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No. 71465-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

DANIEL LAMONT,

Appellant,

v.

DAVID M. SAVIO and BAOYE WU SAVIO, and QUORUM REAL ESTATE PROPERTY MANAGEMENT, INC.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case involves a claim for personal injury asserted by Appellant Daniel Lamont against his landlords (Respondents Savios) and their property manager, Respondent Quorum. Lamont leased a single-family home in Seattle from the Savios. Lamont fell down a set of stairs in the home that led to the basement. Neither Lamont nor any prior tenant had ever notified the Savios or Quorum of any concerns or problems with the stairs.

Lamont does not know why he fell. His experts claim that minor rise and run variations in the stairs were the cause, but their underlying factual assumptions are directly in conflict with what Lamont *does* remember, which he testified to at his deposition. And Lamont himself admits that he was aware of variations in the rise and run of the stairs prior to his fall, but that he never mentioned it to the Savios or Quorum.

Lamont's claim is simply this: he argues that before renting the house to him, the Savios and Quorum had a duty to remove the carpet from the stairs, measure all the treads and risers, determine which building code applied to the stairs, and then rebuild the stairs as necessary to comply with that code.

The trial court dismissed Lamont's claims on summary judgment. This Court should affirm.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The superior court properly dismissed Lamont's claims, where much of the expert testimony Lamont submitted was inadmissible. The remaining admissible expert testimony, when combined with Lamont's own admissions and the applicable law, left no issue of *material* fact for trial. Were the Savios and Quorum entitled to judgment as a matter of law?

III. STATEMENT OF THE CASE

A. Property History

The residence in question was built in 1941, according to City of Seattle records. CP 43-44. It has a single main floor, and a finished basement. There are two ways to access the basement: from an exterior stairwell, and from a stairway inside the residence. CP 70.

The Savios purchased the property in 2002. CP 106. They hired Quorum to manage the property, because they lived overseas. CP 106 . Between November 2002 and April 2012, Quorum leased the property to seven different tenants. During that time frame, there were never any complaints or issues raised by any tenant with respect to the interior stairs leading down to the basement. CP 39-40. The stairs remained in the same configuration throughout that time, and throughout the time that Quorum managed the property, with the same carpet on top. CP 40.

B. Lamont's Initial Walkthrough of the Property

Lamont learned of the Savio property from an advertisement on Craigslist. He contacted Mr. Bill Van Dyke of Quorum to schedule a visit at the property. CP 48-49. Lamont and Van Dyke together did about a one-half hour walk-through at the property. CP 49-50.

On that first visit to the property, Lamont walked throughout the house, including the basement. He recalls that he and Van Dyke walked up and down the stairs from the upstairs hallway to the basement. CP 61-62. Lamont did not observe any issues or concerns with the stairs. CP 59-60. It was obvious that that the house was an older home; Lamont concluded that it was clearly 1930s or 1940s vintage, as opposed to being something from the 1960s or later. CP 59-60.

C. Lamont Leases the Property

Lamont decided he wanted to lease the property, and executed a written lease on April 20, 2012. CP 52-53; CP 89-105. Prior to executing the lease, Lamont met Van Dyke at the Quorum office, and they went through the lease and discussed it. CP 53-54. Lamont does not recall seeing anything in the lease that sparked any particular discussion with Van Dyke or any concern. CP 53-54. The lease was for the entire premises. There were no other tenants or subtenants. CP 68.

Incorporated into the lease was a Unit Condition Report. CP 55.

This Report was filled out jointly by Van Dyke and Lamont during an inspection walk through of the premises on May 16, 2012. CP 56-58. At the time, Lamont had not yet moved into the premises. CP 58. In the Report, Lamont noted many details with respect to the premises, including scratches on finishes, tears and stains in carpets, and similar condition issues. CP 64-66. He did not list anything on the Unit Condition Report about any issues with the stairs or stairwell. CP 62-63. Lamont was not impeded in any way from having a full opportunity to inspect everything he wanted to inspect. CP 66-67. Lamont agrees that after completing the Unit Inspection Report, he accepted the premises in its then-existing condition. CP 85-86.

D. Lamont Moves In

The lease term began on May 15, 2012 and ended April 30, 2013, but Lamont did not move in until the end of May 2012, or the first of June. CP 52-53. When Lamont moved into the residence, he moved a variety of items into the basement. He used the basement as a work area for his photography business and also for storage. CP 69. Most of the time, Lamont used the interior stairs to get to the basement rather than the exterior entrance. CP 84.

E. Lamont Used the Stairs Frequently, Without Incident or Complaint

After move-in, Lamont used the interior stairs to get down to the basement frequently. CP 71. He used the basement to work on his computers for his photography work, and to do the laundry. CP 71. The stairs were carpeted the whole time that he lived there, and Lamont vacuumed the stairs approximately every one or two weeks. He did not notice any change in the condition of the stairs or the carpeting during the entire duration of his tenancy. CP 77.

Two of Lamont's children were living with him part-time during his tenancy, prior to his fall. Neither of the children mentioned anything to him about any concerns with the stairs or stairwell to the basement. CP 72-73. And no one else who had been over at the residence ever brought up any concern about the stairs or stairwell. CP 73.

F. Lamont Knew That the Stairs Had Rise and Run Variations, But Never Communicated This to Respondents

Lamont claims that in the months prior to his fall, he noticed that the stairs were somewhat steep and had somewhat narrow treads, though he did not actually measure them. CP 74. As Lamont put it, "It's not something I made notes about but it just seemed like they were sort of -- is funky a legal term that we can use here today? They were funky." CP 75. He understood this to be variation in the rise and run of the

treads. CP 74. But Lamont did not give this much thought; he had experience with older homes that had staircases that were a little steeper or a little shallower in the width of their treads than would be found in new construction today (i.e., "a little funky"). CP 76-77. Lamont never contacted either Quorum or Savio regarding any concerns of any kind about the stairs or stairwell. CP 76, 88.

G. Lamont's Fall

On August 3, 2012, Lamont came home from a couple of errands, and went down the hallway to go down to the basement and work on a photography project. CP 78. He took a step down the stairs and as he proceeded to take another step he suddenly "had no footing. I was just in the air. I had this incredibly eerie sense of pitching head over heels through the air." CP 79. He was aware of taking a step down the stairs and then was aware of his feet being above his head, but that is the last thing he remembers about his fall. CP 80. His footing in the hallway was fine and his step onto the first tread was fine. He fell after that. CP 81. Lamont landed on the carpeting on the basement floor, and was unconscious for approximately 1.5 hours. CP 80.

Lamont had been up and down the stairs many times before the day of the accident with no problems, and has no idea why anything different happened on that day. CP 80, 87.

H. Lamont Remains for the Lease Term

After his injury, Lamont continued to live at the Blaine property through the end of the lease term. At no time, *even after the fall*, did he ever ask Quorum or the Savios to do anything about the stairs to the basement. CP 82-83.

I. Lamont's Experts Offer Inadmissible Testimony to Try to Create a Question of Material Fact.

After filing suit, Lamont hired experts Toby Hayes and Joellen Gill to inspect the stairs. They submitted declarations offering a variety of inadmissible opinions about what law applies, what codes apply, whether a codes was violated, etc., and opining that Lamont fell because he stepped on the second tread and it was slightly too shallow, causing him to lose his footing and fall. CP 195-201 (Gill), CP 202-209 (Hayes). In the summary judgment proceedings below, the Savios and Quorum objected to the court considering the improper materials. CP 211-213.

IV. STANDARD OF REVIEW

A CR 56 summary judgment dismissal by the trial court is reviewed *de novo* by the appellate court. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). The appellate court also reviews *de novo* any evidentiary rulings by the trial court in conjunction with the

CR 56 motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The purpose of summary judgment is to secure the just, speedy and inexpensive determination of lawsuits by avoiding a useless trial where no material facts are at issue. *Maybury v. City of Seattle*, 53 Wn.2d 716, 336 P.2d 878 (1959). The trial court pierces the formal allegations made in the parties' pleadings and grants relief by summary judgment where it appears from uncontroverted facts set forth in affidavits, declarations, depositions or admissions on file, that there are, as a matter of law, no genuine issues to be litigated. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960); CR 56(c). The party moving for summary judgment has the initial burden of proving that there is no genuine issue as to any material fact. *Id.* But, where the motion for summary judgment is supported by evidentiary matter, the adverse party may not rest on mere allegations in the pleadings; it must set forth specific facts showing that there is a genuine issue for trial. *Young v. Key Pharmaceuticals, Inc.,* 112 Wn.2d 216, 770 P.2d 182 (1989); *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975).

Once there has been a showing by the party bringing a summary judgment motion that there are no material facts for a jury to decide, the party opposing such a motion must respond with more than conclusory

allegations, speculation, or argumentative assertions of the existence of unresolved factual issues. *Michelsen v. Boeing Co.*, 63 Wn. App. 917, 920, 826 P.2d 214 (1991); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

Here, the trial court correctly concluded that there were no issues of material fact and that the governing law did not support or permit trial on Lamont's legal theory, and so dismissed all of Lamont's claims.

V. ARGUMENT

A. The Court Must Disregard Inadmissible Testimony Offered by Lamont's Experts Hayes and Gill.

Only admissible evidence may be considered by the court on a motion for summary judgment. CR 56(e); *Washington Public Util. Dists. Utils. Sys. v. PUD No. 1*, 112 Wn.2d 1, 771 P.2d 701 (1989). Expert testimony must be based on facts, and is not admissible where it is speculative or the subject of conjecture. *Curtis v. YMCA*, 82 Wn.2d 455, 511 P.2d 991 (1973); *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (affirming trial court's exclusion of proffered expert testimony regarding the cause and nature of an accident, where expert offered opinion on party's location based solely on the party's own statement: "[i]t is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.").

The Court should disregard the inadmissible declaration

testimony of Lamont's hired expert witnesses Joellen Gill and Wilson "Toby" Hayes. First, expert witnesses in a premises liability case such as this may not offer opinions about what the law is, or what the law requires. That is the role of the Court, not of a witness. Washington law is crystal clear on this point. *E.g., Hyatt v. Sellen Constr. Co.*, 40 Wn. App. 893, 700 P.2d 1164 (1985). In *Hyatt*, the plaintiff was injured in a jobsite fall, and his expert sought to testify as to what law applied, and whether a violation of the relevant code provisions caused the fall. The trial court excluded that testimony, and the court of appeals affirmed. *Hyatt*, 40 Wn. App at 898-99; *see also State v. Olmedo*, 112 Wn. App. 525, 49 P.3d 960 (2002) (applying same rule and holding that the trial court erred in allowing expert to testify that Department of Transportation regulations applied to propane tank storage, and that defendant had violated those regulations).

Thus, the various statements by Lamont's experts that certain conditions were "violations of code" at the subject location, the numerous references to the "requirements" of a written statutory provision, and the opinions that any supposed "violations" were the cause of Lamont's fall are inadmissible and should be stricken. The Court should disregard Paragraphs 5, 6, 8, 11, 13, 16, 18, and 19 of Gill's Declaration (CP 196-201) and Paragraph 5 of Hayes' Declaration

(CP 205) for these reasons, as well as that portion of Hayes' testimony that relies upon his stated review and acceptance of Gill's inadmissible opinions. CP 205-208.

Gill also submitted a supplemental declaration on behalf of Lamont, after the summary judgment hearing. CP 260-262. That declaration, too, is entirely based on Gill's legal conclusions about violations of particular code provisions, and about the applicability of particular code provisions. Neither subject is properly subject to expert testimony, as both involve questions of law, which are the province of the court.

Second, a witness who is not a medical professional may not offer opinions on medical diagnoses or medical causation. Wilson Hayes states that he holds a Ph.D. in Biomedical Engineering, but he is not a trained or licensed medical professional. His area of expertise in this case—if any—would properly be limited to biomechanics and "human factors" analyses, not to diagnoses, prognoses, or medical causation. Opinions of medical causation may only be offered by a properly licensed medical professional. *See, e.g., Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 687-88, 183 P.3d 1118 (2008) (holding that a plaintiff in a negligence case must present competent medical testimony as to a causal relationship between the alleged

negligent act and the subsequent injuries or condition complained of; such testimony must be based upon the facts of the case, not on speculation or conjecture, and must be based upon a reasonable degree of medical certainty). Hayes is not a licensed medical professional, and his statements regarding the nature and causes of Lamont's injuries therefore are not admissible here. The Court should disregard Paragraph 7 of Hayes' report (CP 205-206) for this reason.

Finally, both of Lamont's purported expert declarations are inadmissible because they assume and rely on a set of facts *directly contrary to the sworn deposition testimony of the Lamont*, or that otherwise have fatally inadequate foundation. For instance, both experts essentially state that Lamont's descending step onto the second tread of the basement stairs caused his foot to slip, roll, and come off the second tread, resulting in his fall down the stairs. But Lamont was clear in his deposition that he never even touched the second tread with his foot. CP 79-81. Likewise, both experts opine that loose carpeting contributed to the fall. But, again, Lamont made no such statement at his deposition; he did not attribute his fall to any particular condition at all, let alone a carpet issue. CP 79-81. Nor is there any evidence to support the necessary inferential leap that the carpet was in the same condition at the time of fall as at the time of inspection. In fact, Gill bases her

opinions solely on measurements taken without carpet or pad on the stairs (CP 196-197); yet it is undisputed that the stairs were *not* in that bare condition at the time of the fall. Taken together, abundant foundational deficiencies render the rest of Gill's testimony subject to exclusion. Gill's Declaration ultimately amounts to unqualified speculation, and her entire declaration should be disregarded. These same evidentiary deficiencies render Hayes' analysis inadmissible; it, too, should be disregarded and stricken.

B. On Appeal, Lamont Does Not Argue a Common Law Claim under the "Latent Defect" Theory, and He Cannot Prevail on Such a Theory.

In the landlord-tenant setting, Washington law treats non-common areas of the premises differently from common areas. Non-common areas are those areas reserved exclusively for the tenant's possession and use. *Aspon v. Loomis*, 62 Wn. App. 818, 825-26, 816 P.2d 751 (1991). Here, the entire premises was a non-common area, being leased to Lamont for his sole use.[1]

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[1] In contrast, common areas are those which are either (1) shared with other tenants, or (2) shared with, or remaining under the control of, the landlord. *Schedler v. Wagner*, 37 Wn.2d 612, 225 P.2d 213, 230 P.2d 600 (1950). Typical common areas include parking lots, courtyards, and stairways at apartment buildings, which multiple different tenants are entitled to use. A landlord has an affirmative obligation to maintain the common areas of the premises in a reasonably safe condition for the tenants' use. *Geise v. Lee*, 84 Wn.2d 866, 529 P.2d 1054 (1975).

Under Washington's long standing common law, the landlord is liable for injuries arising from defects in non-common areas *only* where the plaintiff proves: (1) a latent or hidden defect in the leasehold; (2) that existed at the commencement of the leasehold; (3) of which the landlord had actual knowledge; and (4) of which the landlord failed to inform the tenant. *Flannery v. Nelson*, 59 Wn.2d 120, 366 P.2d 329 (1961); *Aspon v. Loomis, supra.* The latent defect doctrine does not impose upon the landlord any duty to discover obscure defects or dangers. Nor does it even impose any duty to repair a known defective condition. The landlord is liable *only* for failing to inform the tenant of dangers actually known by the landlord and which are not likely to be discovered by the tenant. *Flannery v. Nelson, supra.*

Neither Savio nor Quorum had superior knowledge to Lamont regarding condition of the stairs at the time of his fall (which was three months into his tenancy). In fact, Lamont himself was the party with superior knowledge: he admits that he recognized the "funky" nature of the stairs well before his accident, with their rise and run variations. CP 74-77. Yet he did not notify either Savio or Quorum of any concern. CP 77-78. Nor would those conditions be "latent," even if they were considered a "defect." The stairs' dimensions and configuration were as observable to Lamont as to anyone else. Indeed, they were even more

so, as he lived there and used the stairs for months before his fall. In *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 523 (1993), the Supreme Court applied nearly identical language in analyzing Washington's recreational use immunity statute, RCW 4.24.210. There, the Court held that "latent" refers to the existence of the condition itself, not to the "injury causing potential" of the condition. *Van Dinter*, 121 Wn.2d at 46-47. So whatever the allegedly defective condition at issue here was—whether the carpet, the height of the stair, width of the treads, or some new theory that Lamont or his experts might invent—any such condition of the stairs was readily visible to anyone, especially including regular user Lamont, and was not "latent." So even if Quorum or Savio had actual knowledge of such a condition, neither had any duty to warn Lamont of a condition that was there to be seen, and of which he already had actual knowledge.[2]

C. As a Matter of Law, There Was No Breach of the Lease Agreement, Because Lamont Never Gave Notice of a Condition Requiring Repair, and Because There Was No Reasonable Opportunity for the Savios or Quorum to Respond to Any Such Notice.

Lamont argues that the lease imposed a duty to inspect and repair, based on the lease provision that Quorum shall maintain the premises in a "sound and habitable condition." *Appellant's Brief* at 17.

[2] Lamont's appeal brief makes no mention of this analysis, thus waiving any argument.

That assertion is incorrect. First, the lease does not require Quorum to inspect the premises. Rather, it places the duty on Lamont to promptly report any defects or problems to Quorum (CP 91), and provides that Lamont accepted the premises in the condition at the time the lease was executed. CP 92. The integrated Unit Condition Report executed by Lamont on April 16, 2012 (CP 103-105) did not identify any issues with the stairs.

Even if Lamont had notified Quorum of a need for repair, the landlord is entitled to a reasonable time to effect repairs after notice, before a breach of the lease is established. *O'Brien v. Detty*, 19 Wn. App. 620, 576 P.2d 1334 (1978), *rev. den.*, 90 Wn.2d 1020 (1978). Here, there was no notice from Lamont—or anyone else—of any issue with the stairs, or of any repair that was needed.

Lamont cites *Mesher v. Osborne,* 75 Wash. 439, 134 P.1092 (1913), for the proposition that a duty to inspect exists, and therefore constructive notice exists. In that case, Osborne rented a home to Prince, who testified that at the inception of the lease, Osborne agreed to "put the premises in repair and keep them in repair." *Id.* at 441. Osborne knew of a hidden cesspool under the yard, but Prince did not. One day a neighbor child visiting the Prince home fell through rotted boards covering the cesspool and drowned. Osborne admitted that he

knew the cesspool was there but never inspected it to determine whether the boards covering it were sound. The court held that because Osborne had agreed to put the premises in repair, he had a duty to "to inspect the premises for concealed dangers and either remove them or notify the tenant of their existence that he might either decline the tenancy or guard against the dangers." *Id.* at 451.

Mesher is not applicable here, however. First, unlike the landlord in that case, the Savios and Quorum did not affirmatively undertake to "put the premises in repair" at the outset of the lease. Such an undertaking would perhaps imply a duty to render the premises in some condition other than that which it was in when Lamont signed the lease. But there was no such agreement to do so here. Rather, Lamont expressly accepted the premises in their current condition, after using the stairs and inspecting the house. CP 92. Second, the *Mesher* court made clear that the landlord either needed to correct the concealed danger, *or tell the tenant about it*, so the tenant could decide whether to decline the tenancy or to accept the tenancy and simply guard against the now-known hazard. In this sense *Mesher* actually reflects the "latent defect" analysis detailed above, as set out in *Flannery* and

Aspon.[3]

And to the extent Lamont claims *Mesher* imposes a duty to inspect and repair under the lease without some other notice from the tenant, subsequent Washington cases make clear that this is incorrect. *See, e.g., Teglo v. Porter*, 65 Wn.2d 772, 399 P.2d 519 (1965). In *Teglo* a tenant fell through a rotted floor, and claimed that an oral lease included a promise by the landlord to repair the floor—a condition which was known to both parties. *Id.* The landlord failed to do so, and the tenant was injured due to the fall. The Supreme Court held that where there is a covenant to repair, liability can arise *if the tenant has given the landlord notice of the need for repairs* and the landlord fails to effect the same within a reasonable time. *Teglo*, 65 Wn.2d at 774, 776; *see also O'Brien v. Detty, supra*. Of course, it is undisputed that Lamont provided neither the Savios nor Quorum with any such notice here.

Here, there was nothing the Savios or Quorum could tell Lamont about the stairs that his testimony reveals he did not already know. He knew the stairs had rise and run variations, which he describes as

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[3] Subsequent Washington courts have read *Mesher* as standing for exactly this rule: a landlord's duty to warn the tenant of concealed hazardous conditions of which the landlord has actual notice. *McCormick v. Milner Hotels, Inc.*, 53 Wn/2d 207, 208, 332 P.2d 239 (1958). The same rule was articulated in *Howard v. Wash. Water Power Co.*, 75 Wash. 255, 134 P.927 (1913), decided at the same time as *Mesher*.

"funky" and, and he accepted that condition. Nor was any such "defect" in the rise and run "latent"; the stairs' dimensions and configuration were more observable to Lamont than to anyone else, as he lived there and used the stairs for months before (and after) his fall. But Lamont never complained or notified anyone about any concern regarding the condition of the stairs.

D. Lamont Cannot Establish a Claim for Breach of the Implied Warranty of Habitability, Because the Premises were Sound and Habitable as a Matter of Law, and There Was no Notice or Opportunity to Correct.

In *Foisy v. Wyman*, 83 W.2d 22, 515 P.2d 160 (1973), Washington's Supreme Court held that an implied warranty of habitability is contained in all residential leases, and that a breach of the implied warranty is a defense to an unlawful detainer action. In a purchase and sale setting, recent cases have explained that the premises do not need to actually be uninhabitable before the warranty is breached, but that the inquiry instead is whether the condition creates an "actual or potential safety hazard" to the occupants, or "if the violations present a substantial risk of future danger." *Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC,* 146 Wn. App. 760, 771-72, 193 P.3d 161 (2008); *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.,* 115 Wn.2d 506, 519-22, 799 P.2d 250 (1990).

1. The condition of the stairs did not violate the implied warranty.

None of these cases offer guidance in the setting of tenant suing a landlord for damages for personal injury. *Westlake View* and *Atherton* were construction defect cases, where the condominium unit buyers sued to recover damages for defective construction. The plaintiffs in those cases relied on the implied warranties that Washington law imposes in the sale of a new residential dwelling to the first buyer. A more recent case, *Landis & Landis Constr., LLC v. Nation*, 171 Wn. App. 157, 286 P.3d 979 (2012), *rev. denied,* 177 Wn.2d 1003 (2013), on which Lamont relies, was a rescission case in a residential tenancy, as detailed below.

In the context of a tenant's claim for personal injuries, different considerations apply. Here, the premises clearly were in a sound and habitable condition as a matter of law. Lamont made a detailed inspection before moving in, as the Unit Condition Report shows, and had no issues with the stairs. Neither did the previous tenants going back to 2002, when the Savios bought the property and Quorum began managing it. Regardless of whether the stair configuration (the rise and run dimensions, and other physical attributes) meets the current City of Seattle construction code for new residences, or even if it meets the

City's 1936 code, the stairs' physical attributes were well known to Lamont. Indeed, even though Lamont perceived the stairs as "funky," he *never* gave notice to Quorum or anyone else that this was a problem, that he felt the stairs posed a risk, or that their "funkiness" required any corrective action. Prior to the accident the stairs had been used for more than ten years with no problems, including regular use for multiple months by Lamont himself. He did not ask for corrective action even after he fell, and he remained a tenant in the home until the lease expired, continuing to use the very stairs that he now claims were obviously incredibly dangerous.

This is not a case of an "out of sight, out of mind" condition, or of any sort of deceptive act by the landowners. Quite to the contrary, these stairs were walked on practically daily—by Lamont, his family, and his guests, and by the other tenants during the preceding 10 years. The physical condition of the stairs was obvious and known to the users. The condition of the stairs did not violate any implied warranty.

2. Notice, plus opportunity to correct, is required before there can be a breach of the implied warranty of habitability.

Proof of "notice plus opportunity to correct" is a bedrock element of any tenant claim against a landlord for personal injuries. If the claim is based on a violation of RCW 59.18, Washington's

Residential Landlord Tenant Act ("RLTA"), liability only arises where the landlord fails to respond within the statutorily specified time after receipt of notice. RCW 59.18.070; *Howard v. Horn*, 61 Wn. App. 520, 810 P.2d 1387, *rev. den.* 117 Wn.2d 1011 (1991). And as detailed above, the same rule applies to a contract-based claim alleging a breach of the lease terms.

The same rule must be applied to an alleged breach of the implied warranty of habitability. If a warranty of habitability is a term of the lease – whether expressly included, or implied by law under *Foisy* – then notice of a problem plus opportunity to correct are prerequisites to liability for personal injuries. *O'Brien v. Detty, supra.*

As noted above, Lamont cites *Landis & Landis Constr., LLC v. Nation*, 171 Wn. App. 157, 286 P.3d 979 (2012), *rev. denied*, 177 Wn.2d 1003 (2013), apparently for the proposition that no notice is required in premises liability cases. That is an incorrect assumption by Lamont, in large part because *Landis* involved completely different issues. There, the landlord rented a house, and upon move-in the tenants found that the house was infested with rats. The tenants moved out immediately, without waiting for the landlord to try to correct the problem. The landlord then refused to return the tenants' prepaid rent, so they sued the landlord to recover it. The trial court granted summary

judgment to the landlord, on the basis that the tenants had failed to provide notice and opportunity to correct, as required by the RLTA. The tenants appealed, arguing that the rat infestation violated an implied warranty of habitability, that this obligation was separate from the RLTA's provisions, and that no notice or opportunity to correct was required.

This Court agreed with the tenants, and held that an action for rescission can be based on violation of the implied warranty of habitability and that no notice was required. But the court focused heavily on the fact that (1) this was a rodent infestation, which can be an actual or potential health hazard, (2) other courts have rejected the argument that a new tenant who encounters rodent infestation must "wait it out" and let the landlord try to correct it, and (3) the tenants were simply suing for rescission (to "unwind" the lease and get back the prepaid rent), not for personal injuries. The court concluded there was a genuine issue of material fact as to whether the implied warranty of habitability had been violated sufficiently to support a rescission remedy, and remanded for trial on those issues.

The *Landis* court's analysis and the policies underlying its decision are not applicable here. First, unlike a rodent infestation, which clearly is (or should be) unacceptable to tenants and a serious

health risk, this case involves a set of stairs that had presented no issues to prior tenants or to Lamont himself. Whatever minor rise and run variations may have existed, *vis a vis* applicable codes, they were known to and acceptable to Lamont, and remained so after his fall through the end of his tenancy. Second, neither the peculiar nature of rodent infestation, nor the case law from other jurisdictions on which the *Landis* court placed great emphasis, apply here. Finally, *Landis* was a rescission case; all the tenant wanted from the landlord was to unwind the lease, get back the money the tenant had prepaid for future rent, and be done. In that setting, the court could logically conclude that enforcing a "notice plus opportunity to correct" rule would be unfair to the tenant and would unjustly enrich the landlord., since the landlord would be able to keep the prepaid rent after providing a rat-infested rental. The present case is very different, because Lamont seeks money damages for personal injury based on a negligence theory, and his claim is based on a known condition which he voluntarily encountered with consistency and regularity, and which he never took issue with or complained about.

Indeed, every Washington case on which Lamont relies that involved a personal injury claim by the tenant also involved actual notice to the landlord of a problem, and opportunity to repair. For

example, in *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001) ("*Lian I*"), the tenant was injured when she fell through some exterior stairs that were rotted, decrepit, and obviously dangerous. The landlord was fully aware of those conditions. The tenant testified that she complained to the landlord and that the landlord made a "desultory" attempt at repairs, but plaintiff nonetheless later fell and was injured. The trial court found in the plaintiff's favor, but the court of appeals reversed and remanded for additional factual findings and to clarify its liability analysis. On remand, the trial court again found in favor of plaintiff. *Lian v. Stalick*, 115 Wn. App. 590, 62 P.3d 933 (2003) ("*Lian II*"). The evidence showed that the tenant had fallen once before on the rotted steps, had called the landlord and complained and asked that they be repaired, and that the landlord failed to do so. The Court of Appeals affirmed.

In *Tucker v. Hayford*, 118 Wn. App. 246, 75 P.3d 980 (2003), the tenants were made sick by a contaminated water supply well serving the home. In 1993, the landlord had a water test report that showed some issues with the well, and recommended a sanitary seal be replaced and that chemicals stored near the well be moved. It also recommended that the well be tested annually. The landlord did nothing. Tenancy began in 1994, and continued to 2000, when the tenants all became sick

from the contaminated water. The court held that the landlord was on notice of the well problems, and thus there was a fact issue as to the tenant's claims under the RLTA, Chapter 59.18 RCW.[4]

E. Lamont Cannot Maintain a Claim under Restatement (Second) of Property Section 17.6.

Restatement (Second) of Property Section 17.6 states that a landlord is subject to liability for physical harm to tenants caused by:

> [A] dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of: (1) an implied warranty of habitability; or (2) a duty created by statute or administrative regulation.

Martini v. Post, 178 Wn.App. 153, 313 P.3d 473, 483 (Div. 2, 2013).[5]

1. As a matter of law, there was no hazardous condition that substantially endangered or impaired the health or safety of the tenant.

Lamont's experts claim that the rise/run variations created a hazardous condition, "an accident waiting to happen." And Lamont claims this is "uncontested." *Appellant's Brief at 16.* That assertion is

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[4] As discussed below, even the recent Washington Court of Appeals cases which apply the Restatement (Second) of Property Section 17.6 involved *actual* notice to the landlord of a condition needing correction, and the landlord's failure to do so.

[5] Our supreme court has never adopted Section 17.6, and since the Restatement is supposed to reflect and accurately state the common law, it is in direct conflict with our Supreme Court's prior holding in *Flannery v. Nelson*, 59 Wn.2d 120, 366 P.2d 329 (1961). That decision *is* binding on all lower courts in Washington; it is error to ignore *Flannery* and apply some other law of the court's choosing. *1000 Virginia L.P. v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). But the *Martini* court adopted Section 17.6 for tenant claims anyway, as had Division 3 in *Lian II*.

incorrect. As the Savios and Quorum argued to the trial court, the experts' conclusory opinions in this regard are patently nonsense—there was no "accident waiting to happen." The stairs had been in use for approximately 10 years since the Savios purchased the property, with multiple tenants (and their guests), and there is no evidence of there *ever* being a problem until Lamont fell. Lamont *himself* continued to use the stairs for the approximately nine-month balance of the lease term after he fell, and *never asked Savio or Quorum to repair them.* As a matter of law, the rise/run variations that the experts measured, viewed in light of the long history of non-events, and Lamont's own acceptance of those conditions in the face of his actual knowledge of the stairs' geometry and daily use of same, simply do not rise to the level of a "dangerous condition," whatever Lamont's experts may claim.

Indeed, Lamont's counsel affirmatively told the trial court that only by disassembling the stairway and conducting an expert analysis could one learn of the purported dangerous condition or non-compliance with code:

> MR. KYTLE: So, you know, and there's quite a bit of difference between knowing the stairs are "funky" as opposed to their not being compliant with the law and dangerous, **which it took an expert to measure and determine**.

CP 434 (emphasis added). This important admission reveals that even if there was a technical violation of code, that fact alone would not have led a property manager or landlord to understand the existence of any danger arising from that condition. Expert analysis and measurement would have been required. Of course, this admission comports with reality, given the evidence that until he retained counsel and hired expert witnesses for purposes of a lawsuit for money damages, Lamont himself did not believe the stairs to be unsafe in any way. Even though he testified that he was well aware of a variation in rise and run long before his accident, Lamont never notified the Savios or Quorum Defendants of any concern —*not even after falling.*

2. Section 17.6 requires notice to the landlord and reasonable opportunity to repair.

Lamont correctly points out that cases from Divisions Two and Three of this court have adopted Section 17.6. But in both cases they did so in "notice plus opportunity to correct" settings. In *Lian II, supra*, the tenant had fallen on the rotted steps previously, and had complained to the landlord about them, but the landlord had not repaired them. Similarly, when Division Two recently adopted Section 17.6 in *Martini v. Post*, 178 Wn.App. 153, 313 P.3d 473 (2013), one of the tenants died in a fire in the rental home, after the tenants had repeatedly asked the

landlord to repair windows that had been painted shut and could not be opened. The decedent's estate presented evidence showing that the decedent could have opened the window and gotten out safely had it not been painted shut. The trial court dismissed the case on summary judgment, because the claimed defect was in a non-common area, and thus at common law the only duty the landlord had was to warn – and the tenants already knew of the defect because they had complained about it.

The court of appeals realized that it had to change the law or else the plaintiff would have no remedy, and thus adopted Section 17.6 for claims by tenants against their landlords. *Martini*, 343 P.3d at 483. The *Martini* court adopted Section 17.6 only in the factually-compelling setting of a claim by a deceased tenant, who died while trapped inside the house during a fire, and who had given notice of a defect which violated life safety codes (the windows that would not open), which the landlord did not bother to address. Though in conflict with our common law as announced by the Supreme Court in *Flannery*, the *Martini* court's rationale is at least understandable: as the *Martini* court noted, the plaintiff would have not been able to pursue a claim otherwise, because it was a non-common area and the tenants knew of the problem. And the fact that the tenants had asked the landlord to repair the

condition and that the landlord failed to do so (the "notice plus reasonable opportunity to correct" requirement found both at common law (*O'Brien*) and under the RLTA (*Howard*), and a bedrock element of Washington law) were critical to the *Martini* court's decision to adopt Section 17.6 in that setting.

In contrast, Lamont gave no notice or request for corrective action to Savio or Quorum, and neither Savio nor Quorum ever had any reason to believe that anything needed to be done with the stairs. Nothing in Section 17.6 of the Restatement, or in *Martini* or *Lian II*, suggests that the long-standing "notice and opportunity to correct" requirement has magically been stripped from this state's common law (or from the RLTA, for that matter; *see* RCW 59.18.070 (no violation until notice and opportunity to correct)). Nowhere does Section 17.6 state that the landlord has a duty to inspect for, find, and correct code issues; it only refers to a landlord duty to "repair" certain conditions.

Perhaps recognizing this problem, Lamont argues that the Savios and Quorum had notice of the stair dimensions because a third party contractor replaced the carpet in 2002. *Appellant's Brief* at 18. This theory was not argued on summary judgment; instead, Lamont presented it in his Motion for Reconsideration, which the trial court never ruled on. It is not properly before this court.

Even if it were, though, Lamont's argument in this respect fails as a matter of law. Lamont argues that the Savios and Quorum had "notice" of a dangerous condition, simply because a third-party contractor carpeted the stairway 10 years before Lamont's tenancy. That is incorrect. The staircase carpet was installed in approximately 2002 via a services contract between the Savios and Carpet World, a now-defunct entity. CP 473. There is no agency relationship created via an arms-length third-party contract for construction services. *E.g., Chapman v. Black*, 49 Wn. App. 94, 98, 741 P.2d 998 (1987) (agency or employee relationship requires that his or her physical conduct in the performance of the service be subject to the other's control or right of control; independent contractor is not subject to such control). Lamont provided no evidence to suggest that either the Savios or Quorum retained control over the carpet installation,[6] and no admissible evidence regarding: (1) what the carpet service learned about the stairs via its work, (2) whether or how it measured the staircase, or (3) whether or how its personnel performing this work would have been competent or qualified to understand code compliance or the type of "human factors" analysis that Lamont himself needed from his litigation experts before concluding that the stairs were purportedly unsafe.

[6] Quorum did not even contract with the Savios to manage the property until after the work was done.

3. Neither the RLTA, nor Section 17.6, required the Savios and Quorum to inspect the stairs before leasing, determine applicable codes, and rebuild the stairs to meet those codes.

Because even Section 17.6 clearly requires "notice plus opportunity to correct," Lamont is constrained to argue that the Savios and Quorum had a duty to inspect the stairs before leasing the premises, that they should be held to have constructive notice of what such an inspection would have revealed, that such an inspection would have revealed a code violation, and that they can be liable for not rebuilding the stairs accordingly. This is incorrect, for several reasons.

a. No case law or statute supports this proposition.

The Savios and Quorum are not aware of any case law or statute that suggests that a residential landlord must affirmatively inspect a rental house for compliance with all applicable codes, and rebuild the premises to comply. Lamont does not cite to any such authority.

b. No reasonable inspection would reveal the alleged defects.

Lamont's argument requires the court to accept the following proposition: the Savios and Quorum were obligated to (1) determine when the house was built, (2) track down (in this case) a 70 year old building code, the 1936 Seattle Building Code, (3) try to ascertain if it applied to the 1941 construction, (4) measure all the stairs, with a very

high level of accuracy (5) evaluate whether "uniform" means NO variation at all, or whether it means "some" variation is acceptable, as the original City building inspector presumably did here in 1941, (6) determine how much variation *is* acceptable to still be "uniform", and then (7) rebuild the stairs to be "uniform" if they *did* show some variation in excess of that unknown maximum.

This is absurd. It is impractical, burdensome, and unrealistic in the real world, which is the world in which landlords and their tenants necessarily must operate. Moreover, the "inspection" itself presents obvious problems: in this case, Lamont had to bring in experts who had to remove the carpeting from the stairs and then take detailed measurements of each of the treads and risers, and then replace the carpeting. Lamont's attorneys then had to research current and pre-1940 City codes, before they could determine whether those measurements complied with those codes.

c. A landlord would not know what "repair" to make, assuming the landlord knew what code applied.

Even if the court were to assume that a landlord should know that the 1936 Seattle Building Code applied, and were to perform the carpet removal, measurement and carpet reinstallation process, another problem arises: what does it mean when the 1936 code says "The

dimensions of treads and risers shall be maintained uniform in each run of stairs." CP 259. This is an inherently subjective standard. Does it mean NO variance at all? That would be the interpretation urged by Lamont, in which case a deviation of, for example, 0.010" (roughly the thickness of a human hair) between *any two treads in the flight* would be a code violation. But surely that cannot be the actual, real world meaning of such a provision. Even the current code which Lamont claims applies (SCC 22.206.130(A)) allows a 3/8 inch variation in rise and run within a flight of stairs, and it strains the imagination to think that a 70 year old code provided that limited a tolerance, much less a more restrictive one.

Whatever the answer to this conundrum might be, it demonstrates that under Lamont's argument, the Savios and Quorum would still – at the end of a burdensome process – be required to guess at what was required, because there is no objectively verifiable and knowable standard. Viewed another way, Lamont cannot show that the stairs violated the applicable 1936 Code.

d. Lamont cannot show that the Savios or Quorum violated a duty imposed by statute or regulation, because the SMC does not require reconstruction of existing stairs, and Seattle's new 2014 residential inspection and certification ordinance does not require stairs to be inspected.

Along with the other elements of Section 17.6, Lamont must show that the existence of the rise/run variations violates a duty created by statute or regulation. *Martini v. Post, supra*; *Appellant's Brief* at 16. Section 17.6 does not say that the plaintiff simply must show that the condition "violates a statute or regulation" – it says the plaintiff must show that the condition "violates a **duty created by** statute or regulation." (Emphasis added.) So Lamont must not only show a non-compliant condition, he must show that a *duty* created by statute or ordinance was violated.

i. The SMC was not violated because it speaks to maintenance of existing structure, not reconstruction of same.

The applicable code for the Savio residence would be the one in effect when the house was built in 1941. *Sorensen v. W Hotels, Inc.*, 55 Wn.2d 625, 635, 349 P.2d 232 (1949) (building ordinances apply prospectively, absent clear language indicating an intent to apply retroactively). SMC 22.200.030(A) (the building code in effect when the house was constructed) applies "to the construction, alteration, rehabilitation and repair" of the house.

Lamont argues that SMC 22.206.130 and .160 apply here. Section 130 specifically states:

22.206.130 Requirements

> A. Stair and Stairway ***Construction.***
>
> 1. All stairs, except stairs to inaccessible service areas, exterior stairs on grade and winding, circular or spiral stairs shall have a minimum run of 10 inches and a maximum rise of 7 3/4 inches and a minimum width of 36 inches from wall to wall. The rise and run may vary no more than inch in any flight of stairs.

(Bolding in caption added.) By its own terms, this section refers to *construction* of stairs, not "maintenance" of stairs. As set forth above, the SMC itself provides that the applicable code is the one in place when the stairs were built in 1940. Lamont attempts to end-run this by arguing that "maintenance" of the stairs includes measuring them and rebuilding them to meet the current requirements of SMC 22.206.130(A). The English language, resilient as it is, cannot be twisted sufficiently to reach that result.

The SCC does not define "maintain" or "maintenance." The court must therefore look to the dictionary for the common and ordinary meaning of the words. *Skagit County Pub. Hosp. Dist. No. 1 v. Dep't of Revenue,* 158 Wn. App. 426, 437, 242 P.3d 909 (2010). "Maintain" means "to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline." CP 224-225. "Maintenance" means "the act of maintaining" or "the upkeep of property or equipment." CP 226. Both terms necessarily address the preservation or upkeep of

what exists, not the alteration of what exists or the construction of something new. This is consistent with the ordinary, plain meaning of the words. For example, one would not say "I maintained my deck last summer" to refer to the process of demolishing the deck and constructing a new one of different dimensions and characteristics. Because "maintenance" of the stairs does not encompass rebuilding them to new dimensions, the dimensional requirements of SMC 22.206.130(A) do not apply.

Similarly, section .160 refers to a laundry list of things the landlord must "maintain", as set out in section .010 through .140, but there is no logical way to read this as requiring that an owner renovate a home to comply with new construction codes (such as section .130) whenever those codes change. No such duty exists.

ii. <u>There is no violation of the SMC without notice and opportunity to correct.</u>

Even if the stairs were not compliant with an applicable Seattle building code, that does not create a *violation* of that code; that arises only upon a formal notice to the owner and a failure to comply with same. SMC 22.206.270 provides:

> **22.206.270 Violations.**
>
> A. Any failure to comply with a ***notice*** of violation, decision or order shall be a violation of this Code.

(Italics and bolding in text added). This is logical, and consistent with the long-standing requirement under Washington law that a landlord must be given notice of a problem and reasonable opportunity to correct it, before liability can arise.

Nor does the SMC create any private right of action for the alleged stair inconsistencies. As stated in SMC 22.206.305,

> **22.206.305 Tenant's private right of action.**
>
> Nothing in this Code is intended to affect or limit a tenant's right to pursue a private right of action pursuant to Chapter 59.18 RCW for any violation of Chapter 59.18 RCW for which that chapter provides a private right of action. When an owner commits an act prohibited by SMC Sections 22.206.180 A1, 22.206.180 A2, or 22.206.180 A7, a tenant has a private right of action against the owner for actual damages caused by the prohibited act.

This means that Lamont may argue a claim under the RLTA, Chapter 59.18 RCW, but this leads back to the same problem: he must show "notice of a problem and opportunity to correct" to prevail on such a claim.

iii. There is no violation of a duty imposed by the SMC because it does not require a landlord to preemptively inspect for stair rise and run dimensions and then reconstruct the stairs.

Section 17.6 requires Lamont to show that Savio and Quorum violated a *duty* imposed by statute or regulation. Lamont therefore

argues that Savio and Quorum had a *duty* to review every possibly applicable state and City code applicable to the premises, inspect every inch of the premises with an expert before leasing to Lamont, identify every condition that failed to meet one of those codes, and reconstruct the home to comply.

In fact, Seattle's newest rental unit code makes clear that there is no duty to inspect and reconstruct stairs in a rental housing unit. In 2012, after Lamont's fall, the City enacted the Rental Housing Registration and Inspection Program, SMC 22.214. CP 227-228. This program began to take effect in 2014, and requires a phased-in process of registration and inspection of most rental housing units in the City. CP 229-234. Notably, the inspection process must be conducted by a City inspector or certified private inspector (SMW 22.214.05 - .060), and a certificate of compliance must be filed with the City. CP 231, 236-238. The inspection must include checking and verifying compliance with the following specific SMC provisions:

> 1. The minimum floor area standards for a habitable room contained in section 22.206.020.A. Section 22.206.020.A shall not apply to single room occupancy units;
>
> 2. The minimum sanitation standards contained in the following sections:

a. 22.206.050.A. Section 22.206.050.A shall only apply to a single room occupancy unit if the unit has a bathroom as part of the unit;

b. 22.206.050.D. Section 22.206.050.D shall only apply to a single room occupancy unit if the unit has a kitchen;

c. 22.206.050.E;

d. 22.206.050.F; and

e. 22.206.050.G;

3. The minimum structural standards contained in section 22.206.060

4. The minimum sheltering standards contained in section 22.206.070

5. The minimum maintenance standards contained in section 22.206.080.A;

6. The minimum heating standards contained in section 22.206.090

7. The minimum ventilation standards contained in section 22.206.100

8. The minimum electrical standards contained in section 22.206.110.A;

9. **The minimum standards for Emergency Escape Window and Doors contained in section 22.206.130.J;**

10. The requirements for garbage, rubbish, and debris removal contained in section 22.206.160.A.1;

11. The requirements for extermination contained in section 22.206.160.A.3;

12. The requirement to provide the required keys and locks contained in section 22.206.160.A.11; and

> 13. The requirement to provide and test smoke detectors contained in section 22.206.160.B.4.

SMC 22.214.050M (emphasis added). CP 242. *There is no requirement that the stair dimension standards in SMC 22.206.130(A), or in any other code for that matter, be inspected for or certified.* If the City does not impose a duty to perform such an inspection in a program implemented *after* Lamont filed suit, there is no rational way to conclude that a landlord had a duty to do so in 2012, before the ordinance was even enacted.

VI. CONCLUSION

Lamont doesn't know why he fell, his experts base their opinions on a factual scenario that is directly contradicted by Lamont's own testimony, and Lamont – who had *superior knowledge* of the alleged conditions – never communicated that information to the Savios or Quorum and never asked that the stairs be rebuilt, even during the approximately nine months of his tenancy *after* his fall.

Lamont's claim that the Savios and Quorum had a duty to inspect the house for code compliance before leasing to Lamont, and rebuild the stairs to suit whatever code applied, is not supported in Washington law, logic, or the real world. It is not even supported by the 2014 City of Seattle rental unit inspection and certification ordinance, which provides specific guidance on what must be inspected, and

conspicuously omits any provisions or reference to stairway dimensions.

The trial court's dismissal of Lamont's claims against the Savios and Quorum should be affirmed.

RESPECTFULLY SUBMITTED on July 24, 2014.

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