Case No. ~~45579~~ 45779-2-II

IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RENATO FIGURACION and JOLEEN FIGURACION, individually and the marital community comprised thereof and S.F., by and through her Parent/Guardian JOLEEN FIGURACION, a minor child,

Appellant.

v.

REMBRANDT REALTY TRUST; THE NEIDERS COMPANY, LLC., A Washington Corporation,

Respondents.

BRIEF OF RESPONDENTS

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A. INTRODUCTION

Plaintiffs/Appellants Renato Figuracion, Joleen Figuracion, and S.F.'s (the "Figuracions") claims are simply based upon the notion that because minor plaintiff S.F. was injured by the subject steam radiator, the steam radiator must be considered a dangerous condition upon which Rembrandt should be liable as the landlord. This type of rational is circular and cannot be used as the basis for any liability against Rembrandt. If the same rationale were to be employed regarding other common utilities found in an apartment, the result would be that a landlord would be held liable for any and all injuries that may occur in an apartment. This would impermissibly saddle any landlord with a greater responsibility of the parents. *Ochampaugh v. City of Seattle,* 91 Wn.2d 514, 522, 588 P.2d 1351 (1979) (to hold the possessor of land liable under such circumstances [drowning in a pond] would be to impose upon him an oppressive burden and shift the responsibility for the care of children from their parents to strangers.")

For instance, what if instead of being pressed against the radiator by C.F., S.F. was caused to insert an object into an uncovered outlet while Joleen Figuracion left her unattended? Would Defendant/Respondent

Rembrandt Realty Trust ("Rembrandt") then be liable for failing to install covers over plugs? The answer is simply, no.[1]

The Figuracions' claims are equally flawed under the Restatements they cite. As discussed further below, the Figuracions cannot establish that any of the Restatement (2nd) of Torts applicable to the present matter can be sustained as Rembrandt was not the "possessor of land" for any area inside the Figuracions' apartment. An uncovered steam radiator, on its own, cannot be considered a dangerous condition, and accordingly cannot satisfy the elements of any Restatement relied upon by the Figuracions. Additionally, settled Washington authority provides that the Figuracions' actions and inactions were a superseding and intervening cause of their alleged injures.

B. STATEMENT OF ISSUES

1. Whether the trial court properly dismissed the Figuracionss' claims against Rembrandt. (Appellants' Assignments of Error 1-9).

[1] As Plaintiffs' expert discusses the CDC regarding covers for steam radiators, it should be noted that the CDC has equally referenced the use of safety plugs on electrical outlets. (CP 73354): http://www.cdc.gov/family/parentabc/. Notably, like an outlet, the plaintiffs were in an as equal if not greater position to guard against any injuries relating to the radiator. Just as Plaintiffs allege that a cover should have been installed, Plaintiffs could have utilized a more effective guard other than boxes, like a common baby gate which are readily available.

2. Whether Rembrandt should be awarded attorneys' fees and costs pursuant to RAP 18.1.

C. STATEMENT OF THE CASE

(1) Factual History

Dan Figuracion (who we understand to be Renato Figuracions's father) and Joleen Faker (Joleen Figuracion's maiden name) signed a lease for a unit in the Rembrandt Apartments for the period from May 22, 2008, to April 30, 2009. (CP 260). During the period of the lease term Joleen Figuracion resided in the apartment along with her daughter, S.F. her son C.F., and her husband Renato. Under the lease agreement, the Figuracions agreed to the following:

> To the extent permitted by law, Owners assumes no liability to Resident or Residents guests or invitees except to the extent that such liability is direct result of Owner's gross negligence. Resident agrees to accept the premises in its present condition and to save and hold Owners harmless from any claims or any damages arising out of or resulting from owner's or residents' negligence or for any defects in the premises now or hereafter occurring. (CP 263).

On or about April 27, 2009, C.F. and S.F. (who were three years old and one year old, at the time, respectively) were playing unattended while Joleen was in another room and no one else was at the apartment. (CP 270-73). Joleen heard crying from S.F. in the other room, and told C.F. to play nicely with S.F. Joleen again heard S.F. crying and again did not check on her. *Id.* After waiting for approximately two minutes and listening to S.F.'s

cries, Joleen went to check on her. *Id.* At that time, Joleen discovered that S.F. was wedged between some boxes and the unit's radiator. (CP 273-77; CP 285). Joleen testified that the boxes were prohibiting S.F. from moving out of the area behind the radiator. *Id.*

In her testimony, Joleen related that the boxes surrounding the radiator were placed there by her and Renato. She admitted that this caused S.F. to become trapped for two minutes and kept her body in contact with the radiator causing her burns. (CP 276-77). Joleen further admitted that she is responsible for failing to respond to her child's screams. (CP 280). Joleen also testified that she was aware that the radiator got hot enough to cause her to wear only shorts and a t-shirt in the apartment. (CP 281-82). The fact that the boxes caused S.F. to become trapped against the radiator is supported by the Tacoma Fire Department's report. (CP 287-88).

In or around April 2012, the Figuracions filed their Complaint alleging multiple causes of action including: (1) Breach of the Residential Landlord Tenant Act; (2) Breach of Contract; and (3) Negligence. (CP 290-98).

(2) No Evidence of Code Violation

Rembrandt's expert, Cliff Chamberlain, has reviewed the radiator and the boiler room at the apartment. (CP 325 at ¶ 3). In a thorough review of all applicable codes, Mr. Chamberlain could not find the subject steam radiator to be in violation of any applicable code, statute, ordinance, or

regulation at the time of the subject injury. (CP 325 at ¶ 5; CP 791 at ¶ 9). The steam radiator, like all steam radiators operates through the function of steam transitioning from a gas to a liquid condensate phase. (CP 325 at ¶ 4). Again, like all steam radiators, the radiator can be hot to the touch when operating. *Id.* The radiator in question was also affixed with a tenant operable manual control valves, allowing the tenant to turn the radiator on and off. *Id.* Again, in Mr. Chamberlain's extensive review of all codes and regulations applicable to the steam radiator in question, he could find no indication of a code violation. (CP 325 at ¶ 5; CP 791 at ¶ 9).

Further, the Tacoma Housing Authority's Housing Quality Standards Checklist, which was generated for the same unit that was occupied by the Figuracions at the time of the accident, documents that there are no code or regulation violations posed by the units steam radiator. (CP 756-757). Additionally, the City of Tacoma Permitting Documents document that the apartment's boiler, which provides for the individual unit radiators, was inspected and certified. (CP 759-767). Quite clearly, if steam radiators were not permitted by code or regulation to be in residential dwellings, the City of Tacoma would not have certified the operation of Rembrandt's central boiler system, nor would the Tacoma Housing Authority have noted on the Housing Quality Standards Checklist that the unit's heating system "passed" inspection.

(3) No Evidence of a "Defect" or "Condition" Needing Repair

Absolutely no evidence has been offered suggesting that the subject steam radiator is in some way "defective" or in need of repair. However, Ms. Figuracion did testify that following the accident, her husband turned the radiator off. (CP 85).[2] Further, the maintenance request records generated in response to requests from the Figuracions were produced in this matter. (CP 773-787). The **only** maintenance request regarding the subject radiator noted was received on May 4, 2009. (CP 775).[3] Of course, the subject incident occurred on April 27, 2009, meaning that the only maintenance request for the subject radiator was generated after the accident. Accordingly, there is no evidence in the record supporting the position that the Figuracions complained about the radiator not turning off prior to the subject incident. Significantly, the maintenance repair record generated for the radiator states that the radiators turn off, and that the resident had turned the radiator off. (CP 775). This single repair record notes that the radiator can be turned on and

[2] This is a page of the condensed deposition transcript of Joleen Figuracion. The pertinent testimony begins on deposition page number 26 and runs through page 27. While it is suggested that the valve was previously "stuck," the fact is this: the steam radiator could be turned from "on" to "off," and it in fact was.

[3] There does appear to be reproductions of this same maintenance request in different places within this set of records.

off, it was in fact turned off, and that no "defects" were complained of, nor is it noted that the radiator is broken in some way and in need of repair.[4]

(4) Procedural History

This lawsuit was initiated upon the Figuracionss filing a Complaint for damages, filed on April 19, 2012. (CP 1-9). In their Complaint, the Figuracionss raised several claims against Rembrandt, including claims based on "violations of the landlord tenant laws," and claims based on negligence. *Id.* Renato and Joleen Figuracion brought claims on their own behalf, as well as on the behalf of S.F., their minor child. *Id.*

On June 26, 2012, Rembrandt filed an Answer denying liability and asserting a number of Affirmative Defenses, including, but not limited to, comparative fault, a defense based upon the alleged willful or wanton conduct of the Renato and Joleen Figuracion. That is, the Figuracions' damages may have been proximately caused, in whole or in part, by the actions and/or negligence of the Figuracions themselves, superseding and intervening superseding causes, as well as a defense stating that fault must be allocated to all at fault entities pursuant to RCW 4.22.070 (CP 10-19). *Id.*

[4] It is also curious that this repair request states that it was inquired as to whether it was possible to put something around the radiator—for the kids. (CP 775). It seems odd given that the Figuracions' contention has been that when they initially walked through the apartment they were told they could not put a cover over the unit, that they would then ask the same question. (Appellant's Brief at page 10; CP 82).

The Figuracions moved for partial summary judgment on October 25, 2013. (CP 24-48). The Figuracions moved to have several of Rembrandt's defenses dismissed, including the defense that the minor plaintiff may have been contributorily negligent and that, accordingly, there should be an allocation of said negligence. *Id.* Rembrandt did not dispute this portion of the Figuracions' motion for partial summary judgment, and on December 20, 2013, counsel for Rembrandt and the Honorable Susan Serko signed an Order granting the Figuracions' motion for partial summary judgment with respect to this claim. (CP 904-906).

Rembrandt filed a Cross-Motion for Summary Judgment, arguing that Rembrandt breached no duties with respect to the subject steam radiator, and alternatively, that any damages suffered by the Figuracions were caused by intervening superseding causes. (CP 349-396).

On December 20, 2013, the Trial Court, with the Honorable Susan Serko presiding, heard the parties' respective motions for summary judgment. (RP 12/20/13). On January 7, 2014, the Trial Court issued an order denying the Figuracions' Motion for Partial Summary Judgment and granting Rembrandt's Cross-Motion for Summary Judgment. (CP 926-27).

On January 10, 2014, the Figuracions filed their Notice of Appeal.

D. ARGUMENT

I. STANDARD OF REVIEW FOR RULINGS ON SUMMARY JUDGMENT

The standard of review for an Order Granting Summary Judgment is *de novo*; the Appellate Court performs the inquiry as the trial court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). A party may move for summary judgment, in whole or in part, on two bases. First, where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56. Second, it can point "out to the trial court that the nonmoving party lacks sufficient evidence to support its case." *Guile v. Ballard Community Hospital*, 70 Wn. App 18, 21, 851 P.2d 689 (1993).

The non-moving party may not rest upon mere allegations, but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990). "If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden at trial,' then the trial court should grant the motion." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182 (1989)(quoting *Celotex Corp. v. Catrett*, 477 US 317, 322 (1986)).

II. THE TRIAL COURT PROPERLY GRANTED REMBRANDT'S CROSS-MOTION FOR SUMMARY JUDGMENT, DISMISSING THE FIGURACIONS' CLAIMS AGAINST REMBRANDT

A. The Figuracions are requesting that the judicial system perform the function of the legislature and rule that as a matter of law steam radiators must be covered

In the absence of any duty created by statute, ordinance, or regulation to remove and/or cover a steam radiator, what the Figuracionss are requesting this Court to do is in contravention of the distinction between the Judiciary and the Legislature. Whether there exists a duty to cover a steam radiator in a residential dwelling is a question of law, regardless if you look to codes, regulations, the common law, or the implied warranty of habitability as codified within the RLTA. Here, the Figuracionss have failed to point to any code, regulation, statute, or case law which supports a duty for landlords to cover and/or remove steam radiators from residential dwellings (while there is, however, ample case law from other jurisdictions squarely rejecting this precise proposition). Now, despite the absence of any authority supporting such a duty, the Figuracionss are requesting that the Judicial System create such a duty, and then permit the Figuracionss to present the issue as to whether or not the judicially "enacted" duty was breached.

Courts acquire their rule-making authority from the Legislature and from its inherent power to prescribe rules of *procedure and practice*. Promulgation of state court rules creates procedural rights. Creation of *substantive rights* is in the province of the Legislature in the absence of any constitutional prohibitions. *State v. Templeton*, 148 Wn.2d 193, 212, 59 P.3d 632 (2002). Accordingly, it is not within the province of this Court to accept the Figuracions' proposition. In the event that it is determined that as a matter of public policy steam radiators must be either (1) removed from residential dwellings, or (2) that they are required to be covered, it is the function of a legislative body with the proper rule making authority to enact such regulations.

With respect to the distinction between the policy making function of the Legislature and the role of the Judiciary, Washington State's Supreme Court stated the following:

> Further, the Legislature is the fundamental source for the definition of this state's public policy and we must avoid stepping into the role of the Legislature by actively creating the public policy of Washington. [...] An argument for the adoption of a previously unrecognized public policy under Washington law is better addressed to the Legislature. The specter of judicial activism is unloosed and roams free when a court declares, 'This is what the Legislature meant to do or should have done.' Therefore, we should not create public policy but instead only recognize clearly existing public policy under Washington law.

Sedlacek v. Hillis, 145 Wash.2d 379, 390, 36 P.3d 1014 (2001) (internal citations omitted). *Sedlacek* involved a widow who brought a wrongful discharge claim against her and her deceased husband's former employer. Following her husband's diagnosis of Leukemia, Mr. and Ms. Sedlacek were both subsequently terminated. Because Ms. Sedlacek did not have Leukemia (i.e., she was a non-disabled person), she argued that, based on public policy and foreign authority, she should be entitled to bring a wrongful discharge claim based upon her association with and/or her relation to a disabled person (i.e., her husband). *Id.* at 381-382. Washington's Supreme Court held, based on the reasoning set forth above, that Ms. Sedlacek's claim was properly dismissed due to a lack of Washington legislation supporting her legal theory. *Id.* at 390. Interestingly, the plaintiff in *Sedlacek* actually had foreign authority that lent support for her claim, but the Court ultimately determined that because Washington's legislature had not provided a basis for her claim, it was not colorable. In the present matter, all of the foreign authority addressing the issue of steam radiators in residential dwellings (discussed at lengths below) confirms the appropriateness of their use and existence in residential dwellings.

The recognition by *Sedlacek* of the Legislature's role in defining Washington's public policy is significant. In the absence of legislatively

created policy requiring the removal and/or covering of steam radiators, it is not the role of the judicial system to decide what the legislature should do. If this principal were not adhered to, juries would be presented with a myriad of questions for their determination on the whim of courts trying to create policy, such as: is a landlord liable if her leased apartment has a code-compliant stove that burns a child?; is a landlord liable if her leased apartment has a code-compliant corner wall which a child falls into, sustaining injuries?; is a landlord liable if her leased apartment has a code-compliant fireplace that a child sticks his hand into, sustaining injuries?; is a landlord liable if her leased apartment has a code-compliant door that closes on a child's hand, causing injuries? Quite clearly, this is precisely why courts are charged with ruling on whether a duty exists as a matter of law; to prevent examples such as the ones provided above from being presented to a jury. *See Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Absent a duty to do or not do something, a plaintiff's claims are properly dismissed. The absence of a recognized duty does not present the court with the opportunity to decide if they would like to create such a duty.

If this Court entertains the Figuracions' claim despite an absence of a duty to remove and/or cover steam radiators created by any code, regulation, statute, or common law, there would be absolutely no limits on

what a tenant could hale a landlord in front of a jury for. Accordingly, tenants in Washington would no longer be able to rent a dwelling, as no property owner could shoulder this newly bestowed burden of limitless liability.

B. The Figuracions cannot, as a matter of law, establish liability under the common law

A tenant may premise an action against a landlord under any of three legal theories: the rental agreement, common law, and an implied warranty of habitability under the Residential Landlord–Tenant Act, RCW 59.18. *Howard v. Horn*, 61 Wn. App. 520, 522–23, 810 P.2d 1387 (1991). Common law negligence encompasses four basic elements which the plaintiff must prove: duty, breach, proximate cause, and injury. *Id.* at 523. Existence of a duty is a question of law. *Hertog, ex rel. S.A.H.*, 138 Wn.2d at 275. Breach and proximate cause are generally fact questions for the trier of fact. However, if reasonable minds could not differ, these factual questions may be determined as a matter of law. *Id.*

1. The subject steam radiator does not constitute a "latent defect"

A tenant's common law claim is limited. A tenant may recover from his or her landlord for injuries caused by a latent defect known to the landlord. *Howard,* 61 Wn. App. at 523. The landlord's duty there is only to warn of the latent defect; there is no common law duty to repair.

Dexheimer v. CDS, Inc., 104 Wn. App. 464, 475, 17 P.3d 641 (2001) (internal citation omitted).

The Figuracions allege that the steam radiator constituted a latent defect that Rembrandt should have warned against. However, landlords generally do not have a duty to warn against open and obvious danger (i.e. a hot radiator). *See Sjogren v. Properties of Pacific Northwest, LLC*, 118 Wash. App. 144, 75 P.3d 592 (2003). What is central to the latent defect theory is that there is no liability if the defect (or dangerous condition) is open and obvious to the tenant. *Peterson v. Betts*, 165 P.2d 95, 107, 24 Wash.2d 376 (1946). Put differently, the rule in Washington is that a landlord is not liable for injuries caused by patent defects. *Coleman v. Hoffman*, 115 Wn. App. 853, 865, 64 P.3d 65 (2003) (internal citation omitted).

First, there is no evidence to suggest that the existing radiator concealed a latent defect or condition. The mere presence of a steam radiator, on its own, does not create a "dangerous condition." As noted above, the radiator could be turned "on" and "off," and it was in fact turned off following the incident. (CP 85; 773-787). Furthermore, the Figuracions have never identified or stated what, if any, "defect" they allege that the subject radiator had. The only repair order generated regarding the subject steam radiator came after the incident, and does not

state that there were any problems or "defects" with the radiator. (CP 775). A radiator is akin to any other common household items such as a fireplace, stove or iron. While not directly addressed in Washington, multiple jurisdictions have ruled on claims similar to the Figuracions' and have repeatedly found no liability on the part of a landlord with respect to a child's burns on a steam radiator.

Prior to S.F.'s injury, the Figuracions were fully aware that the radiator was hot as reflected by the Renato and Joleen Figuracion's attempt to place boxes around the radiator to keep the kids from getting behind it. (CP 276-77). Accordingly, given that the radiator was open and obvious, there was simply no duty on behalf of Rembrandt to warn the Figuracions with respect to the radiator being hot—Rembrandt's own actions demonstrate their appreciation for how hot a steam radiator can be.

Lastly, the dangerous condition, if any, with respect to the radiator was created by the actions of Joleen and Renato Figuracion by building a trap around the radiator and/or by C.F. holding S.F. up against the radiator, not any condition of the radiator in and of itself. This issue will be discussed in more detail below.

2. Rembrandt was not the "possessor" of the Figuracions' apartment, nor was the subject steam radiator in a "common area"

"Possession and control, not title, is the threshold inquiry in common law premises liability". *Coleman v. Hoffman,* 115 Wn.App. 853. A possessor of land is (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)." *Ingersoll v. DeBartolo, Inc.,* 123 Wn.2d 649, 655, 869 P.2d 1014 (1994) (citing Restatement (2nd) of Torts § 328E (1965)); *See also City of Seattle v. McCready,* 124 Wn.2d 300, 306-307, 877 P.2d 686 (1994) ("Common authority rests 'on mutual use of the property by persons generally having joint access or control for most purposes.".); *See Jarr v. Seeco Constr. Co.*, 35 Wn.App. 324, 327-28, 666 P.2d 392 (1983) ("A possessor of land is 'a person who is in occupation of land with intent to control it.' " *citing Strong v. Seattle Stevedore Co.,* 1 Wn. App. 898, 901, 466 P.2d 545 (1970), quoting Restatement (2d) of Torts § 328E (1965)).

As stated above, at the time of the subject incident, the apartment was leased in its entirety to the Figuracions. Rembrandt did not retain

under the lease any control over the day-to-day operations of the interior of the apartment. In fact, Rembrandt could not access the property without first providing notice to Joleen and Renato Figuracion. (CP 262 at ¶ 10(J)). Furthermore, as the apartment was subject to a lease agreement between Rembrandt and Joleen and Renato Figuracion, Rembrandt was not entitled to immediate occupation of the apartment. Accordingly, Rembrandt was not in possession of the apartment at the time of the incident pursuant to section (a), (b) or (c) as stated above. Therefore, Rembrandt was not the "possessor" under Restatement (2nd) of Torts § 342, and therefore is not liable for the Figuracions' alleged injuries.

Significantly, the Figuracions' position with respect to this issue has been squarely rejected by this Court. In *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005), a plaintiff brought a personal injury action against the owners and the property manager of a neighboring rental home for injuries he suffered as a result of a garage door that fell on his head. One of the plaintiff's theories of liability was based upon the Restatement (2nd) of Torts § 343 (1965). This Court rejected the plaintiff's argument and stated that,

> By its terms, this section [Restatement (2nd) of Torts § 343] applies only to one who is a "possessor of land." As landlords, the Savages could enter only if the Jacksons gave permission. The same was true for their property manager, McMenamin's. The Jacksons [the tenants of the home at

> issue], not the Savages or McMenamin's, were the possessors of the home in issue here.

Id. at 331. Here, as was the case in *Pruitt,* Rembrandt and the Neiders Company are merely the owners and managers (respectively) of the Rembrandt apartment, they were not the possessors of the Figuracions' apartment.

The Restatement (2nd) of Torts, § 343, which imposes duties upon the "possessor of land," does not apply to the landlord except with respect to common areas.[5] *Id.* at 330-331. Liability on behalf of a landlord under Restatement (2nd) of Torts § 343 does not extend to non-common areas. By definition, a landlord is not the "possessor" of non-common areas. *Id.* at 331 (citing *Sjogren v. Properties of the Pacific Northwest, LLC.,* 118 Wn. App. 144 (plaintiff fell in common area possessed by landlord); Restatement (2nd) of Torts § 360 (1965) (under certain conditions, person who leases part of land and retains part of land may be liable for "dangerous condition upon that part of the land retained in the lessor's control").

For example, in an apartment building the entryway and hallways are typically viewed as common areas as the landlord has a duty to

[5] Restatement of Torts (2nd) §§ 342 and 343 seemingly appear interchangeably in cases analyzing this issue. Both sections concern liability of a possessor of land. The distinction is that § 342 addresses liability to gratuitous licensees, and § 343 addresses liability to business visitors. However, both sections address a possessor's liability.

maintain these areas, and has the ability to allow unfettered access. In contrast, a tenant's apartment itself is a non-common area as the landlord does not retain a duty to maintain the area inside the apartment, nor does a landlord have access to the apartment without consent of the tenant. *See Geise v. Lee,* 84 Wn.2d 866, 868, 529 P.2d 1054 (1975). ("The general rule in the United States is that where an owner divides his premises and rents certain parts to various tenants, while reserving other parts such as entrances and walkways for the common use of all tenants, it is his duty to exercise reasonable care and maintain these common areas in a safe condition.)[6]

Pursuant to the terms of the lease, Rembrandt did not reserve any portions of the apartment for common use. The apartment was leased in its entirety to the Figuracions. Accordingly, no common areas remain with respect to the interior of the apartment between Rembrandt and the Figuracions. Therefore, Rembrandt does not owe any duty outside of what is provided under the RLTA to the Figuracions, and there is no

[6] It is conceivable that a court could determine that a central heating system could constitute a "common area." However, this connection could only be made if, say, a toxin was circulated through a central heating system into individual units. In that scenario, it would be logical to consider the central heating system as a "common area." However, when it is the fixture itself that causes an injury (i.e., a contact burn) and that apparatus is within the leased apartment, the apparatus cannot convincingly be termed to be in a "common area," especially, as is the case here, the radiator can be turned off by the tenant, again, as it was here.

liability that can be attributed to Rembrandt pursuant to the Figuracions' negligence claims in this matter.

C. The Figuracions' do not have a viable claim under the RLTA, nor can they offer any evidence that the RLTA was violated

At this point, it seems necessary to address a distinction that has to this point been seemingly overlooked. The Figuracions cannot use the RLTA as a basis for their claim for personal injury damages. There are two reasons for this: (1) there are strict notice requirements under the RLTA that the tenant must comply with in order to establish a violation of the RLTA (which have not been met in this matter), and (2) monetary recovery is not provided for under the RLTA. *See Lian v. Stalick*, 106 Wn. App. 811, 819, 25 P.3d 467 (2001); *see also Dexheimer CDS, Inc.*, 104 Wn. App. at 469-71.

As articulated in *Dexheimer*, "a tenant may premise an action against a landlord under any of three legal theories: the Residential Landlord Tenant Act (RLTA), the rental agreement, or the common law. *But not all three theories allow for the recovery of monetary damages.*" *Id.* at 467 (emphasis added).

The RLTA provides remedies for a landlord's violation of the duties codified in RCW 59.18. "Those remedies, however, are limited to (1) the tenant's right to repair and deduct the cost from the rent, (2) a decrease in the rent based upon the diminished value of the premises, (3)

payment of rent into a trust account, or (4) termination of the tenancy." RCW 59.18.090. *See also Dexheimer*, 104 Wn. App. at 471. Monetary damages are not available for a breach of a landlord's duties under the RLTA. *Id.* (internal citations omitted).

However, the Figuracions have proceeded as though they have numerous claims based on essentially the same theory: one for a breach of the RLTA, one for a breach of the implied warranty of habitability as codified in the RLTA, and a claim based upon Restatement (2nd) of Property § 17.6 (1977). Here, there exists no evidence that the RLTA has been violated; accordingly, the Figuracions' claims based on the implied warranty of habitability and the Restatement (2nd) of Property § 17.6 fail as a matter of law.[7] Because a tenant's claims based on the implied warranty of habitability or the Restatement (2nd) of Property § 17.6 (1977) are premised on a violation of the landlord's duties under the RLTA, it is logical to begin with and dispose of the Figuracions' claim for a breach of the RLTA, even though the RLTA does not provide a basis for the Figuracions' claim for personal injury damages.

[7] Although Rembrandt addresses the Figuracions' claims based on a breach of the implied warranty of habitability and their claim based on the Restatement (2nd) of Property § 17.6 (1977) separately, it is unclear how this Court's adoption of the Restatement (2nd) of Property § 17.6 (1977) changes and /or modifies what tenants could already pursue under a claim for a breach of the implied warranty of habitability.

Relevant to this case, the Residential Landlord Tenant Act RCW 59.18.060 ("RLTA") requires that:

> 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**. RCW 59.18.060. (emphasis added)

However, RCW 59.18.060 does not create a generally actionable duty on the part of the landlord to "keep the premises fit for human habitation." *Lian*, 106 Wn. App. at 816 (internal citation omitted).

Rembrandt repeatedly requested the Figuracions to identify a specific code provision that has been violated with respect to the steam radiators in support of their claim. (CP 300-323).[8] The Figuracions have provided no such evidence but have instead relied upon the notion that the radiator was simply "too hot" and therefore created a dangerous condition. This is a clear misinterpretation of the law and the basic heating function of a steam radiator.

The Figuracions claim that the subject radiator violated the RLTA cannot stand when the radiator is not in violation of any applicable codes, regulations or statutes. As referenced above, and as discussed extensively below, the subject radiator simply is **not** in violation of any codes, regulations,

[8] Specifically, CP 319-321.

or statutes—past or present. Accordingly, the Figuracions' RLTA claim is without merit.

Lastly, because the Figuracions cannot establish a violation of the RLTA, their claims based upon the implied warranty of habitability and Restatement of (2nd) of Property §17.6 fail as a matter of law. The implied warranty of habitability and Restatement of (2nd) of Property §17.6 do not provide tenants with broader legal theories than does the RLTA. The distinction is merely that a tenant can recover damages for personal injuries through claims based on the implied warranty of habitability and Restatement of (2nd) of Property §17.6. Put differently, if a tenant could not establish that a landlord breached his duties under RCW 59.18.060(1), that same tenant could not establish a violation of the implied warranty of habitability or Restatement of (2nd) of Property §17.6.

1. The subject steam radiator does not violate any codes, regulations, or statutes, past or current.

The Figuracions failed to identify a single code, regulation, or statue which the subject steam radiator is in violation of. However, Rembrandt's expert, Cliff Chamberlain, has investigated the boiler system as well as the radiator in the Figuracions' former unit and testified without reservation in his declarations that the subject uncovered steam radiator is **not** in violation of any applicable building codes, past or present. (CP 325

at ¶¶ 3,5; 791 at ¶ 9). Mr. Chamberlain also identified the two American Society of Heating, Refrigerating and Air Conditioning Engineers ("ASHRAE") chapters that are the industry standards regarding steam heating systems. (CP 793 at ¶13; 796). Mr. Chamberlain testifies that the two chapters, "clearly provides [sic] that there is not requirement that a steam radiator be covered. This is a current standard in place today." *Id.* Further, Mr. Chamberlain testifies that, "put simply, if Plaintiffs [sic] apartment were built today, an uncovered steam radiator would be allowed under all relevant codes, regulations and industry standards." (CP 971 at ¶ 9).

Further, as discussed below, Mr. Chamberlain methodically outlined Ms. Giesa's (the Figuracions' expert) misguided reliance upon excerpts of inapplicable standards in the Figuracions' attempt to demonstrate a code violation.

2. The Tacoma Building Code section and ASTM standards relied upon by the Figuracionss' expert are neither applicable or informative

The only building code that the Figuracions point to as being violated is Tacoma Building Code Sec. 2.01.03. This section of the Tacoma Building code states that existing buildings may have their existing use or occupancy continued, if such use or occupancy was legal at

the time of adoption of this chapter, and that their continued use is not dangerous to the health, safety or welfare of the occupants. There is nothing contained within this section that addresses steam radiators or even heating apparatuses in general. This section simply addresses when something can or cannot be grandfathered in. Accordingly, the steam radiator cannot "violate" this section of the Tacoma Building Code.

If the steam radiator at issue was in violation of a current code, but the argument advanced by Rembrandt was that the radiator complied with the applicable codes when built, then this section would be relevant, but this section cannot serve as a predicate code violation. And as discussed extensively, not only does the subject radiator comply with past building codes, but it also complies with all applicable, current codes as well, making this code section relied upon by the Figuracions' expert all the more irrelevant.

The Figuracions allege that there is sufficient evidence to establish a question of fact by the mere allegation that S.F. was burned on the radiator. Not only is this an incorrect interpretation of the Tacoma Building Code, but if the Figuracions' rationale were employed on all building components, almost everything in a building would be considered

in violation of building codes because any building component has the potential to cause injury, including serious injury.

What the Figuracions ignore is that the purpose of Chapter 2.01 of the Tacoma Building code is to ensure that all buildings comply with minimum standards including heating and life safety. *See* Tacoma Building Code 2.01.020(B). In a review of the Tacoma Building Code Chapter 2.01, at no point does it provide that a radiator must be covered in any fashion. In fact, the Figuracions have not provided a reference to even a current statute which would require the installation of a cover over a steam radiator. To say that Tacoma Building Code 2.01.030 creates a requirement to install a cover, would contradict the requirements for current buildings, and place a higher standard on existing buildings than they would to new construction.

Furthermore, the ASTM standards that the Figuracions' expert, Ashley Giesa, submits were violated by the subject radiator are entirely inapplicable to the instant matter. (CP 402; 418-433). First, and perhaps most significantly, both of the ASTM standards relied upon by Ms. Giesa contain the following disclaimer:

> This guide addresses the skin contact temperature determination for **passive heated** surfaces only. The guidelines contained herein are not applicable to chemical, electrical, or other similar hazards that provide **a heat**

> **generation source at the location of contact.** (CP 418 ¶ 1.6; 427 ¶ 1.3) (emphasis added).

This qualifying language seems rather intuitive and logical. It would not make sense to apply this standard to, for instance, a burner on a stove top, or to the glass face of a fireplace. It would be impractical and illogical to require that a stove top burner turned up to high must not be capable of burning skin when pressed against it for sixty seconds. When standards are taken out of context and applied to unintended scenarios, these are the results that flow.

A quick Google search confirms that these ASTM standards are not intended to be applied to steam radiators. Direct heating is defined as: "The heating of a space by means of exposed heated surfaces or a heat source such as a stove, a **radiator**, or fire."[9] Again, both of the ASTM standards relied upon by Ms. Giesa contain disclaimers that expressly state that these standards are intended for evaluation of "passive heated surfaces only."

Lastly, As Mr. Chamberlain testified in his declaration, these ASTM standards were not in existence at the time when the subject radiator was installed in the building, and importantly, these standards are voluntary standards for manufactures and engineers unless it is stated

[9] This definition was obtained from DictionaryofConstruction.com. The web address is http://www.dictionaryofconstruction.com/definition/direct-heating.html.

within a code that something must comply with an identified ASTM standard. (CP 790 at ¶ ¶ 6, 8).

D. Because there is no violation of the RLTA, nor any violations of applicable code or regulations, the Figuracions cannot establish a breach of the implied warranty of habitability

Although this area of the law has been less than a model of clarity, courts have held that a plaintiff may collect personal injury damages for violations of the implied warranty of habitability as codified within the RLTA. *See Lian*, 106 Wn. App. at 819-20 (holding that the RLTA does not bar a tenant from "pursuit of remedies otherwise provided him by law" for the landlord's failure to carry out the duties required under RCW 59.18.060. RCW 59.18.070. Some legal commentators have interpreted "remedies otherwise provided by law" to include a tort action for personal injuries caused by the landlord's breach of the RLTA). But of course, in order for there to be a violation of the RLTA section which codifies the implied warranty of habitability, there must be a failure 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." RCW 59.18.060.

Furthermore, the violation of a code, statute, ordinance or regulation alone is not sufficient to trigger a violation of the implied warranty of habitability, the violation must be dangerous. *See* RCW 59.18.060 ([...] "if such condition endangers or impairs the health or safety of the tenant."). While there has been somewhat of a split with regards to a violation that is sufficiently dangerous to fall within the purview of the implied warranty of habitability, it is clear that such a violation cannot merely be defects in workmanship, trivial, of an aesthetic nature, or those involving procedural breaches. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 522, 799 P.2d 250 (1990)(internal citation omitted). Though, it is no longer the case that a building code violation need to rise to the level of "profoundly compromising" the integrity of a dwelling or make if physically uninhabitable. *Id.* at 519-520 (citing *Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wash.2d 406, 417, 745 P.2d 1284 (1987)). However, in order for code violations to implicate the implied warranty of habitability they must at least raise a "serious questions of safety." *Id.* at 520.

With this framework, it is clear that the Figuracions cannot maintain a claim for breach of the implied warranty of habitability. As discussed above, there has not been a single code or regulation violation

identified by the Figuracions. While, to the contrary, Rembrandt's expert, Mr. Chamberlain confirmed that not only did the subject steam radiator comply with all applicable codes and regulations when the Rembrandt Apartments were built, but they could install the same radiator today and it would be compliant. (CP 325 at ¶¶ 3,5; 791 at ¶ 9). Accordingly, in the absence of any identified code or regulation violations, the trial court properly dismissed the Figuracions' claims against Rembrandt.

E. Because there is no violation of the RLTA, nor any violations of applicable code or regulations, the Figuracions cannot establish liability under the Restatement (2nd) of Property §17.6

As stated above, there cannot be a violation of the implied warranty of habitability or the Restatement of (2nd) of Property §17.6 where a tenant could not establish that a landlord violated his duties as established under the RLTA. Regardless, the Restatement (2nd) of Property § 17.6 (1977) states:

> A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant 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.**

(emphasis added). This rule applies even when the dangerous condition occurs in an area of the premises under the control of the tenant so long as the defect constitutes a violation of either the **implied warranty of habitability** or **a duty imposed by statute or regulation**. *Lian*, 106 Wn. App. at 821-22.

First, past the Figuracions' bare accusations, there is absolutely no evidence suggesting that the existence of the steam radiator constitutes a "dangerous condition" in need of "repair." Mr. Chamberlain testified that the subject steam radiator has a manual control valve that allows the occupant to turn the radiator on and off, plus it provides very limited steam flow modulation for space temperature control. (CP 325 at ¶ 4). Again, as stated above, Mr. Chamberlain confirmed that the subject steam radiator was still code compliant. Mr. Chamberlain confirmed that not only did the subject steam radiator comply with all applicable codes and regulations when the Rembrandt Apartments were built, but they could install the same radiator today and it would be compliant. (CP 325 at ¶¶ 3,5; 791 at ¶ 9). Mr. Chamberlain further testifies that the valve which is used to turn the radiator "on and off" is not "painted shut," as was suggested by the Figuracions' expert. (CP 794 at ¶ 16).

As established above, because the existence of the steam radiator did not violate any "duties created by statute or administrative regulation," the Figuracions' claims are without merit.

Washington cases analyzing whether the Restatement (2nd) of Property § 17.6 (1977) has been violated, all involve clear violations of applicable building codes and/or regulations. In *Stalick*, the plaintiff brought suit against her landlord after she sustained injuries on stairs to her apartment that were "decrepit, rotten, and inherently dangerous." *Stalick*, 106 Wn. App. at 814. As the court noted in *Stalick*, "the uncontroverted facts show that the steps failed to comply with the UBC [Uniform Building Code]). *Id.* at 818.

In *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013), a tenant's husband brought an action against landlord for negligence. The home that the tenants were renting had a second story window that could not be opened, which tenants requested to be fixed by the landlord, a request that went unanswered. *Id.* at 157. During a house fire, the tenant was trapped in the bedroom with the inoperable window, and it was claimed that the tenant's inability to open the window contributed to her death, for which the land lord was liable. *Id.* at 157-158. However, the inoperable window was in clear violation of Tacoma Municipal Code § 2.01.070, which provides in relevant part, that windows and glazing shall

be in good condition, and that operable windows shall be able to operate in the manner in which they were designed. *Id.* at 171 (citing Tacoma Municipal Code § 2.01.070). The key distinction between *Martini* and the facts here is that the window in *Martini* was defective, i.e., inoperable. The radiator at issue here was not defective or inoperable.

In the present matter, the Figuracions have not established a single code violation. This failure is dispositive to the Figuracions' claims based on the RLTA, the implied warranty of habitability, as well as under the Restatement (2nd) of Property § 17.6 (1977). While it is unclear how this Court's adoption of the Restatement (2nd) of Property § 17.6 (1977) modifies or changes tenant's ability to seek personal injury damages under the implied warranty of habitability, the Restatement (as interpreted by the cases above), certainly does not expand the scope of a landlord's liability. To the contrary, the express language of the Restatement (2nd) of Property § 17.6 (1977) states that in order to establish a violation of this restatement, the dangerous condition must violate either: an **implied warranty** of habitability, or a duty created by **statute or administrative regulation**. Accordingly, if a tenant cannot establish a violation of the implied warranty or the violation of a code or regulation, that tenant cannot establish liability under her the Restatement (2nd) of Property §

17.6 (1977). Therefore, the trial court properly dismissed the Figuracions' claim based on her the Restatement (2nd) of Property § 17.6 (1977).

F. Other jurisdictions analyzing the same issue have never found a landlord liable merely because a steam radiator in a private residential dwelling is uncovered

As stated above, there is no evidence that the steam radiator in question has breached any applicable statute, code or regulation. The basis of Figuracions' claim is the existence of the steam radiator itself. However, as found in numerous jurisdictions, the mere presence of a steam radiator is not a basis for liability. While reviewing the case law regarding radiators in Washington as well as other jurisdictions, Rembrandt has not found a single case where a landlord has been found liable for a non-defective uncovered radiator. Simply stated, steam radiators are a common utility and are not a dangerous condition. *Dargie v. East End Bolders Club*, 346 Ill.App. 480, 105 N.E.2d 537 (1952) (CP 368). Case law involving steam radiators have repeatedly found that the steam radiators are common fixtures and the simple fact that they will get hot in order to perform their function does not make them unsafe.

> The steam radiator has so long been a common fixture in our society that every adult person is chargeable with knowledge that it must be hot in order to serve its purpose and is to that extent 'dangerous'. Whatever risk is attendant upon keeping a radiator hot is not an 'unreasonable risk' but is a necessary concomitant to the heating function which it serves and is justified by its utility

Della Porta v. Roma, 370 Pa. 593, 88 A.2d 911 (1952) (CP 375); *see also Hubbard v. Chicago Housing Authority*, 138 Ill.App.3d 1013, 93 Ill.Dec. 576 (1985) (CP 381). (regarding an ordinance to provide "safe heating" the court held "[t]o interpret the ordinance to find a violation, as the Figuracions suggest, would prevent the use of any heating unit which would be capable of causing burns through prolonged contact. Such a construction of this ordinance would impose too heavy a burden on the defendant here, as well as on all landlords."); *see also Loving v. Chicago Housing Authority*, 203 Ill.App.3d 205, 148 Ill. Dec. 532 (1990) (CP 386) ("liability based on negligence did not exist for the failure to cover a steam radiator which was being used for its intended purpose and which was not defective."); *Utkan v. Szuwala*, 60 A.D.3d 755, 875 N.Y.S.2d 510 (2009)(landlord has no duty arising under common law, statute, regulation, or terms of the lease to protect tenant's children from uncovered radiators in the apartment) (CP 390).

In addition, case law regarding a landlord's liability to children in an apartment with respect to steam radiators has similarly found no liability on the part of the landlord. In *Rivera v. Nelson Realty, LLC*, 7 N.Y.3d 530, 825 N.Y.S.2d 422 (2006) (CP 393) the plaintiff claimed an uncovered radiator in good working order, though not a hazard in a home occupied only by adults, is dangerous to children. The court ruled that no duty to remedy this alleged hazard is imposed by the NY landlord tenant act or arises under common law by virtue of the lease. Accordingly, **any duty to protect children from uncovered radiators remains that of the tenant**, unless some other statute or regulation imposes it on the landlord.

Therefore, pursuant to the forgoing, there is simply no legal basis for the Figuracions' claim that a common, non-defective, steam radiator created an unreasonably dangerous condition on the property. The lack of evidence of code violations with respect to the radiator, and the fact that a steam radiator on its own is not a dangerous condition, forms a bar to all of the Figuracions' claims against Rembrandt as discussed in further detail below.

III. THE ACTS OF THE PARENTS AND/OR THE FIGURACIONS CHILDREN, IRRESPECTIVE OF THE CHILDRENS' NEGLIGENCE, CONSTITUTES INTERVENING SUPERSEDING CAUSES

Notwithstanding the arguments above, the steam radiator itself is not the proximate cause of S.F.'s injuries. Rather, the Figuracions parents' actions of placing boxes around the radiator created a trap, which was the ultimate cause of S.F.'s injuries as she was unable to get away once she entered the enclosed space containing the radiator.[10] Joleen and Renato Figuracion's actions created a superseding cause, thereby breaking any chain of causation that could be traceable to Rembrandt.

Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes. *Anderson v. Dreis &*

[10] Similarly, C.F. preventing S.F. from being able to exit from behind the radiator would also serve as an intervening, superseding cause, irrespective of any negligence on the part of S.F.

Krump Mfg. Corp., 48 Wn. App. 432, 442, 739 P.2d 1177, review denied, 109 Wash.2d 1006 (1987).

Here, it is not reasonably foreseeable that the parent would create a trap for their children behind a radiator, nor is it foreseeable that an older sibling would prevent their younger sibling from being able to exit from behind a radiator. It is also not reasonably foreseeable, or expected, that a mother would wait for 2 minutes before checking in on their screaming baby. As Rembrandt's expert, Dr. Haeck, testified in his declaration, any child coming in contact with a hot surface will pull away immediately. (CP 340-41 at ¶ 3). Due to the boxes surrounding the radiator, S.F. became trapped and was unable to escape from behind the radiator. Accordingly, it is the boxes around the radiator and/or C.F. that prohibited S.F.'s escape, resulting in her burns.

The Figuracions allege that the fact that the apartment was occupied by two toddlers is sufficient to establish that the alleged injury suffered by S.F. was foreseeable, and therefore cannot be an intervening or superseding cause. This is incorrect and is not supported under Washington case law.

Washington's Supreme Court squarely addressed the issue of foreseeability in the same context that the Figuracions have argued it. In *Cook v. Seidenverg*, 36 Wn.2d 256, 217 P.2d 799 (1950), a tenant's child

suffered severe burns from an electric space heater that her mother was using due to their landlord not providing sufficient heat, and the tenants subsequently brought suit against the landlord. The court stated that when the landlord failed to provide sufficient heat, it was foreseeable that the tenant would utilize a portable electric heater. However, while the act of using an electric heater may well be regarded as part of a natural and continuous sequence resulting from the failure to provide heat, the court ruled there must have been some additional and further act or force in operation which lead to the child's injuries. In *Cook* the court was unclear on the precise nature of the accident, but the court did know that that it must have been due the following:

1. Negligence of the mother in placing the heater in a position of danger;
2. The mother knowingly using a defective heater;
3. The mother failing to supervise the child's use of the heater;
4. The act of the child, independent of any negligence, in coming to close in proximity of the heater;
5. Or a latent defect in the heater which caused the child's cloths to ignite;
6. Or some other intervening circumstance like nature.

Cook, 36 Wn.2d at 264. The Washington Supreme Court in *Cook* held that "***any of these circumstances must, under the fact of this case, be***

held to constitute a supervening cause of harm within the meaning of that term." *Id.* (*emphasis added*).

Important here is that in *Cook* the landlord was aware of the presence of children in the apartment and that the tenant was utilizing the electric heater. Despite that knowledge, the act of the child coming too close to the heater, or the mother failing to supervise her child, among other things, constituted a superseding and intervening cause, thereby breaking the chain of causation.

While the Figuracions have alleged that the mere fact that the Figuracions were living in a home with toddlers is sufficient to show that the alleged harm was reasonably foreseeable as parents cannot visually supervise their children all day, as evidenced by the decision in *Cook*, failure to supervise is ***precisely*** an act which constitutes a supervening cause of harm, irrespective of whether the lack of supervision is labeled as "negligent." Moreover, while it appears that Joleen Figuracion has changed her story with respect to how the incident occurred, the statement that the act of C.F. pressing S.F. against the heater for a sufficient time to cause her burns is also a supervening cause as contemplated under *Cook*.

In addition, as evident by the Supreme Court's holding in *Cook*, whether an action is a superseding or intervening cause operates independently of parental immunity or the age of the acting party. Accordingly, it is clear that in either case, whether it is stacked boxes, a failure to supervise by Joleen Figuracion, or the actions of C.F. or S.F., there are several facts which create superseding or intervening causes in

this matter. Therefore, the trial court's denial of the Figuracions' Motion for Partial Summary Judgment regarding parental immunity should be affirmed.

IV. IF THIS CASE PROCEEDED TO TRIAL, THE JURY SHOULD HAVE BEEN INSTRUCTED TO ALLOCATE FAULT TO ALL ENTITIES, EVEN IMMUNE ENTITIES, CONSISTENT WITH RCW. 4.22.070(1)

Regardless of the parental immunity doctrine, RCW 4.22.070 requires allocation of fault. As stated in *Tegman v. Medical Investigations*, Inc. 150 Wn.2d. 102, 75 P.3d 497 (2003), RCW 4.22.070 was the "centerpiece" of the tort reform act of 1986, and courts have consistently held that several, or proportionate liability is now the general rule. In *Anderson v. City of Seattle*, 123 Wn.2d 847, 873 P.2d 489 (1994), the court ruled that despite immunity by one party who was released from the claim, (i.e. a party whom no judgment could ever be entered against at trial) the remaining defendant is only responsible for its proportionate share of fault.

Similarly, in *Romero v. West Valley School Dist.* 123 Wn.App. 385, 98 P.3d 96 (2004) (overruled on other grounds *Barton v. State, Dept. of Transp.*, 178 Wn.2d 193, 398 P.3d 587 (2013)), the court has previously allowed the jury to allocate fault to the parents for their negligence under RCW 4.22.070. *Romero* is the only case that discusses both RCW 4.22.020 and RCW 4.22.070 and the allocation of negligent parents under RCW 4.22.070.

In addition, as noted in *Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994), despite rejecting apportion of fault to the minor child, the Washington Supreme Court allowed the apportionment of fault to the father of the minor child. As noted by Justice Durham in her concurrence, "[u]nder the tort reform act, the trial court must hold [the defendant] liable according to the degree of its fault, no more, no less."

Accordingly, even if we are to assume *arguendo* that Joleen and Renato are immune under the parental immunity doctrine, this immunity does not relate to the allocation of fault under RCW 4.22.070. As discussed in the case law cited above, the parental immunity doctrine does not impact the allocation of fault under RCW 4.22.070. This is in line with the purpose of the tort reform act, RCW 4.22.070, where a party is only liable for the degree of its fault. Even if Joleen and Renato are immune, they still are allocated fault. Significantly, RCW 4.22.070(1) explicitly states that, "entities whose fault shall be determined include [...] entities immune from liability to the claimant." Irrespective of immunity, Rembrandt does not assume any of Joleen and Renato's liability. As discussed further below, Joleen and Renato did owe a duty, and that duty was breached.

Further, the contract entered into between the Figuracions and Rembrandt expressly requires the determination of the Figuracions' negligence with respect to this claim for damages. The contract entered into between the Figuracions and Rembrandt provided, in pertinent part, the following: "Resident agrees to accept the premises in its present condition

and to save and hold Owners harmless from any claims or any damages arising out of or resulting from owner's or residents' negligence or for any defects in the premises now or hereafter occurring." (CP 263). Under the present circumstances, this provision simply requires an allocation of fault to the Figuracions parents for their negligence. The Figuracions have previously submitted that this contract provision violates RCW 59.18.230(2)(d). (CP 494). Quite clearly, however, RCW 59.18.230(2)(d) relates only to a landlord limiting his liability through contracting with a tenant in which a landlord's duties under RCW 59.18 et esq. are waived. This provision has no bearing on a tenant saving and holding harmless a landlord to do claims that arise out of the tenant's negligence.

Lastly, t he Figuracions have confused the import of parental immunity. Parental immunity applies to claims brought against parents for damages, perhaps through a claim of contribution, which is not presently at issue. Parental immunity does not operate to bar the application of 4.22.070(1). Put differently, an allocation of fault is separate and distinct from a claim for damages brought by a party against parents. Here, Rembrandt is requesting that, consistent with 4.22.070(1), fault be allocated to the Renato and Joleen Figuracion. Rembrandt is not pursuing a claim for damages against the Renato and Joleen Figuracion.

V. WHETHER OR NOT THE MS. FIGURACIONSS' ACTS OR OMMISIONS ROSE TO THE LEVEL OR WILLFUL OR WANTON IS A QUESTION OF FACT FOR THE JURY

Parental immunity does not apply where there is sufficient evidence to establish that a parents actions relating to the injury of a child rose to the level of willful or wanton misconduct. Willful or wanton misconduct by a parent is not something that can be done with mathematical precision but rather the gravity of the parent's misconduct. *Jenkins v. Snohomish County*, 105 Wn.2d 99, 106, 713 P.3d 79 (1986). Willful or wanton misconduct is found if the actor knows, or has reason to know, of circumstances that would inform a reasonable person of the highly dangerous nature of that conduct. *Livingston v. City of Everett*, 50 Wn.App. 655, 659, 751 P.2d 1199 (1988) (Court held that sufficient evidence raised a question of fact as to whether a parent's action of leaving a four year old unattended for less than one minute in a room with two large dogs rose to the level of willful or wanton misconduct). Furthermore, where there is evidence of knowledge of a danger and that danger was willfully entered, it is sufficient to establish willful misconduct. *Adkisson v. City of Seattle*, 42 Wn.2d 676, 682, 258 P.2d 461 (1953).

Notably, the current matter is strikingly similar to another case arising in New Jersey, *New Jersey Div. of Youth Services v. A.R.*, 419 N.J. Super. 538, 17 A.3d 850 (2011) (CP 252), where an action was brought seeking a determination of abuse or neglect of a minor child, where a

father had placed his 10 month old child on a twin bed without railings next to an operating radiator. The child was later found against the hot radiator with third degree burns covering the majority of his skull. *Id.* The trial court found that the father's negligence was "common negligence;" however, on appeal the court found that the defendant intentionally placed the child in a bed without rails. *Id.* at 545,546. The New Jersey court also found that the father took steps by positioning blankets to act as a buffer, preventing the child from falling off the bed. By placing a buffer, the Court found that the father recognized the inherent danger by leaving his child sleeping on a bed without rails near a radiator, and concluded that an ordinary reasonable person would understand the dangers of the situation; i.e. willful or wanton misconduct. *Id.*

Joleen Figuracion has already testified that she was aware that the radiator was hot. (CP 281-82). In addition, Joleen and Renato Figuracon took steps to isolate the radiator by constructing a barrier of boxes, causing or at least largely contributing to S.F.'s injuries.[11] (CP 276-7). Joleen has also testified that the boxes caused S.F. to become wedged against the radiator, and that she failed to timely respond to her child's screams for help. (CP 270-73). The shear gravity of Joleen and Renato Figuracion's actions creating a situation which caused their child to

[11] As stated by Dr. Haeck, it is a basic reaction that children will immediately pull away from a hot surface. (CP 340-41 at ¶ 3) As evidenced by Joleen's testimony, the boxes that she and Renato stacked beside the radiator caused S.F. to become wedged against the radiator and therefore unable to pull away. Had S.F. been allowed to pull away from the radiator, she could have avoided injury.

become pressed against a hot radiator alone is sufficient evidence to give rise to a question of fact as to whether their actions rose to the level of willful or wanton misconduct. This is not a "garden variety" negligent supervision case as described by Figuracions. Joleen and Renato Figuracion created a dangerous condition in their apartment independent from any actions of Rembrandt and then ignored S.F.'s screams for help. This in not simply losing track of your child as is the situation under the case law cited by the Figuracions in support of their motion. These are independent torts committed by Joleen and Renato Figuracion that caused injury to their child, S.F.

The stacked boxes notwithstanding, if the steam radiator is as dangerous as Figuracions are alleging, it is necessarily the case that Joleen Figuracion's actions of leaving her children unattended in the living room was an unreasonably dangerous act. Simply stated, the Figuracions cannot have it both ways. The Figuracions cannot allege that the radiator was a dangerous condition and at the same time argue that by leaving their children unattended in the same room with the radiator surrounded by stacked boxes, that there conduct was not willful or wanton. At a minimum, based on the nature of Figuracions' allegations alone, there is a question of fact as to whether Joleen and Renato Figuracion's actions arose to the level of willful or wanton misconduct. Therefore, the Figuracions' motion for partial summary judgment with respect to this defense was properly denied.

E. REQUEST FOR ATTORNEY FEES AND EXPENSES

Rembrandt requests attorney fees and expenses incurred in defending against the Figuracions' Appeal. RAP 18.1. The basis for fees and expenses on appeal are similar to fees allowable at trial, e.g., by statute, equity, or agreement. *Landberg v. Carlson*, 108 Wash.App 749, 758, 33 P.3d 406 (2001). Moreover, this Court, upon motion of a party or on its own initiative, may order a party who files a frivolous appeal or fails to comply with the appellate rules to pay terms or compensatory damages to another party. RAP 18.9. Given the absence of any statutes, regulations, codes, or common law duty requiring the removal or covering of steam radiators in residential dwellings, the Figuracions' Appeal is frivolous. For those reasons, Rembrandt requests attorney fees and expenses incurred in defending against the Figuracions' Appeal.

F. CONCLUSION

For the reasons set forth above, the trial court properly granted Rembrandt's cross-motion for summary judgment, dismissing the Figuracions' claims against Rembrandt. Accordingly, this Court should affirm the trial court's rulings. Further, Rembrandt should be awarded attorney's fees and costs incurred in defending this frivolous appeal, pursuant to RAP 18.1 and 18.9.

RESPECTFULLY SUBMITTED this 13th day of August, 2014

SCHEER & ZEHNDER LLP

By_____
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Attorneys for Rembrandt Realty Trust,
and The Neiders Company, LLC.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

RECIPIENT	DELIVERY INSTRUCTIONS
Counsel for Plaintiffs Paul Lindenmuth Ben F. Barcus & Associates 4303 Ruston Way Tacoma, WA 98402-5313	(X) Via U.S. Mail ( ) Via Legal Messenger (X) Via E-MAIL ( ) Via Overnight Mail

DATED this 13th day of August, 2014, at Seattle, Washington.

Magdalen Diaz, Legal Secretary