaging in risk taking behavior (RP 1532-35), all matters within the common understanding of jurors as Weidner asserted in its closing argument. (RP 3639)

Whether an expert's proffered testimony is admissible, or improperly goes to matters within the jury's common understanding, are questions for the trial court in exercising its discretion. *Stedman v. Cooper*, 172 Wn. App. 9, 18, ¶ 21, 292 P.3d 764 (2012) (trial court did not err in excluding testimony of accident reconstructionist); *Litts v. Pierce Cty.*, 9 Wn. App. 843, 846, 515 P.2d 526 (1973) (affirming exclusion of expert ophthalmologist who would have testified to consequences of plaintiff's myopic condition; "the purpose of opinion evidence is to assist the trier of fact in correctly understanding matters not within common experience. If the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert opinion.")

Where the reasons for excluding expert testimony are “fairly debatable,” this Court will not reverse the trial court’s discretionary decision. *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001).

The trial court had ample grounds to exclude Dr. Vincenzi’s testimony about the effects of intoxication, particularly where he could not and did not testify to how it could have caused the accident to occur. This Court should affirm on any or all of them.

**3. The trial court properly exercised its discretion in limiting Dr. Carhart’s testimony to the area of his expertise.**

Weidner similarly fails to establish an abuse of discretion in the trial court’s reasonable decision to limit accident reconstructionist Dr. Carhart’s testimony to the area of his expertise and to exclude his opinion on “human postural control . . . with respect to alcohol.” (RP 1563; 2975 (offer of proof))<sup>5</sup> Over Gerlach’s objection that the testimony was entirely speculative, the trial court allowed Dr. Carhart to opine that Gerlach fell while attempting to climb over the balcony, even though his was opinion contrary to

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<sup>5</sup> This Court’s review is limited to the offer of proof presented to the trial court. *Tomlinson v. Bean*, 26 Wn.2d 354, 361-62, 173 P.2d 972 (1946). Weidner improperly cites to a declaration given by Dr. Carhart on a discovery motion, but that was not Weidner’s offer of proof, which was made on the record in open court. (RP 2973-81) ER 103(a)(2); *Adcox v. Children’s Orthopedic Hosp. and Med Ctr.*, 123 Wn.2d 15, 28, 864 P.2d 921 (1993).

contemporary accounts and Gerlach's position when she landed on the cement walkway after the balcony railing gave way.

The trial court excluded only Dr. Carhart's alcohol related opinions, which were beyond his expertise in accident reconstruction and based solely on his review of "peer reviewed literature" and "the medical records of a blood alcohol level of .252." (RP 2975-76); *Estate of Bordon v. Dept. of Corrections*, 122 Wn. App. 227, 246-47, 95 P.3d 764 (2004) (affirming exclusion of testimony of correction's expert about what a judge would have done as "beyond his expertise and merely speculative" as not an abuse of discretion), *rev. denied*, 154 Wn.2d 1003 (2005). Dr. Carhart offered the unremarkable conclusions that alcohol "affects stability, affects balance," (RP 2976), and can "yield a propensity to fall" which "increases the loads that you would exert on the environment." (RP 2979) Foundation aside, his testimony was properly limited for the same reasons Dr. Vincenzi's was excluded. *See also Edgar v. Brandvold*, 9 Wn. App. 899, 904, 515 P.2d 991 (1973) (trial court did not abuse its discretion in excluding firearms expert to testify to safety required when hunting), *rev. denied*, 83 Wn.2d 1007 (1974); *Kenna v. Griffin*, 4 Wn. App. 363, 365, 481 P.2d 450 (1971) (trial court did not abuse

discretion in refusing to admit testimony of psychiatrist to testify as to the effect of alcohol on intent to commit battery).

**C. The trial court did not commit reversible error in instructing the jury of a landlord's duties under the Residential-Landlord Tenant Act.**

- 1. This Court must affirm because substantial evidence supports the properly instructed jury's unchallenged finding that Weidner breached its common law duty to an invitee.**

Weidner's challenge to the trial court's denial of partial summary judgment and instructions to the jury under the Residential Landlord Tenant Act ignores its concession that the jury entered an "undifferentiated" general verdict that did not distinguish between Weidner's liability as an owner and occupier of land under the common law and liability for breach of a landlord's duties under the RLTA. (App. Br. 33, n.29) Weidner concedes that the trial court properly instructed the jury on common law negligence and does not challenge the substantial evidence supporting Weidner's liability for breach of its duty to Gerlach as an invitee. As Weidner itself proposed a general verdict form that failed to distinguish the two theories, (CP 1233-35), its challenge to the RLTA claim must be rejected.

Because Weidner did not except to the general verdict form, this Court must affirm the jury's undifferentiated verdict if any one of Gerlach's claims establishing Weidner's liability is supported by

substantial evidence. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003). As Tegland summarizes the rule:

In a multitheory case, i.e., a case in which the jury may base its verdict on one of a number of theories of liability asserted by the plaintiff, an appellate court will be obligated to remand if one of the theories is later invalidated on appeal, *but only if the defendant objected to the use of a general verdict and proposed a clarifying special verdict form.*

Tegland, 15A Wash. Prac., *Handbook Civil Procedure* § 88.6 (2010-2011 ed.) (emphasis added), *citing Davis*, 149 Wn.2d 521;<sup>6</sup> *see also, Collings v. City First Mortgage Services, LLC*, 177 Wn. App. 908, 924, ¶ 34, 317 P.3d 1047 (2013) (“remand for a new trial is required only if the defendant objected to the use of a general verdict and

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<sup>6</sup> *Accord, Corey v. Pierce County*, 154 Wn. App. 752, 767, ¶ 31, 225 P.3d 367 (2010) (“Notwithstanding the elimination of the negligence cause of action, the verdict remains unaffected” where sufficient evidence supported jury’s verdict on intentional tort claims), *rev. denied*, 170 Wn.2d 1016 (2010); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 36, 935 P.2d 684 (1997) (where “jury rendered a single monetary verdict on both the strict liability product-warning claim and the negligent failure-to-warn claim” instructional error on “negligent failure-to-warn claim would not affect the judgment”); *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 173, 914 P.2d 102 (1996), *modified by* 932 P.2d 1266 (1997) (where verdict form did not require jury to specify which sections of employee handbook contained enforceable promises of employer, court may affirm “if we find substantial evidence of a breach of any promise of specific conduct”); *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 11, 882 P.2d 157 (1994) (where defendant conceded warning claim properly before jury, court may affirm where verdict form failed to distinguish between liability for negligent design and failure to warn).

proposed a clarifying special verdict form”), *rev. denied*, 179 Wn.2d 1028 (2014).

Weidner concedes that the trial court submitted the common law negligence claim to the jury under instructions that accurately stated the law (App. Br. 33, n.29), and makes no challenge to the overwhelming evidence that Weidner breached its duties owed to invitees, such as Gerlach, by failing to repair its rotten wooden balcony railings. *See Sjogren v. Properties of the Pacific NW, LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003) (tenant’s guest is invitee to whom landlord owes affirmative duty of care). It is similarly undisputed that Weidner did not propose a special verdict, or object to the trial court’s verdict form on the ground that it failed to distinguish between the two theories. (RP 3512) This Court should reject Weidner’s challenge to the judgment on the jury’s general verdict on this basis alone.

**2. Weidner’s duty to maintain the premises in a reasonably safe condition extended to Gerlach, and all persons who could reasonably be expected to use the premises, not just to its tenant.**

The trial court correctly instructed the jury that a landlord’s breach of its implied and statutory warranty of habitability may be

evidence of negligence. (CP 1874-76); *see* WPI 130.06.<sup>7</sup> Weidner does not contend that its rotted railing rendered the premises safe for occupancy or in compliance with its statutory and implied warranties and proposed its own instruction describing those duties that was substantially similar to Inst. No. 13. (*compare* CP 1227 with CP 1873)

Weidner’s argument that the duties of a landlord to maintain the premises in a habitable and safe condition runs only to a tenant who has signed the lease substantially undermines the remedial purpose of the warranty of habitability – to ensure that tenants have a safe and habitable place to live. *See Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973). There is no sound policy basis to limit the right of action of one who is injured due to a violation of the RLTA’s health and safety requirements to the signator on the lease, and to exclude guests and others who are foreseeably exposed to dangerous conditions. *See Sjogren*, 118 Wn. App. at 151 (landlord’s duties extend to guest of tenant; noting that even under *Lian v. Stalick*, 106 Wn. App. 811, 822, 25 P.3d 467 (2001), the case principally relied upon by Weidner to limit RLTA liability, “the landlord could be liable

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<sup>7</sup> The trial court also instructed the jury on the implied warranty of habitability (CP 1873-74), and not solely on a landlord’s duties under RCW ch. 59.18, as Weidner claims. (App Br. 26)

for personal injuries for violating the act’s warranty of habitability or a duty created by statute or regulation”).

In *Martini v. Post*, 178 Wn. App. 153, 171, ¶42, 313 P.3d 473 (2013) (App. Br. 32, n.27), Division Two adopted *Restatement (2<sup>nd</sup>) of Property: Landlord & Tenant*, § 17.6 (1977), also cited favorably in *Lian*, 106 Wn. App. at 821-22, which provides that “[a] landlord is subject to liability for physical harm caused to the tenant *and others* upon the leased property with the consent of the tenant” due to a dangerous condition that is in breach of the implied warranty of habitability or a duty created by statute or regulation. (emphasis added).<sup>8</sup> While the *Martini* court reserved the question of whether

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<sup>8</sup> Other states allow guests and other third parties to enforce in tort the breach of the landlord’s statutory duty to maintain the premises in a habitable and safe condition. *See, e.g., Scott v. Garfield*, 912 N.E.2d 1000, 1005-06 (2009) (tenant’s guest suffering injuries from fall caused by defective railing could recover from landlord for breach of the implied warranty of habitability); *Merrill v. Jansma*, 2004 WY 26, 86 P.3d 270, 289, ¶ 46 (Wyo. 2004) (Residential Rental Property Act, which imposes a duty on landlords to maintain leased premises in a fit and habitable condition, imposes a tort duty that may be enforced by visitor, as well as by tenant); *Shump v. First Cont'l-Robinwood Assoc.*, 71 Ohio St. 3d 414, 419-20, 644 N.E.2d 291 (1994) (landlord owes the same statutory duties to persons lawfully upon the leased premises as the landlord owes to the tenant); *Thompson v. Rock Springs Mobile Home Park*, 413 So. 2d 1213, 1215 (Fla. Dist. Ct. App. 1982) (breach of warranty of habitability grants right to maintain tort action “not only to the tenant, but also to persons in the tenant’s household and visitors who come upon the premises at the tenant’s implied or express invitation.”); *Ford v. Ja-Sin*, 420 A.2d 184, 187 (Del. Super. 1980) (landlord owed tenant’s guest duty to maintain stairway in safe condition under Landlord-Tenant Code).

those statutory duties extend to a tenant's guest, 178 Wn. App. at 169, ¶ 39, this Court should now hold that the landlord is not relieved of its statutory duty to maintain the premises in a safe condition based on the fortuity that the victim of its negligence is a guest, rather than the signator to the lease.

**D. The trial court did not abuse its discretion in excluding expert testimony challenging the reasonableness of Gerlach's medical treatment based on inadmissible collateral source evidence.**

The trial court acted within its discretion in excluding testimony from Weidner's expert, who purported to challenge the reasonableness of Ms. Gerlach's medical bills based almost entirely on inadmissible collateral source evidence. (*See* CP 1547, ¶ 5.6; RP 169-70) Thomas Wickizer, Ph.D. sought to rebut Gerlach's evidence that the care she received was reasonable and necessary and that her medical expenses were consistent with community standards (RP 1362-66, 1370), by testifying that healthcare providers inflate their fees knowingly and then negotiate with third-party payers (*i.e.*, insurance companies and Medicare) who ultimately pay discounted rates. (*See, e.g.*, CP 1384-85; *see also* CP 945-46) The trial court properly rejected this testimony because it was not helpful to the trier of fact, was irrelevant, and prejudicial. ER 702, 403.

Under ER 702, a qualified expert may testify if the expert's testimony will help the jury "to determine a fact in issue." "[E]xpert testimony will be deemed helpful to the trier of fact only if its relevance can be established." *State v. Greene*, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999), *cert. denied*, 529 U.S. 1090 (2000). Acting as a gatekeeper, the trial court "has broad discretion in determining whether an expert's testimony is admissible" and "can exclude otherwise admissible evidence if it fails to meet ER 702 standards." *Det. of McGary*, 175 Wn. App. 328, 339, ¶ 30, 306 P.3d 1005, *rev. denied*, 178 Wn.2d 1020 (2013); *State v. King Cty. Dist. Court W. Div.*, 175 Wn. App. 630, 637-38, ¶ 11, 307 P.3d 765 (trial court can exclude otherwise admissible evidence under ER 702), *rev. denied*, 179 Wn.2d 1006 (2013). A trial court's decision to exclude expert testimony is reviewed for abuse of discretion. *McGary*, 175 Wn. App. at 337, ¶ 21. Because a trial court "has [ ] very wide discretion" regarding admissibility of expert testimony, the trial court's ruling will not be disturbed on appeal even if "the reasons for admissibility or exclusion of opinion evidence are both fairly debatable." *Hill v. C. & E. Const. Co.*, 59 Wn.2d 743, 746, 370 P.2d 255 (1962); *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001).

The trial court did not abuse its broad discretion in excluding Dr. Wickizer's testimony as speculative, unhelpful, and prejudicial. (RP 169-70) The trial court correctly noted that a minitrial would be required "to let the jury decide" if or how "Harborview inflates bills," and did not want to hear argument about "how much each insurance company gets a break on each and every bill," particularly Gerlach's third party payors who had subrogation rights. (RP 169-70); *Det. of West*, 171 Wn.2d 383, 401, ¶ 25, 256 P.3d 302 (2011) ("the trial court had discretion and acted within it by" excluding expert rebuttal testimony to "eliminate[] the danger that a minitrial would ensue").

Further, the trial court correctly reasoned that Dr. Wickizer's testimony would open the door to inadmissible collateral source evidence. (CP 1547, ¶ 5.6) Under the collateral source rule, "payments, the origin of which is independent of the tort-feasor, received by a plaintiff because of injuries will not be considered to reduce the damages otherwise recoverable." *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (quotation omitted), *as corrected*, 22 P.3d 791 (2001). The purpose of the rule is "to prevent the wrongdoer from benefitting from third-party payments" therefore, to effectuate this purpose, "courts generally exclude evidence that the plaintiff has received compensation from a third

party for an injury for which the defendant has liability.” *Cox*, 141 Wn.2d at 439.

Weidner cannot distinguish *Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001), where Division Three rejected the argument that “the collateral source rule applies only to actual amounts paid on the plaintiff’s behalf” and held that the difference between the amount “actually billed” and the amount “paid is not itself determinative” of the reasonableness of the medical expense. The *Hayes* court affirmed the trial court’s exclusion of similar evidence, explaining that reduced-rate payments from third-parties are irrelevant because “[t]he question is whether the sums *requested* for medical services are reasonable.” *Hayes*, 105 Wn. App. at 616 (emphasis added); ER 402 (irrelevant evidence “is not admissible”). As the *Hayes* court observed, “[p]laintiffs in negligence cases are permitted to recover the reasonable value of the medical services they receive, *not* the total of all bills paid.” 105 Wn. App. at 616 (emphasis added); *see also Hernandez v. Stender*, 182 Wn. App. 52, 60, ¶¶ 17-19, 358 P.3d 1169 (2014) (trial court did not abuse its discretion in excluding the fact that one of plaintiff’s treatment providers had waived payment of his bill).

Weidner’s argument that Dr. Wickizer would only testify to the “reasonable cost of medical services and how the charges billed to Gerlach compare to charges for like services,” (App. Br. 36), ignores 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. (*See, e.g.*, CP 1389 (“My estimates of reasonable value of medical expenses for physician services provided to [plaintiff] are based on the Medicare Physician Payment Schedule.”)) His testimony would necessarily require comparing for the jury the amounts billed by Harborview with the amounts it received from the payors responsible for Gerlach’s medical expenses, and with the “reasonable” Medicare rates relied on by Dr. Wickizer, subverting the rule’s purpose of “prevent[ing] the wrongdoer from benefitting from third-party payments.” *Cox*, 141 Wn.2d at 439.

The trial court did not abuse its discretion in excluding Dr. Wickizer’s testimony. Any marginal relevance of Dr. Wickizer’s “reasonableness” testimony was substantially outweighed by its propensity to confuse or mislead the jury. ER 403.

## **V. CONCLUSION**

This Court should affirm the judgment on the jury’s verdict.

Dated this 10<sup>th</sup> day of April, 2018.

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**DECLARATION OF SERVICE**

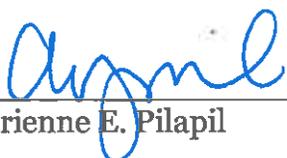
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**DATED** at Seattle, Washington this 10<sup>th</sup> day of April, 2018.

  
\_\_\_\_\_  
Andrienne E. Pilapil



(Exhibit 54)

**SMITH GOODFRIEND, PS**

**April 10, 2018 - 8:54 AM**

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