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No. 97325-3

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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KIMBERLY J. GERLACH, individually,

Petitioner,

v.

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

Respondents.

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SUPPLEMENTAL BRIEF OF RESPONDENTS

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## A. INTRODUCTION

In the early morning hours of October 27, 2012, after a night of heavy drinking to the point that Kimberly Gerlach's blood alcohol level ("BAC") was .238, almost three times the legal limit for driving in Washington, RCW 46.61.502(1), Gerlach fell to the walkway below from outside her boyfriend's second-story apartment unit at the Cove Apartments, a facility owned by Cove Apartments LLC and managed by Weidner Property Management LLC ("Cove"). Gerlach does not remember what happened that night, and no one saw how she fell. No one knows what she was doing in the moments preceding the fall.

The trial court, however, made multiple erroneous decisions on the RCW 5.40.060 statutory defense that exonerates a defendant from any liability if the plaintiff was under the influence of alcohol and the plaintiff was more than 50% at fault for their injuries, hamstringing Cove's presentation of that statutory defense. It also improperly concluded that Cove owed a duty of care to non-tenants arising from the Residential Landlord Tenant Act, RCW 59.18 ("RLTA").

## B. STATEMENT OF THE CASE

Division I's opinion correctly set forth the facts and procedure. Op. at 2-3. But Gerlach omitted *numerous* facts in her petition for review that bear on this Court's review, requiring Cove to correct those

misstatements for the Court's consideration on the merits.

Gerlach went out drinking with friends, including Brodie and Colin Liddell<sup>1</sup> and her then-boyfriend, Nathan Miller, CP 1180, drinking to the point that her BAC was .238, as determined in a hospital blood draw after the accident, approximately *three times* the legal limit for driving. RP 219-44.

Despite the discussion in her petition that she fell while leaning against the balcony railing, nobody actually saw Gerlach standing on the balcony or even enter the apartment. CP 1181.<sup>2</sup> Brodie was the 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, nor did anyone see her enter the apartment. CP 1181; RP 719. Gerlach herself suffered from retrograde amnesia and could not remember anything that happened on October 26-27. CP 1181; RP 2689. Gerlach did not have a key to Miller's apartment. CP 519. She never entered the apartment – the lights were off, although it was the middle of the night, the front door and sliding

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

<sup>2</sup> Despite her retrograde amnesia as to anything that happened the night of October 26-27, CP 1182, Gerlach asserted in her petition at 4 that she fell over and off of the apartment balcony. She alleged that she entered Miller's apartment, went out on the balcony, and leaned against the balcony railing, causing it to give way. CP 1183. She pointed to the existence of rot in the cap to which the railing is secured and alleged that the rot was the sole proximate cause of her fall. *Id.* Gerlach's newly found memories are clearly inconsistent with her diagnosed amnesia.

glass door were closed, and Gerlach was still wearing her coat, scarf and purse after the fall. RP 2384, 3005-06, 3059-64; Ex. 139.

The record actually supports the view that Gerlach fell while negligently attempting to climb over the railing to enter the apartment through a sliding door on the balcony, as she had done before. CP 1186. Miller told a neighbor, Wendy Rafael, 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. The trial court refused to allow Rafael to relate Miller’s excited utterance to the jury. CP 1552.<sup>3</sup> At trial, Cove’s expert, Dr. Michael Carhart, explained why Gerlach’s version of events was inconsistent with her landing position and the injuries she sustained; in his opinion, Gerlach was attempting to climb onto the balcony from the outside walkway. RP 2997-98, 3000-01.

As for Gerlach’s claim that her fall was caused by rot in the cap to which the railing was secured, an assertion she repeatedly made in her petition, Cove management inspected the balcony railings once a year.

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<sup>3</sup> Evidencing its less than even handed approach to the evidence, the court permitted Colin, over objection, to testify that Brodie told him at the scene that he saw Gerlach leaning on the balcony railing as an excited utterance. RP 1485-88. This directly contradicted Brodie’s sworn testimony that he *only* saw Gerlach land on the ground. RP 718. The trial court also allowed the admission of statements made by Brodie at the scene to officers as excited utterances. RP 1433-39.

Ex. 119, 125. According to Gerlach's own expert, Mark Lawless, this was an entirely prudent practice. RP 2186-89. Miller reviewed the apartment upon moving in. Ex. 112. There is *no evidence* in the record that Cove actually knew of the rot in the cap or elsewhere on the apartment's balcony.

The trial court refused to allow the jury to consider the evidence of Gerlach's actual intoxication, excluding or severely curtailing the admission of testimony from Cove's experts, Dr. Michael Carhart and Dr. Frank Vincenzi, on the effects of her extreme intoxication. CP 883 (Carhart).

In argument of extensive motions in limine, CP 938-1175, the court was initially inclined to let in Gerlach's actual BAC results from Harborview Medical Center, RP 219-20, 228, and to prohibit "speculation" about the effect of Gerlach's intoxication, RP 220-21, even though both Dr. Carhart and Dr. Vincenzi testified that her intoxication profoundly affected her actions at the balcony. CP 782-83. Then, the trial court indicated it would exclude Gerlach's BAC results, RP 620-26, and it limited the Carhart/Vincenzi testimony. CP 1553.<sup>4</sup> However, the court later concluded the BAC results were admissible but expert testimony on their meaning would be limited. RP 1329-33.

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<sup>4</sup> Cove made an offer of proof as to Dr. Vincenzi's testimony. RP 1529-44.

Belatedly, after the court's BAC results ruling, Gerlach's counsel surfaced the idea of a "stipulation" that she was under the influence in lieu of the admission of the BAC results themselves. RP 1335-36. Cove never agreed to such a "stipulation." RP 1550-60. The trial court accepted Gerlach's one-sided stipulation and barred the BAC results or any Vincenzi testimony whatsoever; the court also limited Carhart's testimony. RP 1560-64.<sup>5</sup> The court then told the jury that "the parties" had agreed to a stipulation that Gerlach was intoxicated, when that was clearly untrue. RP 2799-2800.<sup>6</sup> That "stipulation" severely restricted the scope of witness examination. *E.g.*, RP 2400-04, 2715-18.<sup>7</sup>

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

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<sup>5</sup> The trial court deemed Dr. Carhart's testimony on the BAC results to be "speculative." CP 1553. Cove made an offer of proof on Dr. Carhart's testimony regarding the biomechanical impact of Gerlach's extreme intoxication. RP 2973-80.

<sup>6</sup> The court indicated that it would correct that misstatement, upon being advised of it by Cove's counsel. RP 2946-47. It then refused to do so. RP 3361-63.

<sup>7</sup> The trial court also barred defense counsel from playing the portion of Gerlach's videotaped deposition in which she *admitted* that she was drunk when she fell. RP 2716-21. The court foreclosed testimony from Miller on Gerlach's intoxication. RP 2400-04. Both Liddell brothers testified that they did not observe or know precisely how much alcohol Gerlach consumed, RP 2629, 2752, making the BAC results even more crucial as the only reliable indicator of Gerlach's actual level of intoxication.

Cove moved for summary judgment on Cove's duty as a landlord under the RLTA. CP 43-240. The trial court granted Cove's motion as to Gerlach's theory of recovery arising out of the alleged breach of the lease agreement,<sup>8</sup> but denied the motion as to any RLTA claims, ruling that the RLTA's warranty of habitability extends to non-tenants. CP 676-77. The court later instructed the jury in Instructions 13-16 on an implied warranty of habitability, extending the landlord's duty to non-tenants like Gerlach. CP 1873-76. *See* Appendix.

C. ARGUMENT

(1) Division I Correctly Determined That the Trial Court Erred in Its Treatment of Issues Associated with RCW 5.40.060, Necessitating a New Trial on that Defense

Gerlach's voluntary intoxication is a complete defense to any claim she may have against Cove. RCW 5.40.060. *See* Appendix. This Court has *repeatedly* upheld the broad scope of that defense.<sup>9</sup> But the trial court here did everything it could to undermine Cove's right to a fair trial in connection with its RCW 5.40.060 defense. Division I correctly determined that Cove was entitled to a new trial on that defense.

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<sup>8</sup> Gerlach did not contest dismissal of her lease breach claim in the trial court, CP 295, nor did she contend this was error in her Division I briefing.

<sup>9</sup> *Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993); *Morgan v. Johnson*, 137 Wn.2d 887, 896, 976 P.2d 619 (1999); *Peralta v. State*, 187 Wn.2d 888, 389 P.3d 596 (2017).

(a) Gerlach's BAC Results Should Have Been Presented to the Jury

RCW 5.40.060 does not restrict nor exclude the admission of a plaintiff's actual BAC results in connection with the statutory defense, because the Legislature *specifically* referenced RCW 46.61.502 in the statute, importing the case law from RCW 46.61.502 on proof of a party's intoxication. *Peralta*, 187 Wn.2d at 894 (defendant must meet the definition in RCW 46.61.502 that specifically requires proof that the plaintiff's BAC exceeded the legal limit). RCW 46.61.502 allows the admission of actual BAC results to prove intoxication.

BAC results are admissible to prove a plaintiff's intoxication and its effect in an RCW 5.40.060 case. *See, e.g., Geschwind*, 121 Wn.2d at 837 (both the plaintiff's and the defendant's intoxication were before the jury); *Peralta*, 187 Wn.2d at 900 n.6 (where the plaintiff admitted in requests for admissions that she was under the influence and the trial court so instructed the jury, the State Patrol nevertheless presented additional evidence of Peralta's intoxication).<sup>10</sup>

Gerlach's central argument *repeatedly* advanced in her petition for

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<sup>10</sup> Below, Gerlach's counsel even mistakenly argued to the trial court that BAC results were inadmissible in overservice cases. RP 225-26. The trial court adopted counsel's misinterpretation of overservice case law. RP 620-26. But that was wrong. Where a plaintiff sues a commercial liquor provider for overserving a patron, this Court now permits admission of the overserved patron's BAC results at the time of her/his injury. *Faust v. Albertson*, 167 Wn.2d 531, 543, 222 P.3d 1208 (2009) ("BAC evidence is relevant as corroborative and supportive of the credibility of first hand observations.").

review is that “unverified” BAC results derived from a hospital blood draw are somehow not admissible as to the statutory defense. But contending a blood draw is “unverified” is intentionally inaccurate; the BAC results were admissible. Gerlach’s contention that blood draws administered by medical staff for medical purposes are somehow “unreliable” and inadmissible is plainly wrong. Op. at 9-10.<sup>11</sup> Plainly, Harborview Medical Center has experience in performing blood draws that provide accurate BAC results.

As Division I noted, op. at 9-10, a person’s 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 such “other evidence” of intoxication, and are admissible. *State v. Donahue*, 105 Wn. App. 67, 75, 18 P.3d 608, *review denied*, 144 Wn.2d

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<sup>11</sup> In general, “[e]xtraction 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). This Court has long allowed the admission of BAC results taken from hospital blood draws to prove the level of a person’s intoxication. *See, e.g., State v. Erdman*, 64 Wn.2d 286, 288, 391 P.2d 518 (1964).

1010 (2001); *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); *State v. Charley*, 136 Wn. App. 58, 65, 147 P.3d 634 (2006), *review denied*, 161 Wn.2d 1019 (2007).

Washington courts have routinely approved the admission of BAC results from tests performed for medical purposes over objections that they do not meet state toxicology standards. “[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 v. Roys*, 44 Wn. App. 305, 312, 722 P.2d 848 (1986). BAC results generated by a hospital are admissible under RCW 46.61.502 as evidence of a person’s intoxication. *Charley*, 136 Wn. App. at 65. The rules regarding admissibility of BAC results are less stringent in civil cases in any event. *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).<sup>12</sup>

Cove was prejudiced by the trial court’s action because Gerlach’s BAC results were the best evidence regarding Gerlach’s alcohol

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<sup>12</sup> 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.

consumption because, as noted *supra* in note 7, the testimony of Gerlach's friends on her drinking was, charitably stated, vague.<sup>13</sup> Cove could not fully present its RCW 5.40.060 statutory defense without Gerlach's actual BAC results. As Division I observed, "...the exclusion of Gerlach's blood alcohol evidence resulted in the complete absence of evidence as to the extent of her intoxication." Op. at 8.

In fact, the trial court's "stipulation" actually misled the jury. Gerlach's .238 BAC conflicted with her friends' statements calculated to minimize her actual level of intoxication by stating that she had "a drink" or that her own boyfriend could not say "for sure" whether she was drinking at all, as Division I noted. *Id.* Rather, she was *severely* intoxicated, approximately *three times* the legal limit for driving. Gerlach's actual BAC results documented 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.

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<sup>13</sup> The friends who were 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, one could only answer "I know we all had a drink." RP 1496-97. When asked if Gerlach was drinking, 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, who was near to Gerlach when she 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. 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.

Finally, the degree of Gerlach's intoxication was critical on proximate cause and the percentage of her fault. Gerlach's actual BAC results support not only the fact that she was intoxicated, a point on which Cove had the burden of proof under RCW 5.40.060, but the *degree* of her inebriation was additionally relevant on proximate cause, i.e., Gerlach was so intoxicated that she fell off the balcony due to her own physical limitations, rather than any defect in Cove's balcony.

(b) The Trial Court's Reliance on a Non-Existent "Stipulation" as to Gerlach's BAC Results Was Prejudicial to Cove's RCW 5.40.060 Defense

Gerlach spent very little time arguing that the one-sided "stipulation" should have foreclosed admission of her BAC results. Pet. at 9-10. Division I correctly rejected this view. Op. at 5-6. There was no stipulation here. *State v. Parra*, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993) ("[A] stipulation is an agreement between the parties to which there must be mutual assent."). Cove never agreed to the trial court's "stipulation" and vigorously opposed its admission in lieu of Gerlach's actual BAC results. RP 1550-60.

Cove was prejudiced by the so-called stipulation, because the *degree* of her intoxication, not just the fact of her intoxication, was a critical aspect of Cove's defense the jury never got to hear. 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. RCW 9A.16.090; *State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987) (defendant’s voluntary intoxication may be taken into consideration in determining whether the defendant acted with a required mental state, such as intent). Likewise, in a civil case, the degree of a plaintiff’s intoxication is relevant to proximate cause and fault.<sup>14</sup>

Cove could not fully present its RCW 5.40.060 defense when it could not argue the degree to which Gerlach was intoxicated, because the trial court limited it to arguing only that she was “under the influence.” 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, Gerlach’s extreme intoxication.<sup>15</sup>

(c) ER 403 Does Not Foreclose the Presentation of Gerlach’s Extreme Intoxication to the Jury

Gerlach argued in her petition at 13 that ER 403 properly restricted the presentation to the jury of the BAC results on her intoxication and

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<sup>14</sup> See, e.g., *Geschwind*, 121 Wn.2d at 836 (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).

<sup>15</sup> “[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) (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.”).

whether her intoxication was a proximate cause of her injuries. Division I correctly rejected that argument. Op. at 6.

ER 403 allows a court to exclude evidence *only* where it is so *unfairly* prejudicial as to substantially outweigh the evidence's probative value. Under ER 403, the relevance of the BAC results is assumed. *Carson v. Fine*, 123 Wn.2d 206, 222, 867 P.2d 610 (1994). Those results are clearly relevant here. Further, the fact that Gerlach's actual BAC results may merely be prejudicial is not enough to warrant their exclusion. Obviously, "nearly all evidence will prejudice one side or the other in a lawsuit." *Id.* at 224.

Proximate cause and percentages of fault under RCW 5.40.060(1) were jury questions. *Hansen v. Friend*, 118 Wn.2d 476, 484, 824 P.2d 483 (1992). Cove's evidence of Gerlach's voluntary intoxication, both documentary and testimonial, bore on the proof of the elements of the intoxication defense. Op. at 6. Cove therefore should have been allowed to present the full evidence of Gerlach's intoxication, its degree and its effect, as both were central to proving the elements of Cove's RCW 5.40.060 defense. The level of Gerlach's intoxication, not just the fact that she was at or above the legal limit for driving, was highly relevant. Given the clear importance of whether Gerlach's alcohol consumption and resulting severe intoxication were a proximate cause of her injuries, and if

so, to what degree, the admission of the BAC results, by their nature and given the defense of RCW 5.40.060, was not *unfairly* prejudicial within the meaning of ER 403.

(d) The Trial Court Deprived Cove of the Testimony of Key Intoxication Experts on its RCW 5.40.060 Defense

The trial court further abused its discretion in restricting expert testimony on the effect of Gerlach's extreme intoxication on her decisionmaking in connection with her fall. Division I found that the trial court erred in excluding Dr. Vincenzi's testimony, but not Dr. Carhart's. Op. at 10.

Since *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), this Court has employed a three-part test to determine if expert testimony is admissible under ER 702-704: (1) is the witness qualified to testify as an expert? (2) is the expert's theory based on a theory generally accepted in the scientific community? and (3) would the testimony be helpful to the trier of fact? *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004); *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013). This Court's decisions on these rules evidences a liberal policy in favor of admission.<sup>16</sup>

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<sup>16</sup> See, e.g., *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 393 P.3d 776 (2017) (trial court abused its discretion in excluding the expert testimony of an advanced

Division I was wrong in failing to determine that the trial court erred in severely curtailing Dr. Carhart's trial testimony. Op. at 13-14. Dr. Carhart was prepared to testify on the biomechanical effects of Gerlach's fall. CP 520-36. His credentials are extensive. CP 521-23. In addition to his testimony on whether Gerlach's fall occurred as a result of a rail breaking or her attempting to climb into a window, he would have testified on the effects of her extreme intoxication on her decision making and physical abilities. CP 528-29. This Court has held that the testimony of biomechanical experts is admissible. *See, e.g., L.M. by and through Dussault v. Hamilton*, 193 Wn.2d 113, 436 P.3d 803 (2019) (biomechanical expert's testimony on forces involved in childbirth admissible). As biochemical forces in childbirth are an appropriate topic of expert testimony, so are the biomechanics of an intoxicated person's ability to crawl over a balcony rail.

Division I correctly determined Dr. Vincenzi's exclusion was error. Op. at 11-13. Dr. Vincenzi was qualified to testify. RP 1530. He

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registered nurse practitioner on proximate cause a medical negligence case); *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014) (expert testimony on biomechanical forces admissible). *See also, Gonzalez-Mendoza v. Burdick*, 175 Wn. App. 1038, 2013 WL 3477281 (2013) (biomechanical forces expert testimony admissible); *Taylor v. Bell*, 185 Wn. App. 270, 286-87, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012 (2015) (trial court erred in excluding testimony of law professor who was not licensed in Washington although he had extensive experience on multi-jurisdictional corporate practice); *Ponce v. The Mountaineers*, 190 Wn. App. 1048, 2015 WL 6684507 (2015), *review denied*, 185 Wn.2d 1019 (2016) (expert testimony on industry custom in winter recreation industry).

was prepared to testify on the effect of Gerlach's extreme intoxication. CP 508-13, 932-37. He concluded that her intoxication more probably than not caused her fall because such an extreme level of intoxication "impaired her ability to recover from an impending fall and thus contributed to the tragic outcome." CP 512, 936. Her judgment and psychomotor function were adversely impacted by her intoxication. CP 511, 935. Nevertheless, the jury was not permitted to consider Dr. Vincenzi's testimony at all.

The Vincenzi/Carhart testimony on the effect of Gerlach's extreme intoxication on her behavior should have been admitted.

(e) The Trial Court's Erroneous Instructions on the RCW 5.40.060 Defense Prejudiced Cove

Rather than give the WPI instructions on the RCW 5.40.060 defense requested by Cove, CP 1532-38, the trial court gave a single instruction on the statutory defense, Instruction 20 (*see* Appendix). CP 1225. That instruction was an incorrect statement of the law on a plaintiff's voluntary intoxication under RCW 5.40.060. Division I erred in failing to conclude that Cove was entitled to instructions like the ones it proposed based on WPIS<sup>17</sup> (*see* Appendix) that advised the jury of the

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<sup>17</sup> For example, WPI 16.03 discloses the existence of the defense to the jury, as did Cove's proposed instruction 18. CP 1223. Similarly, WPI 16.04 defines for the jury proof of being under the influence of alcohol, as did Cove's proposed instruction 19. CP 1224. WPI 16.05 defined being under the influence, as did Cove's proposed instruction

significance of Gerlach’s voluntary intoxication under the statute.<sup>18</sup> That error is highlighted by the fact that Division I specifically stated the trial court’s instructions “were not particularly clear,” op. at 18, and further indicated that WPI 16.03 has “a more succinct statement of elements” of the statutory defense, was “a more appropriate instruction,” and should be used on remand. *Id.* The trial court’s treatment of the jury instructions was yet *another* example of how the trial court had its “thumb on the scale” as to Cove’s presentation of its RCW 5.40.060 defense.

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In sum, in multiple ways, the trial court severely hobbled Cove’s presentation of its RCW 5.40.060 defense. Division I was correct in determining that Cove was entitled to a new trial on its RCW 5.40.060 defense.

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

Gerlach’s complaint claimed that she was owed a duty of care by Cove arising out of Cove’s obligations to Miller, its tenant, under the RLTA. CP 2. When Cove moved for partial summary judgment to

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20. CP 1225.

<sup>18</sup> *See, e.g.*, Cove’s proposed instruction 21 and supplemental instructions. CP 1226, 1749-50. Cove offered those proposed supplemental instructions after the trial court decided to allow Gerlach’s admission that she was under the influence. The court declined to explain the significance of the admission by those instructions. RP 1792-93, 2785-87.

dismiss such a claim, the trial court erred in denying Cove's motion. CP 676-77.<sup>19</sup> In particular, the trial court erred in concluding that an action for damages could arise out of an alleged violation of the RLTA for a non-tenant.<sup>20</sup> The trial court so instructed the jury in Instruction 13. CP 1873. The trial court compounded its error by instructing the jury that a landlord could be liable in tort to third persons for violation of statutes and codes in Instructions 15 and 16. CP 1875-76. That liability was only predicated on RLTA landlord obligations, however. *Id.*

In the RLTA, the Legislature explicitly provided *a tenant* rights for problems associated with the rented premises. RCW 59.18.060. It did not provide for a cause of action for damages as it did not intend to create a substitute for common law premises liability remedies. Nor did it afford third persons to the landlord-tenant relationship like Gerlach rights or any cause of action for damages. Consequently, the appropriate duty analysis arises out of this Court's protocol for determining if an implied cause of action is available for an alleged statutory violation.

In *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), the Court established a three-part protocol, in which courts must ask "first,

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<sup>19</sup> The trial court, however, granted Cove's motion for summary judgment arising out of her allegation that Cove breached the lease agreement. CP 676.

<sup>20</sup> The trial court asserted in denying Cove's motion that "although the Plaintiff did not sign the lease and was technically not a 'tenant,' the warranty of habitability of the RLTA as contained in RCW 59.18.060 applies to the Plaintiff." CP 677.

whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.” *Id.* at 920-21. This Court has applied the *Bennett* protocol in numerous recent decisions to find that an implied statutory cause of action does not exist.<sup>21</sup>

The Legislature did not intend an implied cause of action for the violation of RLTA provisions by a non-tenant. The RLTA defines a tenant as “any person who is *entitled to occupy a dwelling unit* primarily for living or dwelling purposes *under a rental agreement.*” RCW 59.18.030(27) (emphasis added).<sup>22</sup> Gerlach clearly was not Cove’s tenant, as Cove detailed below. App. br. at 27-28. Miller’s lease did contemplate Gerlach as a tenant. CP 161, 222. She never applied to be a tenant, nor signed a lease. Gerlach gave her parents’ address as her own. CP 52-53,

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<sup>21</sup> See, e.g. *Keodalah v. Allstate Ins. Co.*, \_\_\_ Wn.2d \_\_\_, 449 P.3d 1040 (2019) (RCW 48.01.030, a statute providing that the business of insurance is affected by the public interest and requiring that all persons act in good faith in insurance matters, did not create an implied cause of action.). See also, *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) (Deed of Trust Act does not create an implied cause of action in the absence of a completed foreclosure sale); *Adams v. King County*, 164 Wn.2d 640, 192 P.3d 891 (2008) (no cause of action for damages arising out of Uniform Anatomical Gift Act).

<sup>22</sup> A “rental agreement” is defined as “all agreements which establish or modify the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit.” RCW 59.18.030(25).

57-58, 71, 73. Thus, the record was clear that Gerlach was not a Cove tenant, as the trial court determined in denying her contractual relief arising out of Miller's lease. CP 676-77.

More critically, the Legislature never intended to create a cause of action for third persons to the landlord-tenant relationship arising out of the RLTA. Landowners are generally not guarantors of safety for persons on their property. *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wn.2d 847, 859-60, 31 P.3d 684 (2001); *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996); *Geise v. Lee*, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975). Landowners owe a common law duty of care only in certain well-defined, narrow circumstances. *See generally, Adamson v. Port of Bellingham*, 193 Wn.2d 178, 185, 438 P.3d 522 (2019).<sup>23</sup>

The RLTA itself does not create a cause of action for damages.<sup>24</sup> This Court has even rejected a Consumer Protection Act claim arising out of the violation of RLTA. *State v. Schwab*, 103 Wn.2d 542, 693 P.2d 108 (1985).

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

<sup>24</sup> *Aspon v. Loomis*, 62 Wn. App. 818, 816 P.2d 751 (1991), *review denied*, 118 Wn.2d 1015 (1992) (landlord's duties are exclusively articulated in the RLTA and because it was not expressly referenced in the RLTA, a tenant could not recover for burns incurred from brushing up against a hot pipe in a common area); *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 471-72, 17 P.3d 641 (2001) (tenant injured by a garage door striking him was limited to the remedies set forth *in the RLTA itself* and not monetary damages); *Wade v. Hulse*, 110 Wn. App. 1062, 2002 WL 398502, *review denied*, 147 Wn.2d 1021 (2002).

However, a split Division III in *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001) addressed the question of the remedies afforded a tenant injured in a case involving a fall on steps outside the tenant's apartment. That court reaffirmed that the RLTA did not create a generally actionable duty on the part of the landlord to keep the premises fit for habitation; rather, the landlord's duties were limited to those set forth in RCW 59.18.060. *Id.* at 816. But the court adopted the *Restatement (2d) of Property: Landlord & Tenant* § 17.6.<sup>25</sup> Subsequently, on remand, in *Lian v. Stalick*, 115 Wn. App. 590, 62 P.3d 933 (2003), Division III reaffirmed its adoption of the *Restatement* standard establishing liability for landlords if they breach an implied warranty of habitability or duty imposed by statute or regulation, effectively making RLTA violations actionable in tort through the back door and overriding its own decision in *Dexheimer*.<sup>26</sup> Division III's rationale has never been extended by any Washington court to non-tenants.<sup>27</sup>

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<sup>25</sup> Under § 17.6, a landlord may be liable in tort to the tenant or third parties if the landlord has notice of a defective condition on the premises, fails to repair it, and the condition breaches an implied warranty of habitability or a duty created by statute or administrative code.

<sup>26</sup> See also, *Tucker v. Hayford*, 118 Wn. App. 246, 257-58, 75 P.3d 980 (2003) (tenants who became sick from contaminated well could sue landlords under the RLTA).

<sup>27</sup> E.g. *Sjorgen v. Properties of Pac. NW LLC*, 118 Wn. App. 144, 149-50, 75 P.3d 592 (2003) (injury to a non-tenant occurring in a dark staircase, a common area); *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005) (personal injuries actions by a non-tenant, a roller blader injured by a falling garage door); *Johnson v. Miller*, 178 Wn.

This Court has never adopted § 17.6 of the *Restatement* so as to allow a backdoor cause of action for the RLTA's alleged violation, nor has it ever applied that *Restatement* provision to a non-tenant like Gerlach. It should not do so now. The RLTA was designed to regulate the contractual relationships between Washington landlords and tenants. It was not intended to create a basis for non-tenants to recover damages in tort. Just as in *Keodalah*, there is no need to create a new avenue to recover damages under the RLTA. Gerlach had ample common law premises liability remedies available to her.

Moreover, had the Legislature intended to create a cause of action for third persons to the landlord-tenant relationship arising out of an alleged breach of the RLTA, it would have said so. *It did not*. The Legislature is presumed to be aware of judicial construction of its enactments. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). In the nearly 20 years since Division III's *Lian I* decision, the Legislature has not chosen to expand any duty arising out of the RLTA to non-tenants. It has *acquiesced* in that body of case law declining to find such a duty. *Id.*

The trial court should have granted summary judgment to Cove on

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App. 1045, 2014 WL 129263 (2014) (declining to extend § 17.6 to non-tenants); *Phillips v. Greco*, 7 Wn. App. 2d 1, 433 P.3d 509 (2018) (declining to extend the implied warranty of habitability of § 17.6 to non-tenants, in case involving injury on a deck).

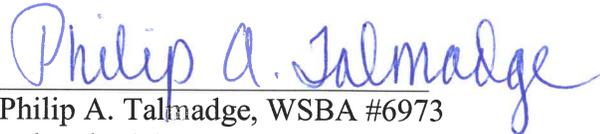
the RLTA and should not have instructed the jury in Instructions 13-16 based on the RLTA.

D. CONCLUSION

The trial court deprived Cove of a fair trial by frustrating its presentation of its RCW 5.40.060 defense and recognizing a duty to Gerlach, a non-tenant, arising out of the RLTA. This Court should reverse the trial court's judgment and order a new trial. Costs on appeal should be awarded to Cove.

DATED this 17th day of December, 2019.

Respectfully submitted,



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# APPENDIX

RCW 5.40.060:

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

RCW 59.18.060 (as it existed in 2012):

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

- (1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition endangers or impairs the health or safety of the tenant;
- (2) Maintain the structural components including, but not limited to, the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable;
- (3) Keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident;
- (4) Provide a reasonable program for the control of infestation by insects, rodents, and other pests at the initiation of the tenancy and, except in the case of a single-family residence, control infestation during tenancy except where such infestation is caused by the tenant;
- (5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the

commencement of the tenancy;

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

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

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

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

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

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

(i) Whether the smoke detection device is hard-wired or battery operated;

(ii) Whether the building has a fire sprinkler system;

(iii) Whether the building has a fire alarm system;

(iv) Whether the building has a smoking policy, and what that policy is;

(v) Whether the building has an emergency notification plan for the occupants and, if so, provide a copy to the occupants;

(vi) Whether the building has an emergency relocation plan for the occupants and, if so, provide a copy to the occupants; and

(vii) Whether the building has an emergency evacuation plan for the occupants and, if so, provide a copy to the occupants.

(b) The information required under this subsection may be provided to a tenant in a multifamily residential building either as a written notice or as a checklist that discloses whether the building has fire safety and protection devices and systems. The checklist shall include a diagram showing the emergency evacuation routes for the occupants.

(c) The written notice or checklist must be provided to new tenants at the time the lease or rental agreement is signed;

(12) Provide tenants with information provided or approved by the department of health about the health hazards associated with exposure to indoor mold. Information may be provided in written format individually to each tenant, or may be posted in a visible, public location at the dwelling unit property. The information must detail how tenants can control mold growth in their dwelling units to minimize the health risks associated with indoor mold. Landlords may obtain the information from the department's web site or, if requested by the landlord, the department must mail the information to the landlord in a printed format. When developing or changing the information, the department of health must include representatives of landlords in the development process. The information must be provided by the landlord to new tenants at the time the lease or rental agreement is signed;

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

(14) Designate to the tenant the name and address of the person who is the landlord by a statement on the rental agreement or by a notice conspicuously posted on the premises. The tenant shall be notified immediately of any changes in writing, which must be either (a) delivered personally to the tenant or (b) mailed to the tenant and conspicuously posted on the premises. If the person designated in this section does not reside in the state where the premises are located, there shall also be designated a person who resides in the county who is authorized to act as an agent for the purposes of service of notices and process, and if no designation is made of a person to act as agent, then the person to whom

rental payments are to be made shall be considered such agent. Regardless of such designation, any owner who resides outside the state and who violates a provision of this chapter is deemed to have submitted himself or herself to the jurisdiction of the courts of this state and personal service of any process may be made on the owner outside the state with the same force and effect as personal service within the state. Any summons or process served out-of-state must contain the same information and be served in the same manner as personal service of summons or process served within the state, except the summons or process must require the party to appear and answer within sixty days after such personal service out of the state. In an action for a violation of this chapter that is filed under chapter 12.40 RCW, service of the notice of claim outside the state must contain the same information and be served in the same manner as required under chapter 12.40 RCW, except the date on which the party is required to appear must not be less than sixty days from the date of service of the notice of claim.

No duty shall devolve upon the landlord to repair a defective condition under this section, nor shall any defense or remedy be available to the tenant under this chapter, where the defective condition complained of was caused by the conduct of such tenant, his or her family, invitee, or other person acting under his or her control, or where a tenant unreasonably fails to allow the landlord access to the property for purposes of repair. When the duty imposed by subsection (1) of this section is incompatible with and greater than the duty imposed by any other provisions of this section, the landlord's duty shall be determined pursuant to subsection (1) of this section.

Instruction 13:

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

- (1) An implied warranty of habitability or
- (2) The condition was dangerous, and violated one or more of the following statutory duties:
  - (A) [To] maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the

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

(B) [To] maintain the structural components, including but not limited to roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable.

(3) The landlord was aware of the condition or had a reasonable opportunity to discover the condition; and

(4) The landlord failed to exercise ordinary care to repair the condition.

CP 1873.

Instruction 14:

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

CP 1874.

Instruction 15:

Administrative Rules provides that:

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

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

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

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

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

...

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

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

CP 1875.

Instruction 16:

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

CP 1876.

Instruction 20:

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

CP 1880.

Defendants' Proposed Number 18:

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

CP 1223.

Defendants' Proposed Number 19:

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

CP 1224.

Defendants' Proposed Number 20:

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

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

CP 1225.

Defendants' Proposed Number 21:

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

First, that the person injured was under the influence of alcohol or

any drug at the time of the occurrence causing the injury;

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

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

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

CP 1226.

Defendants' Proposed Supplemental Instruction:

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

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

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

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

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

CP 1750.

Defendants' Proposed Supplemental Instruction:

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

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

CP 1749.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Supplemental Brief of Respondents* in Supreme Court Cause No. 97325-3 to the following parties:

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Original E-filed with:  
Supreme Court  
Clerk's Office

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

DATED: December 17, 2019 at Seattle, Washington.



\_\_\_\_\_  
Sarah Yelle, Legal Assistant  
Talmadge/Fitzpatrick

**TALMADGE/FITZPATRICK**

**December 17, 2019 - 4:02 PM**

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