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Supreme Court No.:

Court of Appeals State of Washington Division II - No.: ~~45579-2-II~~ 45779-2-II

Pierce County Superior Court No: 12-2-08215-0

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,

Petitioner,

vs.

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

Respondents.

PETITION FOR REVIEW

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ORIGINAL

I. IDENTITY OF PETITIONERS

The petitioners, Renato and Joleen Figuracion individually and on behalf of S.F., their minor child, seeks review of the Court of Appeals decision which affirms the summary judgment dismissal of their claim against their former landlord for injuries suffered by S.F. as a result of coming into contact with a steam radiator located within the apartment rented to them by respondents.

II. COURT OF APPEALS DECISION

The Court of Appeals decision was filed on June 16, 2015. The opinion, signed by Judge Worswick is attached as Appendix A.

III. ISSUES PRESENT FOR REVIEW

Legal commentators have recognized that the standards of liability applicable to landlords for injuries suffered by their tenants are inconsistent, developing and far from clear. See generally, *17 WAPRAC – Real Estate* § 6.35 (2d ed. 2015).[1] Should this petition for review be accepted, it will afford the Supreme Court an opportunity to provide clarity in an area where there is "substantial public interest" and

[1] Authored by William B. Stoebuck and John W. Weaver, who noted that due to inconsistent Appellate Court decisions there is "much confusion about landlord's liability to tenants for personal injuries ...".

incoherency and inconsistency within the laws. See RAP 13.4(b)(2) and (4).

Unfortunately given the lack of clarity in this area of the law both the Trial Court and the Court of Appeals in dismissing petitioners' case, on summary judgment standards, rested their decisions on the factual fiction that a steam radiator, which is capable of inflicting severe burns on relatively minimal contact, is not dangerous to the tenant, and in particular small children. Unfortunately due to the absence of the kind of definitive guidance which can only be provided by this Court, the Court of Appeals rather absurdly concluded that a landlord cannot be liable for the burns suffered by a small child on a steam radiator even though it was an essential component of a "central heating **system**" over which the tenant, other than turning it on and off, had no ability to control with respect to temperature.[2] It is further troubling to note that the Court of Appeals opinion appears to superficially permit a landlord to mislead a tenant on child safety issues without a scintilla of consequences.

The undisputed facts below establish that at the inception of the tenancy in this case the Figuracions were misled by misrepresentation from respondent's management personnel, who told them that the radiator

[2] A landlord is statutorily obligated to provide heat in a residential tenancy. See RPW 59.18.060(8). Thus, any suggestion that the Figuracions could have averted the danger by simply turning off the steam radiator is not well taken.

in the apartment they were about to lease never got very hot and that would violate code to place a cover over it.[3]

1. Did the Court of Appeals misapply Restatement (Second) of Properties § 17.3 and § 17.4 when ruling that the landlord did not retain control over the central heating system at issue in this case?

2. Did the Court of Appeals err in its core holding that the Figuracions, as tenants, had exclusive control and possession of the steam radiator which caused S.F. burn injuries, when it is undisputed that such a steam radiator was an essential component of a central heating system over which the tenant could exercise no control (other than turning on and off), as to the amount of heat coming into their apartment?

3. Did the Court of Appeals err by separating the central boiler from the steam radiator within the petitioners' apartment for analytical purpose when factually they are part and parcel of the same "system" and as recognized in the comments to Restatement (Second) of Property § 17.4 is the kind of appurtenance/fixture which a landlord controls?

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[3] Mr. Figuracion is a carpenter and volunteered to build a radiator cover which would have cost a diminutive amount of money. After S.F. was burned, respondents continued to resist ameliorating the hazard to children posed by steam radiator, indicating that such a refusal was economically grounded on the notion that if radiator covers were provided to the Figuracions, then all other tenants would want the same.

4. Given the undisputed information within record, did the Court of Appeals err in failing to recognize that there was, at a minimum, a question of fact as to whether or not the steam radiator which burned S.F. was "an actual or potential safety hazard" implicating the warranty of habitability recognized by Washington law, when the literature establishes that steam radiators pose a grave safety risk to children, the infirm and elderly?[4]

5. Did the Court of Appeals err by interpreting Restatement (Second) of Property § 17.6 in a manner which rendered the "implied warranty of habitability" set forth therein, superfluous and meaningless, by holding that in order to prove such a violation of the warranty that petitioners were obligated to prove the landlord violated statute or administrative regulation, when such an interpretation is contrary to well established Washington jurisprudence and defies the rules of statutory construction?

6. Given the fact that the landlord controlled the injury producing aspect of the steam radiator, (how hot it could get), did the Appellate Court err in failing to recognize that there was at least a

[4] The "implied warranty of habitability" applicable to residential tenancies is a creature of Washington's common law and statute. See *Foisy v. Wyman* 83 Wn. 2d 22, 31, 515 P. 2d 160 (1973); *Landis and Landis Const., LLC v Nation* 171 Wn.App. 157, 162 289 P. 3d 979 (2012) (common law implied warranty); Restatement (Second) of Property § 17.6 and RCW 59.18.060. According to the Court of Appeals the statutory implied warranty only applies if there are violations of the enumerated provisions of RCW 59.18.060.

question of fact as to whether or not the respondent breached its duty owed to the petitioners as "invitee" under Washington's common law?

7. Should the Supreme Court accept review will it consider the Trial Court's denial of petitioners' motion for summary judgment before the Trial Court on the issue of "parental immunity"?

IV. STATEMENT OF THE CASE

A. Factual Background.

S.F. suffered severe burns from a steam radiator in the apartment rented to her parents by respondents. The injury occurred after her parents were misinformed by respondent's management personnel that the steam radiator never got hot enough to cause any harm and that it would violate "code" to build and place a cover over the offending radiator.

In May or June 2008 the petitioner's parents, after suffering homelessness and living in a hotel, were able to enter into a rental agreement, (1-year lease), for Unit 212 at Rembrandt Apartment, located in Tacoma, Washington. At the time the parents were entered into the rental agreement, it was understood that their two minor children "S.F." (female DOB 3/23/08) and C.F., (male, DOB 8/14/06), would also be residing within the apartment.[5] The Rembrandt Apartments, at the

[5] The apartment is on the ground/basement level of the Rembrandt Apartments. As you enter the apartment, directly in front of you is the restroom. To the left is the living room area which contained the steam radiator upon which S.F. suffered her burns. To the right,

relevant time, had a central heating/steam system comprised of a centered boiler and steam radiators in individual apartments. Within the living room area of the apartment rented by petitioners, there was a 3-tiered steam radiator which was angled away from the wall in such a manner as to provide a triangular shaped space between the radiator and the wall.

At the time of the parents' initial walkthrough with Rembrandt personnel, Mr. Figuracion asked whether or not he could put a cover over the radiator out of concern for the children getting behind it and getting burned. At that time the parents were informed that the radiator never got that hot and that it would be "against code" to put a cover over it. Mr. Figuracion, a carpenter, offered to build a wooden cover that would enclose the entire radiator.[6] Given the fact that the parents were told that they could not cover the radiator in the living room, they stacked boxes around it in order to limit their toddlers' access particularly to the space between the radiator and the wall.

Unfortunately, on April 23, 2009 S.F. was severely burned on the very radiator about which her parents had expressed concern. At the time,

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is a kitchen area which had a bedroom situated behind it. It is undisputed that from the bathroom area, even with the door open, one would not be able to see into either the living room or the kitchen area.

[6] The Figuracions had previously lived in an apartment which had radiator covers made of wood. It was undisputed below that wooden radiator covers are not unusual and are readily available for retail purchase for a relatively nominal price. Here, Mr. Figuracion was offering to build the cover, so the installation of a cover would not have cost respondents a dime, and could have been done very inexpensively.

the two toddlers were in the care of their mother, who was using the restroom, (with the door open), while the two toddlers were in the front room watching PBS. While Mrs. Figuracion was in the restroom (for approximately 5 minutes) she heard her daughter scream. Her initial assumption was the two toddlers were roughhousing and she yelled for them to "knock it off". For a moment the screaming stopped, but once again S.F. began to scream. As a result Mrs. Figuracion jumped off the commode and ran out of the bathroom and found S.F. and C.F. [7] behind the radiator.

Mrs. Figuracion picked S.F. up and felt something hanging on her hand which turned out to be a substantial amount of S.F.'s skin. Mrs. Figuracion immediately stripped off S.F.'s clothing and placed her into a cold bath. EMTs were called and S.F. was immediately transported to Mary Bridge Children's Hospital where she was treated for painful, severe second and third degree burns.

Because an injury to a child was involved, CPS investigated the injury and completed exonerated Mrs. Figuracion. While a CPS social

[7] Below the respondent argued that the two children were "trapped" by the boxes stacked around the radiator. The facts belie this assertion. Mrs. Figuracion indicated that S.F. was wedged into the corner between the radiator and the wall with her brother behind her. Thus, it was the positioning of her brother which kept her behind the radiator until Mrs. Figuracion was able to extract her. There is simply no indication that the boxes had shifted in any way or were otherwise forcing S.F.'s body into contact with the radiator.

worker was investigating, she came into contact with respondent's on-site manager and asked whether or not covers could be placed over the steam radiators to ensure child safety. Indifferently respondent's manager indicated that they would not ameliorate the dangers posed by the hot steam radiator because if it did so for the petitioners then it would be obligated to do so for all other residents.

Ultimately the Figuracions turned off the steam heater and used space heaters in lieu of the radiator until they could move out.

B. Division 2 Affirms Trial Court's Dismissal of Petitioner's Claims Based on the Erroneous Conclusion that the Landlord Did Not Retain Sufficient Control Over the Injury-Producing Aspects of the Central Heating System Warranting Imposition of Liability.

As indicated within the court of appeals' opinion, this matter came before the appellate court on a grant respondent's motion for summary judgment and the denial of the petitioner's motion for partial summary judgment with respect to affirmative defenses, as well as the Figuracion parents' entitlement to "parental immunity".[8] (Slip Op. P. 3) In affirming

[8] As this matter is before the Appellate Court on a grant respondent's motion for summary judgment it was, and continues to be subject to a de novo review. See *Powers v. W.B. Mobile Servs., Inc.*, 182 Wn. 2d 159, 164, 139 P. 3d 173 (2014). As such, all facts, and reasonable inferences therefrom must be considered in a light most favorable to petitioner's, as the non-moving party. *Id.* at 164.

the trial court's decision the appellate court primarily rested on the notion that the injury-producing steam radiator, was not in a "common area" and neglected the well-established propositions that a landlord can be held liable when it retains control over the injury-producing instrumentality. (Slip Op. P. 5-6) In reaching such a conclusion the appellate court noted that "S.F. was injured in the Figuracion's apartment, not on the central boiler."[9]

Predicated on this fundamental legal error, the appellate court went on to reject a number of petitioner's theories of liability. In reaching this conclusion the appellate court failed to fully analyze *Restatement (Second) of Property* §§ 17.3 and 17.4 (1977), and instead utilized its own definition of "common areas" for the purposes of RCW 59.18.060(3).[10]

Petitioner's disagreement with the appellate court's decision which badly misapplied the law, and eviscerated a landlord's duties to minimally ensure tenant safety shall be discussed below.

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[9] As explored below such a conclusion defies commonsense given the fact that, at all times the landlord controlled the amount of heat being produced by steam radiators which were located within the tenants' apartments.

[10] Such a failure on the part of the appellate court to analyze and/or apply these Restatement sections is somewhat puzzling. It is noted, for example, that in the "reporter's note" annexed to Section 17.3 at 8 is indicated that the "types of dangerous conditions" covered by the Restatements includes "heating systems", *Levine v. Bochiaro*, 59 A. 2d 224 (N.J. 1948). Similarly in the "reporters note" to section in 17.4 a wide variety of apparatuses and "central systems", are recognized as being the matters "covered by the rule". Such matters would include hot water systems, and heating systems, citing to, e.g. *Thomas v. Housing Authority of City of Bermerton*, 71 Wn. 2d 69, 426 P. 2d 836 (1967).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals' Decision is Contrary to the Facts and Involved Serious Misapplications of the Law.

a. Respondents are liable for the injuries suffered by SF under the terms of Restatement (Second) of Property § 17.3 and 17.4.

Comment B to Section 17.4, provides under the heading of "parts of property covered by this rule", the following:

> The rules stated in this section apply to the maintenance of walls, roofs and foundations of an apartment, house or office building. **It applies also to any other part of the property the careful maintenance of which is essential to the safe use of the rooms or offices or portions of the property leased to various tenants, such as the central heating, lighting or water system.** (Emphasis added).

Under any kind of reasonable analysis, a central heating system, such as involved in this case, where the tenant has absolutely no ability to control temperature, (other than turning on or off), clearly woud fall within the terms of this rule. As shown by *Thomas v. Housing Authority of Bremerton*, 71 Wn.2d 69, 426 P 2d 836 (1967), this court had little difficulty in recognizing that a landlord can be subject to liability for an unsafe hot water tank within an apartment which scalded a child, even though the water tank in question apparently only serviced a single apartment. Gives the amount of control the landlord had over the heat

system in this case, the need for landlord accountability is even more compelling in this case.

Contrary to the Court of Appeals opinion at pages, 14 and 15, opinions from other jurisdictions support this rather intuitive proposition. See *Coleman v. Steinberg* 253 A. 2d 167 (N.J. 1969); (child burned by steam pipe connecting central furnace to radiator within an apartment); *Morning Star v. Strich*, 40 M.W.2d 719 (Mich. 1950); *McKern v. Goldstein*, 164 A. 2d 260 (Del. 1960) (infant burned on steam pipe connected to apartment radiator); *Niman v. Plaza House, Inc.* 471 S.W.2d 207 (Mo. 1971) (injury from central heating system which included a central boiler and radiators in individual apartments); and e.g., *Vesey v. Chicago Housing Authority* 563 N.E.2d 916 (Ill. 1990) (landlord potentially liable for burn from pipe connecting boiler system to steam radiator located within an apartment).[11]

The same rationale which was applied in these cases should have been applied resulting in the inevitable conclusion that there is at least a question of fact as to whether or not the landlord sufficiently retained

[11] When a dangerous condition is within the landlord's control, the fact that such control is not complete, does not exonerate the landlord from liability. See *Thompson v. Paseo Manor South, Inc.* 331 S.W.2d 1 (Mo. App. 1959). " Ordinarily a landlord retains control of an entire heating system. *Kilman v. Braun,* 806 S.W. 2d 75 (Mo. App. 1991). Steam pipes and the like are "inherently dangerous" See *Thompson v. Paseo Manor,* Supra.

control over the heating system that it was exposed to liability. As explained in *Coleman v. Steinberg* 253 A. 2d at 171

"Control of such facilities, including the entire heating system of which the pipes in each apartment were a part), remained in the landlord. Thus since control of the pipes in each apartment was maintained, the child's parents did not obtain full and exclusive possession and control of their apartment, and the landlord's retention carried with it the duty of using ordinary care to maintain the pipes in a reasonably safe condition. The court held that the evidence was sufficient to show that the pipes were dangerous to members of the tenant family and that it was for the jury to say whether defendant was negligent in permitting them to remain exposed **and without any protective covering or guard.** (emphasis added) citing to *Thompson v. Paseo Manor South Inc.* supra 131 S.W. 2d at 6.

Once it is determined that the landlord in this case retained control, the law clearly supports landlord liability under Sections 17.3 and 17.4 and a, number of other theories.

b. Breach of the Warranty of Habitability.

The appellate court's determination that the implied warranty of habitability (whether, under the common law or statute), only applies when there has been established a regulatory or a statutory violation is simply unsupportable. In order for there to be a violation of the common law implied warranty of habitability, all that needs to be shown is that the condition written in the premises creates "an actual or potential safety hazard" to the occupants. See *Landis and Landis Construction LLC v. Nation* 171 Wn.App. at 165, citing, *Lian v. Stalick*, 106 Wn.App. 811,

818, 25 P. 3d 467 (2001); *Atherton Condo v Blum Dev. Co.* 116 Wn. 2d 506, 519-22, 799 P. 2d 250 (1990). The fact that the steam radiator in the Figuracion's apartment was capable of inflicting second and third degree burns, despite relatively little physical contact, speaks volumes as to whether or not the condition at issue satisfies this definition.

Further, there is simply no support for the court of appeals' determination that in order to have a claim based on the common law implied warranty of habitability, that it must be supported by showing that there were regulatory and/or statutory violations. As discussed in the well-reasoned opinion in *Pinckney v. Smith* 484 F.Supp.2d 1177, 1184 (W.D. Wash. 2007), this court in *Foisy v. Wyman* 83 Wn. 2d 22, 31, 515 P. 2d 160 (1973), expressly rejected the notion that there must be a code violation or a regulatory and/or statutory violation in order to establish a prima facie case that premises are uninhabitable. To require such a showing would be contrary to well established Washington law which recognizes that violation of regulation and/or statute is only evidence of negligence and typically is not required. See RCW 5.40.050; WPI 60.03; *Joyce v. State* 155 Wn. 2d 306, 119 P. 3d 825 (2005), see also, *Xiao Ping Chen v. City of Seattle* 153 Wn.App. 890, 223 P. 3d 1230 (2009).[12]

[12] Apparently the court of appeals misapprehended petitioner's position with respect to whether or not any code violations existed with respect to the offending radiator. As shown by the record, petitioner's before the trial cant, in the appellate court, took the

Further, such position the court of appeals position appears to be directly contrary to the language of restatement (second) of property Section 17.6. Section 17.6 indicates the landlord is subject to the liability for the physical harm suffered by tenants and/or their guests caused by:

"[A] Dangerous **condition existing before** or arising after the tenant had 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).

The use of the term "or" indicates that there are two alternative bases for liability under Section 17.6. There is simply no indication from the language, that in order to establish a violation of the implied warranty of habitability that the violation must be supported by evidence of a regulatory and/or statutory violation. If that is what the drafters of the restatement had intended they would have used the word "and' as opposed to "or". The construction placed upon this provision by the Court of Appeals essentially renders the "warranty habitability" referenced in the restatement be absolutely superfluous and meaningless. This Restatement provision should be interpreted the same way as a statute and a fundamental rule of statutory construction is that it should be interpreted

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position that, given the hazardous nature of the condition, it arguably violated a number of "catch all" safety provisions spread throughout the Tacoma Municipal Code and other building related codes. Petitioner's counsel at oral argument conceded that there was no specific code provision mandating radiator covers but argued that given the inherent dangers involved general safety provisions within relevant codes required a landlord to mitigate the danger.

in a manner which gives effect to all language so as not to render any portion of it meaningless or superfluous. See *Rivard v. State*, 168 Wn. 2d 775, 783, 231 P. 3d 186 (2010); see also *Nevers v. Fireside, Inc.*, 133 Wn. 2d 804, 808 947 P. 2d 721 (1997) (Applying rules of statutory construction to Court Rules). There is certainly nothing within the opinion in *Martini v. Post*, 178 Wn. App. 153, 170-71, 313 P. 3d 473 (2013) which would warrant the evisceration of the implied warranty of habitability as an alternative basis for landlord liability under Section 17.6.

Given the materials submitted before the trial court, the Appellate Court should have found at a minimum a question of fact as to whether or not the condition was dangerous. And such dangers should have been apparent to the landlord when the tenants took possession of the apartment. In this case, the landlord was well aware that two toddlers were going to be living in the apartment and what ultimately transpired should not be viewed as being so unforeseeable as to warrant a determination in favor of this landlord. See *McKeon v. Goldstein*, 164 A. 2d. at 262-63 (finding significant the fact the landlord knew small children would be present in an area where they would be exposed to hot steam pipes and radiator). Given the landlord's knowledge of the potential hazard at the inception of the tenancy, it should have been corrected immediately and no further notice was required. *Id.*

The petitioners should have been permitted to pursue this claim before a jury.[13]

c. The Petitioner Should Have Been Allowed to Pursue a Claim Based on the Common Law Applicable to Invitees.

Before the Appellate Court petitioners fully briefed the claims available to the petitioners given their status as "invitees". See *Mucsi Graoch and Associates, Ltd.,* 144 Wn. 2d 847, 914 P. 2d 728 (1996). Under the terms of the *Mucsi* opinion, a landlord has an affirmative duty to maintain common areas in a reasonably safe condition. As suggested above, even though a "common area" is not directly at issue, but rather involved a fixture over which the landlord retained control, the same principles should have been applied. (see Appellant's Opening Brief Pages 23-28). Further given the circumstances, there is simply no

[13] It is respectfully suggested that the unreasonable nature of respondent's conduct is punctuated by the fact that Mr. Figuracion was more than willing to take reasonable measures to address the inherent hazard created by the steam radiator, but was thwarted by respondent who provided him with gross misinformation. As indicated by this Court's opinion in *Thomas* (71 Wn. 2d at 76), in determining whether or not a duty should be imposed and/or if a duty has been breached, the Court can consider the economic feasibility of providing for child's safety. Here, it would have cost respondent nothing because Mr. Figuracion was willing to address the problem himself. Further even if the respondents were required to expend under $100.00 for a radiator cover, it still should be left to a jury to determine whether it was unreasonable not to do so, given the severity of the hazard of a small child. It is humbly submitted that if the RLTA and applicable common law doctrines are to have any meaning then they must be interpreted in a manner which protects children and persons of low income, "who otherwise would be forced to reside in unsanitary and unsafe housing". *Id.* at 78. Given the inherent dangers involved, it is simply no defense that radiator covers are not required by regulation or that the same safety hazard exist in other buildings. See, *Coleman v. Steinburg, 253 A.2d* at 171.

question that, even though petitioners were aware of the danger, that the landlord should have anticipated that despite such knowledge the petitioners would nevertheless be exposed to the danger. Mrs. Figuracion's had committed to a lease and intended to live in the apartment. See Generally, Restatement (Second) of Torts § 343A(1) (1965), see also *Sjogren v. Props of Pac. NW.*, LLC, 118 Wn. App. 144, 151, 75 P. 3d 592 (2003).

d. Petitioner's Claim Under the Terms of RLTA RCW 59.18. et. seq.

As indicated within the Court of Appeals opinion at Page 7, the violation of RLTA's duties can be a basis for a tenant's personal injury tort claim. See *Tucker v. Hayford*, 118 Wn. App. 246, 257-58, 75 P. 3d 980 (2003). From the statutory language of RCW 59.18.060 it is far from clear that in order to establish a breach in the statutory warranty of habitability that it must be established that there have been violations of Subsections (1) through (15). The language "The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular..." suggests the existence of a general duty to maintain fitness, and noncompliance with the obligations set forth within Subsections (1) through (15) are merely examples of how a landlord can go about in complying with such duties. The statutory language clearly evinces a

legislative intent of providing the tenant with more greater safety protections, not less.

Further, as discussed above, given the inherent dangerousness, particularly to small children, posed by a steam radiator, the landlord by retaining control over the central heating system, arguably violated Subsection (3) which required it to "keep any **shared or common areas visually clean, sanitary, and safe from defects increasing the hazards of fire or accident."** Also, the landlord was obligated to keep the heating system in "good working order" under Subsection (8).

It is respectfully suggested if the terms "good working order" are to mean anything, it should mean that, as much as possible, such appliances should be safe.

The "parade of horribles" posed by the Appellate Court justifying its rather-limited application of the legal protections afforded to tenants, do not withstand a scintilla of critical analysis. (Slip Op. Page 14). As the literature before at the trial court indicated, steam radiators are inherently unsafe and capable of causing severe injuries. That is something quite different than an otherwise-conforming set of stairs. Further, it is likely that having "uncovered electrical outlets" would be violative of the building and/or other safety codes, and the failure of a landlord to provide such covers would expose it to liability. Finally, a

fixed steam radiator which is built into a wall, is something far different than a landlord providing furniture to a tenant. Presumptively a tenant, if concerned about the safety of such furniture, would be within their rights to remove it from the leased premises. Here, the Figuracion parents could not control or remove the steam radiator from the apartment. This Court should find the Court of Appeals' "policy" rationale for narrowly interpreted in the protections afforded to tenants to be unpersuasive.

e. The Trial Court Should Have Determined that the Figuracion Parents Did Not Breach any Duty to Supervise their Child and Given the Absence of Wanton and Willful Misconduct were Entitled to Parental Immunity as a Matter of Law.

Absent wanton and willful misconduct, there is no cognizable duty in the State of Washington for a claim of negligent parental supervision. See *Zellmer v. Zellmer*, 164 Wn. 2d 147, 188 P. 3d 497 (2008). Given that a parent has no cognizable duty to supervise their children in a non-negligent manner, the Court should have found as a matter of law that they engaged in no action which could be characterized as "fault" under the terms of RCW 4.22.015, which could be subject to allocation under the terms of RCW 43.22.070(1), (unless a jury could find that they engaged in wanton and willful misconduct).

Here, it should have been determined by the trial court, as a matter of law, that the Figuracion parents did not engage in such heightened misconduct. The undisputed facts establish that when moving into their apartment they made reasonable inquiry as to how they could go about making the steam radiator safe. In response they were misinformed not only with respect to the danger posed by the steam radiator, but also what could be lawfully done to ameliorate the danger.

Nevertheless the parents did make efforts to try to keep the children away from the radiator by stacking boxes around it-an act which belies any assertion that they were indifferent and/or uncaring as to the safety of their children. The fact that Mrs. Figuracion, at the time S.F. was injured, had her children "under auditory surveillance," undercuts any argument that she engaged in any form of "wanton and/or willful misconduct" or, for that matter, was even to the slightest degree negligent. It has long been established in the State of Washington that a parent does not have an obligation to keep their children under constant surveillance. See *Cox v. Hugo*, 52 Wn. 2d 815, 819, 329 P. 2 467 (1958).

If this Court is inclined to accept review of this matter it is respectfully requested that it also examine the "parental immunity" issue raised before the trial court, but not reached by the Court of Appeals.

CONCLUSION

It is respectfully suggested that the logical and legal errors made by the Appellate Court in affirming the trial court's decision in this matter are palpable. The Appellate Court's interpretation of the common and statutory law designed to protect tenants undermines statutory purposes.

Unfortunately this is likely a byproduct of the fact that Washington's law relating to the liabilities of landlords for injuries suffered by tenants is far from established, and the law which does exist is inconsistent and lacks coherency.

As such it is humbly requested that the Supreme Court, under the terms of RAP 13.4, accept review of this case and in doing so, protect the economically less fortunate and particularly their children.

Dated this 15th day of July, 2015.

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DECLARATION OF SERVICE

I, Tiffany Dixon, hereby declare under penalty of perjury that the following statements are true and correct: I am over the age of 18 years and am not a party to this case.

On this 15th Day of July, 2015, I caused to be served delivered to the attorney for the Respondents, a copy of **PETITION FOR REVIEW**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

Filed with the Supreme Court of the State of Washington, via the Court of Appeals, Division II, via legal messenger (original and one copy, plus filing fee of $200.00) to:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

These documents were provided to Respondents' attorneys, via email and delivery via ABC Legal Messenger:

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DATED this 15th day of July, 2015, at Tacoma, Pierce County, Washington.

Tiffany Dixon, Paralegal
The Law Offices of Ben F. Barcus & Associates, PLLC

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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, Appellants, v. REMBRANDT REALTY TRUST; THE NEIDERS COMPANY, LLC, a Washington Corporation, Respondents.	No. 45779-2-II UNPUBLISHED OPINION

WORSWICK, J. — Renato and Joleen Figuracion appeal the trial court's order granting summary judgment dismissal in favor of Rembrandt Realty Trust (Rembrandt). The Figuracions sued Rembrandt, their former landlord, for damages resulting from burns their young daughter, S.F.,[1] obtained from their apartment's radiator. They argue that the trial court erred by (1) granting summary judgment dismissal against them, because genuine issues of fact remained regarding their tort claim; and (2) denying their motion for partial summary judgment, because no genuine issue of material fact existed regarding whether parental immunity applied to them. We affirm the summary judgment dismissal, holding as a matter of law that Rembrandt did not

[1] We refer to the minor children by their initials for privacy. We refer to Renato and Joleen Figuracion by their first names for clarity; no disrespect is intended.

breach any duties it owed to the Figuracions. We do not reach the Figuracions' appeal of the denial of their partial summary judgment motion.

FACTS

Renato and Joleen Figuracion had two young children, S.F. and C.F. The family signed a rental agreement with Rembrandt Realty Trust and moved into an apartment in the Rembrandt building. After the Figuracions took possession of the apartment, Rembrandt could not enter it without asking for permission. A steam radiator was located in the apartment's living room. When the family examined the apartment before moving in, Renato noticed the radiator and asked Rembrandt whether it could be covered. Rembrandt responded that the radiator did not get very hot, and it was against code to cover it. Instead, the Figuracions stacked boxes and other items around the radiator.

The radiator in the Figuracions' apartment had an on-and-off valve, but the Figuracions believed it did not work and might have been stuck in the on position. The radiator kept the apartment very warm. Rembrandt controlled the central boiler which supplied steam to the individual apartments' radiators, and Rembrandt turned the central system off during summer. The radiator was not in violation of any applicable statute or regulation.[2]

In April 2009, Joleen was at home with the children, who were watching television in the living room. Joleen left and went to the bathroom, which did not have a view of the living room. Joleen estimated that she was in the bathroom for about five minutes. She heard screaming and

[2] In their briefing, the Figuracions argued that the radiator violated applicable codes, but at oral argument they conceded that it did not. Searching the record and applicable codes, we could find no violations of applicable codes.

assumed the children were roughhousing, so she told them to settle down. The screaming continued, and Joleen rushed into the living room to find S.F. behind the radiator. S.F. had a large burn on her stomach. Joleen estimated that about two minutes elapsed between the sound of the first screams and when she found S.F. behind the radiator. After the accident, Joleen was not sure whether C.F. or the boxes had caused S.F. to become wedged behind the radiator.

The Figuracions sued Rembrandt and others[3] for breach of contract, violations of the Residential Landlord-Tenant Act of 1973 (RLTA), chapter 59.18 RCW, the implied warranty of habitability, and negligence. The complaint sought compensation for S.F.'s past and future medical treatment, physical and mental pain and suffering, past and future disabilities and disfigurement, lost capacity to enjoy life, damages to the parent/child relationship, and attorney fees and costs.

The Figuracions moved for partial summary judgment dismissing Rembrandt's affirmative defenses. Rembrandt cross-moved for summary judgment dismissal, arguing, among other things, that there was no evidence that Rembrandt breached any statutory or common law duties.

The Figuracions submitted a declaration from a medical expert who said that S.F.'s burns were primarily second degree burns, with some areas of third degree burns. The expert testified that third degree burns would occur in one second at 150 degrees Fahrenheit, or in roughly two minutes at 124 degrees Fahrenheit and would take longer at a lower heat.

[3] The initial complaint named numerous defendants. Later, several of these defendants obtained dismissal of all claims against them. For simplicity, we refer to all remaining defendants as "Rembrandt."

The Figuracions also supplied a declaration from a mechanical engineer with experience in heating systems. She declared that S.F.'s burn demonstrated that the temperature of the radiator was too high for consumer use. She also declared that the valve on the radiator was "painted open," meaning the Figuracions could not control it. In support of the notion that radiators can be dangerous, the engineer attached copies of web pages from the Centers for Disease Control reporting on home radiator burns among children.

The trial court considered both parties' summary judgment motions, then denied the Figuracions' partial summary judgment motion and granted Rembrandt's cross-motion for summary judgment dismissal. The Figuracions appeal.

ANALYSIS

I. STANDARD OF REVIEW

We review summary judgment determinations de novo, engaging in the same inquiry as the trial court. *Powers v. W.B. Mobile Servs., Inc.*, 182 Wn.2d 159, 164, 339 P.3d 173 (2014). We consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Powers*, 182 Wn.2d at 164. A summary judgment is appropriate only where the pleadings, affidavits, depositions, and admissions on file show the absence of any genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Kelley v. Pierce County.*, 179 Wn. App. 566, 573, 319 P.3d 74, *review denied*, 180 Wn.2d 1019, 327 P.3d 55 (2014).

When engaging in statutory interpretation, we implement legislative intent by giving effect to the plain meaning of a statute. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d

425, 432, 275 P.3d 1119 (2012). We review issues of law de novo. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 208, 875 P.2d 1213 (1994).

In a negligence case, the plaintiff must prove duty, breach, causation, and damages. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 198, 943 P.2d 286 (1997). Whether an actionable duty was owed to a plaintiff is a threshold determination and a question of law that we review de novo. *Munich v. Skagit Emergency Commc'n Cent.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012); *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 762, 344 P.3d 661 (2015). The scope of a duty, by contrast, is ordinarily a question for the trier of fact. *McKown*, 182 Wn.2d at 762. Thus, we must determine whether any genuine issues of material fact exist regarding whether Rembrandt breached any duties it owed the Figuracions.

II. LANDLORD'S DUTY TO TENANTS

The Figuracions argue that Rembrandt breached duties it owed to them under several legal theories. We disagree, holding as a matter of law that Rembrandt breached no duties it owed to the Figuracions. Thus, we affirm the summary judgment dismissal.

A tenant may bring a claim against a landlord for personal injuries under three theories, two of which are at issue here: (1) the RLTA, chapter 59.18 RCW, and (2) the common law. *Martini v. Post*, 178 Wn. App. 153, 167, 313 P.3d 473 (2013).

A. *Figuracions Exclusively Controlled and Possessed the Radiator*

As an initial matter, the Figuracions argue under several theories that the radiator was in a common area or, relatedly, that Rembrandt exercised control over it or retained possession of it. We hold that the radiator was not in a common area, and the Figuracions exclusively controlled and possessed it. Thus, several of their claims fail.

As a general rule, a landlord is liable only for conditions in a common area, or for conditions over which the landlord retains control. Under the RLTA, Rembrandt must keep "common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident." RCW 59.18.060(3). Under the common law, a landlord generally has no liability over noncommon areas once exclusive control has passed to the tenant. *Aspon v. Loomis*, 62 Wn. App. 818, 826, 816 P.2d 751 (1991). Under premises liability law, a landlord is liable for injury to tenants on land he "possess[es]," meaning common areas. *Pruitt v. Savage*, 128 Wn. App. 327, 331, 115 P.3d 1000 (2005); RESTATEMENT (SECOND) OF TORTS, §§ 328(E), 343, 343A (1965). And under *Restatement (Second) of Property: Landlord & Tenant* §§ 17.3 and 17.4 (1977), a landlord may be liable for conditions on a portion of leased premises that he retains in his control if the tenant is entitled to use it or if it is necessary to the safe use of the leased part.

Regarding all of these theories, we hold as a matter of law that the radiator was not in a common area and it was in the exclusive control and possession of the Figuracions. Regarding the RLTA, RCW 59.18.060(3), we give effect to the plain meaning of the term "common area[]" to mean an area that all tenants either may use or own in common. *See Estate of Bunch*, 174 Wn.2d at 432; BLACK'S LAW DICTIONARY 332 (10th ed. 2014). The Figuracions' radiator does not fit the definition of "common area," because no evidence suggests other tenants used or owned it.

We also hold that exclusive possession and control of the radiator upon which S.F. was injured had passed to the Figuracions, regardless of the fact that Rembrandt controlled the central boiler. Thus, the *Restatement (Second) of Torts* §§ 328(E), 343, 343A (1965) and the *Restatement (Second) of Property: Landlord & Tenant* §§ 17.3 and 17.4 (1977) do not rescue

their claims against Rembrandt. S.F. was injured in the Figuracions' apartment, not on the central boiler. And the Figuracions possessed their apartment: it is uncontested that Rembrandt was required to obtain the Figuracions' permission to enter their apartment. The Figuracions rented their apartment without any apparent limitation in the rental agreement. Finally, there are no facts here to suggest the Figuracions were entitled to use the central boiler over which Rembrandt retained control. Thus, these arguments fail.

B. *Duties Under the RLTA*

The Figuracions argue that Rembrandt breached its duty to make the radiator safe under the RLTA, chapter 59.18 RCW. We disagree.

The RLTA provides that landlords must comply with a list of 15 enumerated duties. RCW 59.18.060. As relevant to this appeal, these duties include the following:

> (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;
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> . . . .
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> (3) Keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident;
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> . . . .
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> (8) Maintain all electrical, plumbing, heating, and other facilities and appliances supplied by him or her in reasonably good working order;
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> . . . .
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> (11) Provide facilities adequate to supply heat and water and hot water as reasonably required by the tenant.

The RLTA's duties can be a basis for a tenant's personal injury tort claim. *Tucker v. Hayford*, 118 Wn. App. 246, 257-58, 75 P.3d 980 (2003).

A landlord's liability under the RLTA extends only to those duties specifically enumerated in RCW 59.18.060; the statute does not create a general duty to "'keep the premises

fit for human habitation.'" *Lian v. Stalick*, 106 Wn. App. 811, 816, 25 P.3d 467 (2001) (*Lian* I) (quoting *Aspon*, 62 Wn. App. at 824). As a matter of law, we hold that Rembrandt did not breach any of these duties.

1. *RLTA Subsection 1: Compliance with Applicable Code*

Under subsection 1, Rembrandt had a duty to

> [m]aintain 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(1). At oral argument in this case, counsel for the Figuracions conceded that radiator covers are "not required by any statute, ordinance, or otherwise," and we could find no such requirement. Wash. Court of Appeals oral argument, *Figuracion v. Rembrandt Realty Trust*, No. 45779-2-II (Apr. 6, 2015), at 2 min., 55 sec. through 3 min., 1 sec. Thus, their claim under subsection (1) fails as a matter of law.

2. *RLTA Subsection 3: Common Areas*

Under subsection 3, Rembrandt must keep "common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident." RCW 59.18.060(3). The Figuracions appear to argue that the radiator was a "common area" because Rembrandt retained partial control of the heating system. Br. of Appellant at 33. Above, we hold that the radiator was not in a common area. The Figuracions' claim under subsection 3 fails.

3. *RLTA Subsection 8: Maintenance of Facilities and Appliances*

Under subsection 8, Rembrandt must "[m]aintain all electrical, plumbing, heating, and other facilities and appliances supplied by him or her in reasonably good working order." RCW

59.18.060(8). The Figuracions argue that the radiator was not in reasonably good working order if it was capable of severely burning a child. But the plain meaning of the terms "reasonably good working order," when describing the proper maintenance of "electrical, plumbing, heating, and other facilities and appliances," is that those appliances should operate correctly and perform the tasks they are designed to do. This section requires appliances to work (i.e., a radiator must heat the room). This radiator heated the room, and the Figuracions have not presented facts showing that it was defective. We hold as a matter of law that this radiator was in reasonably good working order, and the Figuracions' argument fails.

4. *RLTA Subsection 11: Supplying Heat*

Under subsection 11, Rembrandt had to "provide facilities adequate to supply heat . . . as reasonably required by the tenant." All the evidence establishes that Rembrandt provided heat; Joleen's deposition establishes that the apartment was very warm. The Figuracions' argument fails.

5. *Extraordinary Remedies Section Inapplicable*

The Figuracions also argue that RCW 59.18.115(2)(a), which provides extraordinary remedies for housing violative of the RLTA, demonstrates that a hazardous radiator violates the RLTA. This argument is without merit. RCW 59.18.115(2)(a) provides: "If a landlord fails to fulfill any substantial obligation imposed by RCW 59.18.060 that substantially endangers or impairs the health or safety of a tenant, including . . . (v) heating or ventilation systems that are not functional or are hazardous . . . the tenant shall give notice" to the landlord. Then, if the landlord fails to rectify the situation, the tenant may inform the local government and, if the local government agrees that the landlord has failed to rectify a condition that violates the RLTA, the

tenant may cease paying rent. RCW 59.18.115. By its plain terms, RCW 59.18.115(2)(a) applies to violations of 59.18.060. Thus, any violation of RCW 59.18.115 must begin as a violation of RCW 59.18.060. And, as discussed above, the radiator at issue here did not violate RCW 59.18.060. The Figuracions' argument fails.

Thus, none of the enumerated duties in RCW 59.18.060 required Rembrandt to make the radiator in the Figuracions' apartment safe. We hold that Rembrandt did not breach any duties it owed to the Figuracions under the RLTA.

C. *Common Law Landlord Liability*

The Figuracions also argue that Rembrandt breached various duties it owed to them under the common law. We hold as a matter of law that Rembrandt breached no duties it owed to the Figuracions under any common law theory.

1. *Liability for Latent Defects*

The Figuracions argue that Rembrandt owed them a duty under the common law for failing to warn them of a latent defect. This argument fails.

A landlord is liable to a tenant for damages caused by a concealed, dangerous condition known to the landlord that existed at the beginning of the leasehold. *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994). Here, there is no evidence to suggest that the radiator was defective, and, thus, it cannot be a latent defect. Thus, Rembrandt breached no duty to warn the Figuracions of the radiator's condition.

2. Restatement (Second) of Property: Landlord & Tenant § 17.6 *and Common Law Implied Warranty of Habitability*

The Figuracions also argue that Rembrandt breached its duty under the common law implied warranty of habitability. This exception to the common law rule barring landlord

liability for open and obvious dangers is set forth in the *Restatement (Second) of Property: Landlord & Tenant* § 17.6 (1977). We note that the Figuracions did not cite, and we could not find, any case in any jurisdiction in which a court held a landlord liable under section 17.6 for a tenant's burns obtained from a properly functioning radiator. We hold that Rembrandt did not breach the common law implied warranty of habitability.

Restatement (Second) of Property: Landlord & Tenant § 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.

This rule applies even when the dangerous condition occurs in an area of the premises under the tenant's control. *Lian v. Stalick*, 115 Wn. App. 590, 594, 62 P.3d 933 (2003) (*Lian* II). To establish liability under section 17.6, the tenant must show that (1) the condition was dangerous, (2) the landlord was or should have been aware of the condition and failed to exercise ordinary care to repair the condition, and (3) the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation. *Lian* II, 115 Wn. App. at 595.

Section 17.6 has been adopted in Washington. *Martini*, 178 Wn. App. at 170-71. Under section 17.6, the Figuracions must show that Rembrandt breached a duty of care owed to them under an implied warranty of habitability or a statute or regulation. But as discussed above, no actionable duty here arises out of a statute or regulation. Thus, for the Figuracions to prevail under section 17.6, Rembrandt must have breached a duty arising from either the RLTA's

implied warranty of habitability or the common law implied warranty of habitability. Rembrandt breached neither.

a. *RLTA Implied Warranty of Habitability*

While the RLTA includes an implied warranty of habitability, it does not create a duty on the landlord's part to keep the premises safe or fit for human habitation. *Lian* I, 106 Wn. App. at 816; *Aspon*, 62 Wn. App. at 825-26. Thus, the Figuracions may rely only on the enumerated provisions of RCW 59.18.060 to show any breach of the RLTA's implied warranty of habitability. And as stated above, the Figuracions fail to show that Rembrandt breached its duties to them under any of the RLTA's enumerated provisions. Thus, as a matter of law, Rembrandt did not breach the RLTA's implied warranty of habitability.

b. *Common Law Implied Warranty of Habitability*

In 1973, our Supreme Court declared that there exists an implied warranty of habitability in all residential rental agreements. *Foisy v. Wyman*, 83 Wn.2d 22, 28, 515 P.2d 160 (1973). Division One of this court recently concluded that the implied warranty of habitability recognized in *Foisy* can serve as a basis for legal action against a landlord under the common law without regard to the RLTA. *Landis & Landis Constr., LLC v. Nation*, 171 Wn. App. 157, 163, 286 P.3d 979 (2012), *review denied*, 177 Wn.2d 1003 (2013); *see also Aspon*, 62 Wn. App. at 825. We agree that the RLTA did not supersede common law remedies, so there remains an implied warranty of habitability independent of the RLTA.

The leading Supreme Court case makes clear that breach of this warranty must be determined on a case-by-case basis. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 522, 799 P.2d 250 (1990). The appropriate standard of

habitability is whether the conditions present a substantial risk of future danger. *Landis*, 171 Wn. App. at 166-67. The warranty does not extend to "'mere defects in workmanship'" or require perfection, nor does it extend to "trivial or aesthetic concerns." *Atherton*, 115 Wn.2d at 522 (quoting *Stuart v. Coldwell Banker Commercial Grp., Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987)); *Landis*, 171 Wn. App. at 167.

But despite this rule of case-by-case evaluation of the implied warranty of habitability, it appears courts in Washington have adopted section 17.6 only to the extent that any violation of an implied warranty of habitability stems from a codified law. In adopting section 17.6 in *Martini*, we wrote in dicta that

> the rule in section 17.6 is based on the assumption that a duty created by a statute or regulation '"represents a legislative determination of the standard of conduct required of the landlord" and that tort liability of the landlord for breaching his duty "tends to increase the likelihood that the will of the legislature as expressed in the statute or regulation will be effectuated.'"

178 Wn. App. at 171 (quoting RESTATEMENT (SECOND) OF PROPERTY § 17.6 cmt a (1977)). In *Martini*, liability arose from a faulty window which violated Tacoma Municipal Code 2.01.070 and RCW 59.18.060(1) and (5). *Martini*, 178 Wn. App. at 171. Furthermore, the parties have not provided any case, and we have found none in Washington, which has found a violation of the implied warranty of habitability where there was no evidence of a defective or legally noncompliant condition. We decline to extend section 17.6 in this case, where it is undisputed that the radiator was not defective and violated no applicable statutes or regulations.

Limiting the application of section 17.6 in this case, where the radiator at issue was compliant with relevant law and was not defective, serves important policy considerations. As Rembrandt argues, to hold that an uncovered radiator may have violated the implied warranty of

habitability despite being neither defective nor out of compliance with any law would open the door to many common conditions being potential violations. Were Rembrandt liable for not covering a working radiator, by the same logic landlords may be liable for providing stairs that people may fall down, providing furniture with uncovered sharp corners, or failing to install covers over electrical outlets. Tenants may be injured by these objects in their apartments in the ordinary course of events. We decline to hold that the implied warranty of habitability makes the landlord a guarantor of safety against such dangers arising from nondefective, legally compliant objects.

Further, our search in Washington and other jurisdictions revealed no case in which a court has found a landlord liable where a tenant was burned on a nondefective steam radiator. *See Hubbard v. Chicago Hous. Auth.*, 138 Ill. App. 3d 1013, 1016, 487 N.E.2d 20, 93 Ill. Dec. 20 (1985) ("To interpret the ordinance [requiring landlords to supply heating] to find a violation, as plaintiffs 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."); *Loving v. Chicago Hous. Auth.*, 203 Ill. App. 3d 205, 208, 560 N.E.2d 1129, 148 Ill. Dec. 532 (1990) (holding that the landlord was not liable for injury resulting from contact with an uninsulated steam pipe); *Dargie v. E. End Bolders Club*, 346 Ill. App. 480, 489-90, 105 N.E.2d 537 (Ill. App. Ct. 1952) ("The radiator was hot. It was being used for the only purpose for which it was intended. There was no escaping steam. The radiator was in no way defective. Its installation and location were in accordance with approved and standard practice. It was no more dangerous than any heating device."); *Rivera v. Nelson Realty, LLC*, 7 N.Y.3d 530, 535-36, 858 N.E.2d 1127 (2006)

(holding that landlord did not breach a New York statutory duty to maintain premises in good repair by refusing to cover a steam radiator); *Della Porta v. Roma*, 370 Pa. 593, 596-98, 88 A.2d 911 (1952) (citations omitted) ("There is no allegation that the radiators were defective in any way—only that they were hot. . . . 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.").

Thus, we hold that because the Figuracions have failed to show that the radiator was out of compliance with any applicable law or that it was defective in any way, Rembrandt did not breach the common law implied warranty of habitability.

In conclusion, we hold as a matter of law that Rembrandt did not breach any duty it owed the Figuracions under section 17.6. Even taking all inferences in the light most favorable to the Figuracions, they have failed to show that there is a genuine issue of material fact about whether Rembrandt breached any duties it owed to them. Because they have not shown that the radiator was defective, that it was in a common area, nor that it violated any applicable statute or regulation, we hold as a matter of law that Rembrandt breached no duties.

Because we affirm the summary judgment dismissal on the grounds that there is no genuine issue of material fact about whether Rembrandt breached any duties it owed to the Figuracions, we decline to reach the parties' remaining arguments about superseding and intervening causes, and the Figuracions' appeal of the denial of their partial summary judgment motion.

ATTORNEY FEES

Rembrandt requests attorney fees pursuant to RAP 18.1 and 18.9. We deny the request. RAP 18.1 allows us to award attorney fees to a party entitled to them under applicable law. No applicable law entitles Rembrandt to attorney fees. And we hold that Rembrandt is not entitled to attorney fees under 18.9 for defending this appeal, because the Figuracions' appeal is not so devoid of merit as to be frivolous.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Johanson, C.J.

Melnick, J.