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COURT OF APPEALS
STATE OF WASHINGTON
2019 APR 22 PM 2:19

No. 71465-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DANIEL LAMONT,

Appellant,

v.

DAVID M. SAVIO, BAOYE WU SAVIO, husband and wife and the marital community thereof; QUORUM REAL ESTATE PROPERTY MANAGEMENT, INCORPORATED, a Washington corporation; and JANE AND JOHN DOE OTHER ENTITIES,

Respondents.

APPELLANT'S REPLY BRIEF

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Table of Contents

Cases

Statutes

Rules

Other Authorities

A. INTRODUCTION

The trial court committed reversible error when it evaluated the evidence before it as if it were the trier of fact. Lamont's experts supplied the trial court with admissible evidence more than sufficient to raise a material question of fact. Although a simple inference is sufficient to create an issue of material fact, Lamont submitted direct, unequivocal expert testimony to establish that his landlords, David and Baoye Wu Savio ("the Savios") and Quorum Real Estate Management Inc. ("Quorum"), breached the standard of care and proximately caused Daniel Lamont's injuries. The trial court erred by granting summary judgment in favor of the Savios and Quorum.

B. ARGUMENT

1. Lamont Submitted Admissible Evidence to Satisfy All *Prima Facie* Elements of his RLTA and Negligence Claims.

a) The Savios' and Quorum's opposition arguments do not defeat Lamont's admissible evidence, which fully establishes the elements of his claims.

In their opposition brief, the Savios and Quorum argue, in essence, three points: First, that the declarations of Lamont's experts should be disregarded; second, that as a matter of law, a landlord and its management company violate no duty when leasing a house with

dangerously unsafe stairways that violate applicable building codes (or, if there is a duty, that the burden falls on the tenant to discover and notify the landlord of the violation before the unsafe condition injures him); and third, that this Court should determine violations of the Seattle Municipal Code based on defendants' argument and analysis of a Code that was not even in existence at those relevant times.

b) The starting point in the relevant analysis is the evidentiary burden involved in a CR 56 summary judgment motion.

"The elements of a negligence cause of action are the existence of a duty to the plaintiff, breach of the duty, and injury to plaintiff proximately caused by the breach." *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Proof of proximate causation requires a showing of cause in fact and legal causation. *Ang v. Martin*, 154 Wn.2d 477, 482, 114 P.3d 637 (2005). "Cause in fact is usually a question for the trier of fact and is generally not susceptible to summary judgment." *Martini v. Post,* 178 Wn.App. 153, 164, 313 P.3d 473 (2013). "Negligence and proximate cause are ordinarily factual issues, precluding summary judgment." 4 Karl B. Tegland, Washington Practice: Rules Practice CR 56, at 418 (6th ed. 2013). In ruling on a summary judgment motion, the court must resolve any doubts on the existence of a genuine issue of material fact against the moving party. *Ventures Nw. Ltd.*

P'ship v. State, 81 Wn. App. 353, 361, 914 P.2d 1180 (1996).

> In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.

J.N. v. Bellingham Sch. Dist. No. 501, 74 Wash.App. 49, 60–61, 871 P.2d 1106 (1994).

c) The Declarations of Lamont's experts present admissible evidence of Breach of Duty, Proximate Cause and Injury, and are uncontradicted.

The Washington Supreme Court in *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007) discusses declarations similar to those presented in this case. In reversing the trial court's grant of summary judgment to the defendant, the court also reversed the trial court's striking of certain portions of an expert declaration where the expert stated that "damaged pipe created a 'hazardous condition' and a 'zone of danger'": language that was similar to an exception to one of the defenses at issue in the case.

In so ruling, the Supreme Court stated:

> While [the expert]'s declaration may have embraced an ultimate fact under ER 704, his statement was not a legal conclusion." ... "**Mere legal conclusions, such that an act was or was not "negligent"** ... is not likely to be helpful to the meaningful evaluation of the facts, as it runs the risk of substituting the expert's judgment for the fact finder's. However, ... [i]t should not be fatal to a party's claim or defense that an expert used legal jargon, so long as an appropriate foundation for the conclusion can be gleaned

> from the testimony. Expert **opinions that help establish the elements of negligence *are* admissible**. ER 704. [citations omitted]

Davis, 159 Wn.2d at 420-21. (emphasis added).

Both Ms. Gill's and Dr. Hayes' declarations contain extensive factual admissible evidence of the measurements, conditions, violations of known standards, and extreme danger of falling posed by the stairs at issue. CP 195-201; 202-208. Based on unquestionable evidence (CP 202-205), Dr. Hayes also testified to the factual nexus and evidence linking the biomechanics of Lamont's fall to the precise risk presented by the defects in the stairs. CP 205-208.

The Savios and Quorum ask the Court to disregard the Declaration of Dr. Toby Hayes because he is not a "medical doctor". Their objection is not well founded. His qualifications to give these opinions as to the biomechanics and causes of falls and associated injury, based on both his graduate education and his professional and forensic experience, are without peer, and are set forth in great detail in his declaration. CP 202-205. Dr. Hayes has been admitted to testify on medical causation on over 100 occasions in State and Federal courts. *Id.*

Washington courts have explicitly refused to create a *per se* rule that only medical doctors can testify to causation. See, *e.g.*, *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449–50, 663 P.2d 113 (1983).

Per se limitations on the testimony of otherwise qualified non-physicians are not in accord with the general trend in evidence to move away from requiring formal titles and degrees. *Goodman v. Boeing Co.,* 75 Wn.App. 60, 81, 877 P.2d 703 (1994). Training in a related field or academic background alone may be sufficient. *Id.* The Washington Supreme Court explained that "'the line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses.'" *Harris*, 99 Wn.2d at 450 (quoting 2 J. Wigmore, *Evidence* § 569, at 790 (rev.1979)). Thus, whether an expert is licensed to practice medicine is "certainly an important factor to be taken into account in making this determination," but is not dispositive. *Id.* at 450–51.

In *Loudermill v. Dow Chemical Co.*, 863 F.2d 566, 568 (8th Cir.1988), the plaintiff offered expert testimony from a toxicologist with doctoral degrees in toxicology and chemistry, but not in medicine. The toxicologist testified that, to a high degree of medical probability, chemical exposure caused the plaintiff's cirrhosis of the liver and death. *Id.* On appeal, the defendant argued that (1) the toxicologist did not possess the proper qualifications to offer expert testimony on the effects of the plaintiff's exposure to chemicals; (2) the toxicologist could not offer opinions as to medical probability because he was not a medical doctor; and (3) the toxicologist's opinions were based entirely upon speculation

and conjecture. *Id.* at 567.

The Eighth Circuit concluded that the toxicologist's testimony was properly admitted. *Id.* at 570. He had extensive knowledge of toxicology and the liver, and his testimony to that effect assisted the trier of fact. *Id.* at 568–69. The toxicologist's lack of a medical degree went to the weight and value of his testimony, which is for the jury to evaluate. *Id.* at 570. He examined microscopic specimen slides, pathology and autopsy reports, government records, and publications concerning liver injuries caused by halogenated hydrocarbons. *Id.* This factual basis likewise went to the weight of his opinion, not its admissibility. *Id.*

Similarly, the Third Circuit in *Genty v. Resolution Trust Corp.* recognized that medical doctors are not the only experts qualified to render an opinion as to the harm caused by exposure to toxic chemicals. *Genty v. Resolution Trust Corp.,* 937 F.2d 899, 917 (3d Cir.1991). The *Genty* court held that exclusion of a toxicologist's testimony "without considering his credentials as a doctor of toxicology, simply because he did not possess a medical degree, is inconsistent with expert witness jurisprudence." *Id.*

This court also recently recognized that the weight, if any, to be given to an expert's opinion based solely on a medical records review, rather than a physical exam, is within the jury's province. *City of Bellevue*

v. Raum, 171 Wn.App. 124, 154 n.25, 286 P.3d 695 (2012), *review denied*, 176 Wn.2d 1024, 301 P.3d 1047 (2013).

On the other hand, the Savios and Quorum had their own expert inspect the stairs at issue on April 29, 2013, but for unknown reasons, respondents chose not to file any declarations from this expert. CP 118. The court might conclude that if their expert had any evidence to contradict the opinions of Lamont's experts, respondents would have provided them. Further, if the defendants are claiming that the stairs and/or carpeting changed their condition between the time of Lamont's catastrophic fall and the time the stairs were inspected by experts, they have submitted no evidence in the record to support that claim.

d) Appellant Lamont's evidence establishes "Duty" and both Legal and Factual "Notice."

The Savios and Quorum argue, in essence, they had no "notice" of any condition of the stairs, no duty to inspect, and no duty to comply with the relevant building codes. However, the RLTA provides in RCW 59.18.060:

> The landlord will **at all times during the tenancy** keep the premises fit for human habitation, and **shall** in particular:
>
> (1) **Maintain the premises to substantially comply with any applicable code,** statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises

> rented **if such condition endangers or impairs the health or safety of the tenant**...;

Id. [emphasis added]

It is apparent that to fulfill that RLTA "duty" or **maintain** the premises in compliance with that provision, a landlord must know what the codes are and inspect to see if the premises are in compliance. That is particularly so in this case, where the landlord agreed to a lease provision that provided a covenant to maintain and repair: **"Landlord shall: (A) maintain premises and appurtenances in a sound and habitable condition."** CP 91; CP 176. See *Pinckney v. Smith*, 484 F. Supp.2d 1174, 1180-1181 (2007) ("...it would be illogical to suggest that the legislature would enact the Residential Landlord Tenant Act ("RLTA"), which requires landlords to comply with applicable ordinances relating to health and safety, if the lessor was under no obligation to take notice of building codes.")

> Defendant argues that this case does not implicate the warranty of habitability because the RLTA only requires a landlord to "maintain" the rental building. Defendant cites the dictionary definition of "maintain" as "to keep in a state of repair, efficiency, or validity: preserve from failure or decline." (App.2) Under this definition, Defendant suggests that the word "maintain" places a duty on the landlord to maintain the property in compliance with existing building codes and eliminates any duty on her part to upgrade the property as building codes change. But in context, the use of the word "maintain" in the RLTA should be read more broadly than Defendant suggests. The word "maintain" in

> the RLTA is modified by the requirement of compliance with applicable building codes. Thus, a building that is not in compliance with applicable ordinances is not "maintained" for purposes of the law. Accordingly, a landlord is in breach of Washington's statutory warranty of habitability if she fails to maintain the premises in compliance with applicable building ordinances.

Pinckney at 1182.

Likewise the Restatement (Second) of Property § 17.6 charges a landlord with notice of conditions on the property **prior to the tenancy**, and provides a remedy for injuries caused when a landlord fails to repair a dangerous condition. The language in § 17.6 stating that a landlord is liable for physical injuries resulting from a dangerous condition "if he has failed to exercise reasonable care to repair the condition" is a **notice** requirement, not a requirement that the tenant prove the elements of negligent repair. As comment (c) explains:

> *Landlord's knowledge of the condition.* The landlord is subject to liability under the rules of this section only for conditions of which he is aware, or of which he could have known in the exercise of reasonable care. **Ordinarily, the landlord will be chargeable with notice of conditions which existed prior to the time that the tenant takes possession.** Where the condition arises after the tenant takes possession, the landlord may not be able, in the exercise of reasonable care, to discover the condition, in which case the landlord will not be liable under the rules of this section until he has had a reasonable opportunity to remedy the condition after the tenant notifies him of it. **Where the landlord is able to discover the condition by the exercise of reasonable care, he is subject to liability after he has had a reasonable opportunity to discover**

the condition and to remedy it.

Restatement cmt. c. *Lian v. Stalick,* 115 Wn. App. 590, 596, 62 P.3d 933 (2003) (emphasis added).

A fair reading of *Mesher v. Osborne* 75 Wn. 439, 451 (1913), and its progeny likewise supports an "antecedent duty" to inspect on the part of the landlord when a lease provision provides for maintenance and repair.

> "The theory of [plaintiff] in prosecuting this action is that, where a landlord lets premises to a tenant, and agrees to keep the same in reasonable repair, **there arises an antecedent duty on his part to make a reasonable inspection** for obscure or latent defects, or others affecting the safety of the premises for ordinary use; that **there is a greater duty of inspection upon a landlord than there is on the tenant, and, where a landlord can, by ordinary diligence, discover the defect which causes the injury, it is hi[s] duty to correct the same**, and he is held to have knowledge of what a reasonable inspection on his part would have disclosed; that, **where there is a breach of this duty on the part of the landlord if the tenant, using ordinary care, and not knowing of the danger, is injured by reason of the defect, the tenant is entitled to recover from the landlord for such damages as may be sustained**." The above theory of the case is sustained by our decisions in the following cases: *Howard v. Washington Water Power Co.*, 75 Wash. 255, 134 P. 927, 52 L.R.A.(N.S.) 578 (1913); *Mesher v. Osborne,* 75 Wash. 439, 134 P. 1092, 48 L.R.A.(N.S.) 917; *Johnson v. Nichols*, 83 Wash. 394, 145 P. 417 (1915); *Hogan v. Metropolitan Building Co.*, 120 Wash. 82, 206 P. 959.

Estep v. Security Sav. & Loan Soc.,192 Wash. 432, 437-438, 73 P.2d 740 (1937)

2. Neither "As Much Knowledge" nor "Superior Knowledge" nor "Assumption of Risk" Defeat Lamont's Claims.

The Savios and Quorum imply that Lamont has as much knowledge as they did or more regarding the condition of the stairs. However, the carpeting that the Savios placed on the stairs "camouflaged" the defect and obscured the fact that the stairs were unequal, increasing the danger. CP 136. In essence, on these facts, the stairs presented a latent or hidden defect for a tenant, and the landlord was in a far superior position to have appreciated the danger.

As noted by Ms. Gill:

> **It is imperative that tread nosings be distinct** so as to assist the user in foot placement and in clearly identifying the leading edge of a stair tread and landing (i.e. ASTM F-1637-95, NBS, etc.). **However, the treads were all the same uniform carpet, effectively camouflaging the tread nosings**. Such a condition was another contributing factor to the dangerous condition of the subject stairway that induced Mr. Lamont's fall.

CP 199-200.

The evidence certainly does not support, as a matter of law, a defense that Mr. Lamont had superior knowledge or "assented" to the condition. The case of *Dehn v. Kohout,* 54 Wash.2d 611, 343 P.2d 883 (1959) involved a plaintiff who fell down a stairway in defendant's apartment

house. The Supreme Court, in affirming the trial court's granting of the plaintiff's motion for a new trial, held that where plaintiff lived in defendant's house for five years and used the back stairway at least twice a week, but preferred to use the front stairway because he considered the back stairway dangerous, the maxim *volenti non fit injuria* ('That to which a person assents is not esteemed in law an injury') did not foreclose plaintiff's recovery as a matter of law.

In so ruling, the Washington Supreme Court noted:

> Plaintiff was candid and honest in speaking of his knowledge of the general condition of the two stairways and his apprehension in using the back stairway; but the most his testimony discloses is his appreciation of the difference between the front and back stairways. He expressed a preference in his use of them. The trial court observed.
>
> "* * * *He did not, however, know of the raised board* which constituted the top step upon which he caught his foot and which precipitated him into the stairway, in an unbalanced condition and, as a consequence, of course, he did fall." (Italics ours.)

Id. at 884.

In conclusion, the Supreme Court agreed with the trial Court:

> * * * that in order to prevail upon the defense of *volenti* as a matter of law that the Defendant must show that the Plaintiff actually knew of **the precise condition which added to his peril**, and if the Plaintiff did not have such knowledge, how can it be said that he could appreciate the degree of risk involved? * * * *Id.* (emphasis added).

Mr. Lamont testified in his deposition as follows:

Q. Oh, I can break it up. Up until the time of your
6 fall, had you noticed any kind of defect with the stairs?

7 A. I had certainly noticed that they were narrow and,
8 you know, but I -- I hadn't -- I had noticed that they were
9 -- that -- that it was a narrow stair, in terms of -- not
10 the -- no, the width was normal, but just the steep -- steep
11 and narrow steps.

12 Q. Okay. Well, let me make sure I'm on the -- got
13 that right. When you say "narrow," what do you mean by
14 that?

15 A. The rise and run of the stairs were somewhat
16 unusual.

17 Q. Okay. How so?

18 A. They were -- well, I never -- I didn't -- I didn't
19 have occasion to get out and measure them. Okay?

20 Q. Presumably not.

21 A. Presumably not.

22 Q. Yeah.

23 A. But they were -- the run, which is the distance
24 back to front.

25 Q. Right.

A. Correct?

2 Q. Yeah. I think that's right, yeah.

3 A. Seemed shallow.

4 Q. Okay.

5 A. Or then, you know -- and I mean, it's just -- it's
6 not something I made notes about, but it just seemed like
7 they were sort of -- is funky a legal term that we can use
8 here today? **They were funky.**

9 Q. Well, I don't -- well, it's your dep. It's your
10 testimony.

11 A. I don't know what –

12 Q. You get to use the word –

13 A. I'm at a loss for a really great way to describe -
14 - it's not –

15 Q. Okay.

16 A. It's not something I obsessed about, but it was
17 something that is -- was noticeable traversing them.

18 Q. Okay. Were they -- you mentioned steep or
19 steeper, I think you used a term. Was that -- is that
20 something you noticed, that they seemed a little steep to go
21 down to the basement?

22 A. They were certainly not wide and gracious stairs,
23 let's put it that way.

24 Q. Well, I -- I -- you mean, you weren't surprised by
25 that, I take it, knowing-

A. I didn't give it much thought.

2 Q. Yeah. Have you been in other older homes that
3 have staircases that are a little steeper or a little
4 shallower in that tread width?

5 A. A little funky?

6 Q. Yeah, a little funky.

7 A. Yes.

8 Q. For lack of a better term.

9 A. For lack of a better term.

10 Q. Okay.

11 A. Yes.

CP 145.

There is **no** evidence that Daniel Lamont knew of "the precise condition which added to his peril" of the stairs. Therefore "how can it be said that he could appreciate the degree of risk involved." *Dehn* at 884; See also *Lian v. Stalick*, 106 Wash. App. 811, 820-821 (2001) *(Lian I)* (landlord may be held liable for dangerous condition on portions of the premises under the control of a residential tenant where dangerous defect was so obvious that the landlord should have anticipated the harm even though the tenant knew of the defective condition).

3. The Stairs Have Never Complied With Seattle Municipal or Building Code Requirements.

The Savios and Quorum cite to the Court a Seattle Municipal Code provision that was not law until long after Lamont fell. Nothing contained in the code cited by the Respondents indicates that it is in any way taking the place of or supplanting any existing law. "We do not favor repeal by

implication, and where potentially conflicting acts can be harmonized, we construe each to maintain the integrity of the other." *Anderson v. State Dept. of Corrections*, 159 Wn.2d 849, 858-59, 154 P.3d 220 (2007), citing *Misterek v. Wash. Mineral Prods., Inc.*, 85 Wn.2d 166, 168, 531 P.2d 805 (1975).

In this case **the dangerous condition of the stairs has never, from original construction to the present, complied with any Seattle Building or Municipal Code.** CP 260-262.

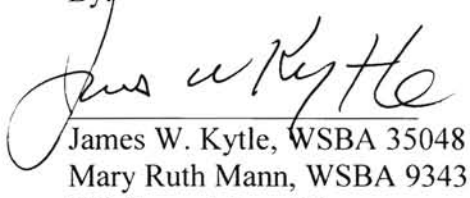
C. CONCLUSION

The trial court committed reversible error in granting the Respondents' Savios' and Quorum's motion for summary judgment – despite Appellant Lamont's production of expert declarations establishing multiple questions of fact. Juxtaposing Lamont's expert opinion testimony against the standard set out in CR 56 (c) illustrates that the trial court made a mistake. Moreover, because the standard of review is *de novo*. any and all ambiguities, inferences, or reasonable hypotheses supporting Appellant Lamont's claims must result in reversal. The trial court's orders granting summary judgment should be reversed, and this case remanded for trial on the merits.

RESPECTFULLY SUBMITTED this 21 day of AUGUST 2014.

MANN & KYTLE, PLLC

By:



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PROOF OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing pleading to be served via email on the following attorneys:

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