No. 97325-3

SUPREME COURT
OF THE STATE OF WASHINGTON

KIMBERLY J. GERLACH, individually,

Petitioner,

v.

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

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

In the early morning hours of October 27, 2012, after a night of heavy drinking to the point that Kimberly Gerlach's blood alcohol level ("BAC") was .238, almost three times the legal limit, Gerlach fell from outside her boyfriend's second-story apartment unit at the Cove Apartments in Federal Way, owned by Cove Apartments LLC and managed by Weidner Property Management LLC ("Cove"), to the walkway below.

The Court of Appeals correctly determined that the trial court's handling of Gerlach's intoxication deprived Cove of anything resembling a fair trial on its RCW 5.40.060 defense when the trial court erred in its evidentiary decisions in connection with the defense and in instructing the jury on the law. Similarly, the trial court also erred in addressing the issues of any duty owed by Cove under the Residential Landlord Tenant Act, RCW 59.18 ("RTLA"). A new trial is necessary here.

This Court should deny review. RAP 13.4(b).

B. STATEMENT OF THE CASE

Division I correctly set forth the facts and procedure in its opinion. Op. at 2-3. It is important to note that Gerlach omits *numerous* facts salient to this Court's review decision.

On the night of October 26, 2012, and into October 27, 2012,

Gerlach went out drinking with friends including Brodie and Colin Liddell[1] and her then-boyfriend, Nathan Miller. CP 1180. They drank to excess, to the point that Gerlach's BAC was .238, approximately three times the legal limit for driving. RP 219-44. After leaving the bar, Gerlach separated from Miller while he went to buy more alcohol, and she went to his apartment with Brodie. CP 1181.

Despite the discussion in her petition that she fell while leaning against the balcony railing, nobody saw Gerlach standing on the balcony or even enter the apartment. CP 1181. Brodie was the only one who witnessed the fall, but he saw her just before she hit the ground – he did not see her leaning against the balcony before the fall. RP 719. Gerlach herself suffered from retrograde amnesia and could not remember anything that happened the night of the accident. CP 1181; RP 2689. Gerlach did not have a key to Miller's apartment. CP 519. And the evidence showed that she never entered the apartment – the lights were off, the door was closed, and Gerlach was still wearing her coat, scarf and purse after the fall. RP 2384, 3005-06, 3059-64; Ex. 139.

Cove adduced evidence showing that Gerlach fell while negligently attempting to climb over the railing to enter the apartment

[1] Brodie Liddell and Colin Liddell are referred to by their first names for purposes of clarity; no disrespect is intended.

through a sliding door on the balcony, as she had done before. CP 1186. Miller told a neighbor that Gerlach must have been trying to climb over the railing because she did not have the apartment key. CP 518-19, 1182. In fact, when he first saw her on the ground he exclaimed, "Why did you do it? I was right behind you!" CP 1181-82.[2] This evidence plainly supported Cove's position. At trial, Cove's expert also explained why Gerlach's version of events was inconsistent with her landing position and the injuries she sustained. Rather, Gerlach was attempting to climb onto the balcony from the outside walkway. RP 2997-98, 3000-01.

Despite her retrograde amnesia and not remembering anything that happened the night of her accident, CP 1182, Gerlach asserts in her petition at 4 that she fell over and off of the apartment balcony. More specifically, she alleged that she entered Miller's apartment, went out on the balcony, and leaned against the balcony railing, causing it to give way. CP 1183. She pointed to the existence of rot in the cap to which the railing is secured and alleged that the rot was the sole proximate cause of her fall. *Id.*

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[2] The trial court refused to allow the neighbor to relate Miller's excited utterance to the jury. CP 1552. However, evidencing its less than even handed approach to the evidence, the court permitted Colin, over objection, to testify that Brodie told him at the scene that he saw Gerlach leaning on the balcony railing, as an excited utterance. RP 1485-88. This directly contradicted Brodie's sworn testimony that he *only* saw Gerlach land on the ground. RP 718. The trial court also allowed the admission of statements made by Brodie at the scene to officers as excited utterances. RP 1433-39.

However, Gerlach's petition ignores the fact that her version of events was vigorously disputed below for the reasons noted above. There was evidence that Gerlach never entered the apartment, and her landing position and injuries were inconsistent with a fall from the position she claims to have been in (*i.e.* standing on the balcony and leaning against the railing). Miller testified that he and Gerlach often leaned against the railings. RP 2407-09.

As for Gerlach's claim that her fall was caused by rot in the cap to which the railing was secured, an assertion she repeatedly makes in her petition, Cove management inspected the balcony railings once a year. Ex. 119, 125. Miller reviewed the apartment upon moving in. Ex. 112. There is no evidence that Cove actually knew of the rot in the cap or elsewhere on the apartment's balcony.

Cove moved for summary judgment on the duty owed by Cove as a landlord under the RLTA. CP 43-240. Gerlach largely did not contest that she was not a tenant, but instead asserted that Cove "waived" her non-tenant status by accepting some payments directly from her. CP 296-97. Cove's Crystal Hammond testified this was not unusual. CP 668. The trial court granted Cove's motion as to Gerlach's theory of recovery

arising out of the lease agreement,[3] but denied the motion as to any RLTA claims on April 10, 2017. CP 676-77.

Gerlach's petition glosses over the trial court's failure to address the evidence of her intoxication, including its decision to either exclude or severely curtail admission of testimony from Cove's experts, Dr. Michael Carhart and Dr. Frank Vicenzi on the effects of her extreme intoxication. Gerlach moved to strike Cove's affirmative defenses, including her comparative fault, and to exclude any evidence of her intoxication, CP 305-53, a motion aggressively opposed by Cove. CP 778-858. The trial court denied the motion as to comparative fault generally in a May 16, 2017 order. CP 882-83. However, the trial court also precluded Dr. Carhart from testifying on the effects of alcohol on Gerlach's actions. CP 883.

On extensive motions in limine, CP 938-1175, the court entered lengthy orders. CP 1539-56. The parties argued extensively about the admission of Gerlach's BAC results. RP 219-44. The court indicated its initial inclination to let in this evidence, RP 219-20, 228, but not to allow "speculation" about the effect of Gerlach's intoxication, RP 220-21, even though both Dr. Carhart and Dr. Vincenzi testified that her intoxication profoundly affected her actions at the balcony. CP 782-83. Then, the trial

[3] Gerlach did not contest dismissal of her lease contract claim. CP 295.

court indicated it would exclude Gerlach's BAC results, RP 620-26, reaffirming its earlier limitation on the Carhart testimony, and extending the limitation to Dr. Vincenzi. CP 1553.[4] However, the court later concluded the BAC results were admissible but expert testimony on their meaning would be limited. RP 1329-33.

Belatedly, after the court's ruling on the BAC results, Gerlach's counsel surfaced the idea of a "stipulation" that she was under the influence in lieu of the admission of the BAC results themselves. RP 1335-36. Cove never agreed to such a "stipulation" designed to forestall admission of Gerlach's actual BAC results. RP 1550-60. The trial court accepted Gerlach's one-sided stipulation and barred the BAC results or any Vincenzi testimony whatsoever; the court limited Carhart's testimony as well. RP 1560-64.[5] The court then told the jury that "the parties" had agreed to a stipulation that Gerlach was intoxicated, when that was untrue.

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[4] Cove made an offer of proof as to Dr. Vincenzi's testimony. RP 1529-44.

[5] That stipulation severely restricted the scope of witness examination. *E.g.*, RP 2400-04, 2715-18. The trial court deemed Dr. Carhart's testimony on the BAC results to be "speculative." CP 1553. Cove made an offer of proof on Dr. Carhart's testimony regarding the biomechanical impact of Gerlach's extreme intoxication. RP 2973-80.

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

RP 2799-2800. The court indicated that it would correct that misstatement, upon being advised of it by Cove's counsel. RP 2946-47. It then refused to do so. RP 3361-63.

After extensive argument on the issue, RP 986-1007, the trial court compounded its evidentiary error on the RCW 5.40.060 by instructing the jury on Gerlach's voluntary intoxication in general terms only in Instruction 20, CP 1225, refusing to give Cove's instructions on voluntary intoxication based on WPI instructions that informed the jury of the RCW 5.40.060 defense. CP 1223-26.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED[6]

Gerlach fails to document how any of the criteria in RAP 13.4(b)[7] are met in this case where Division I's unpublished opinion faithfully applies this Court's precedents on the intoxication defense, RAP 13.4(b)(1), and this opinion does not involve a significant issue of public importance. RAP 13.4(b)(4).

(1) Division I Correctly Ruled That the Trial Court Erred in Its Treatment of Issues Associated with RCW 5.40.060

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[6] If, and only if, this Court grants review, Cove conditionally reserves the right to raise the issues of the admission of Dr. Wickizer's expert testimony, regarding the reasonableness of Gerlach's medical expenses, and the scope of trial on remand. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 715, 845 P.2d 987 (1993) (parties may conditionally raise issues for review).

[7] This Court is fully aware of the criteria governing review set forth in RAP 13.4(b).

Gerlach's voluntary intoxication is a defense to any claim she may have against Cove. RCW 5.40.060. *See* Appendix. In numerous decisions, this Court has confirmed that the statute is designed to afford defendants a "complete defense" to any action in which the plaintiff was under the influence of alcohol, that intoxication was a proximate cause of the plaintiff's harm, and the plaintiff was more than 50% at fault.[8]

The trial court hamstrung Cove's presentation of its statutory defense, as Division I recognized, by limiting testimony on the effect of Gerlach's intoxication, excluding evidence of Gerlach's extreme level of intoxication, and instructing the jury on the significance of RCW 5.40.060.

As Division I properly noted, op. at 4-13, the trial court refused to allow Cove to present evidence of Gerlach's *extreme* intoxication at the time of her injury or any expert explanation of that BAC level when her .238 BAC far exceeded the applicable legal limitation for drinking and driving. RCW 46.61.502(1).

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[8] In *Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993), this Court applied the statute to a passenger in a car, noting no ambiguity in the statute's clear language and observing: "We are obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh." *Id.* at 841. Similarly, in a case involving a girlfriend's assault and battery claim against her boyfriend, the Court stated: "the legislature has chosen to curtail the rights of certain intoxicated persons by enacting RCW 5.40.060." *Morgan v. Johnson*, 137 Wn.2d 887, 896, 976 P.2d 619 (1999). Recently, in *Peralta v. State*, 187 Wn.2d 888, 389 P.3d 596 (2017), the Court reaffirmed the broad sweep of the statute in applying it to an intoxicated pedestrian struck by a WSP vehicle while she was on the road, noting yet again that the statute affords a "complete defense." *Id.* at 897.

BAC Results. Nothing in RCW 5.40.060 restricts or excludes evidence of a plaintiff's alcohol consumption, intoxication, or BAC results. This is because the Legislature *specifically* determined that where a defendant asserts this affirmative defense – that a plaintiff was intoxicated and that intoxication was a proximate cause of her injuries – such evidence *must* be admitted in order to prove the defense. No appellate case has determined that a court may limit a defendant's use of BAC results to document a plaintiff's intoxication in an RCW 5.40.060.[9]

Indeed, where a plaintiff sues a commercial liquor provider for overserving a patron, this Court now permits admission of the overserved patron's BAC at the time of her/his injury. *Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009).[10] It should be no different here as such

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[9] In *Geschwind*, for example, both the plaintiff's and the defendant's intoxication were before the jury in determining whether the plaintiff's intoxication was a proximate cause of his injury and whether plaintiff was more than fifty percent at fault. The defense introduced evidence of the plaintiff's 0.17 BAC result to prove proximate cause and comparative fault, and the jury found the plaintiff to be 70% at fault, barred from any recovery under RCW 5.40.060. 121 Wn.2d at 837. The evidence of plaintiff's intoxication and BAC level was presented in *Geschwind* not only as to whether the plaintiff was intoxicated, but also as to whether the plaintiff's intoxication proximately caused the injury, and to determine the plaintiff's percentage of fault, if any. The issue of contributory negligence is one for the jury. *Young v. Caravan Corp.*, 99 Wn.2d 655, 661, 663 P.2d 834, *opinion amended by* 672 P.2d 1267 (1983). Limiting Cove to arguing only that Gerlach was "intoxicated" without allowing Cove to present evidence as to the degree of her intoxication and its effect on her actions, effectively deprived Cove of the statute's defense. In *Peralta*, a case where the plaintiff admitted in requests for admissions that she was under the influence and the trial court so instructed the jury, the State Patrol nevertheless presented additional evidence of Peralta's intoxication. 187 Wn.2d at 900 n.6.

[10] There, the Court specifically found that BAC results were corroborating evidence on the question of whether a person was apparently intoxicated, the test for a

evidence would be supportive of the fact that Gerlach was intoxicated, a point on which Cove had the burden of proof under RCW 5.40.060[11] and additionally relevant on the point that Gerlach was so intoxicated that she fell off the balcony due to her own physical limitations, rather than any defect in Cove's balcony.

The central argument *repeatedly* advanced by Gerlach to support review is that Division I's opinion would allow "unverified" BAC results derived from a hospital blood draw to be admitted into evidence. But contending the blood draw was "unverified" is not only inaccurate, but the BAC results were *admissible*. Her contention that blood draws administered by medical staff for medical purposes are somehow unreliable and inadmissible is plainly wrong and misleading. Op. at 9-10. "Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Such tests are a commonplace in these days of periodic physical

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cause of action against a commercial seller of alcohol by third persons harmed by the drunk. *Id.* at 543 ("BAC evidence is relevant as corroborative and supportive of the credibility of first hand observations."). Gerlach's counsel mistakenly argued to the trial court that BAC results were inadmissible in overservice cases. RP 225-26. The trial court adopted counsel's misinterpretation of *Faust*. RP 620-26.

[11] As this Court noted in *Peralta*, to establish that the plaintiff was under the influence of intoxicating liquor at the time of the accident, the defendant must meet the definition in RCW 46.61.502 that specifically requires proof that the plaintiff's BAC exceeded 0.08. 187 Wn.2d at 894. This plainly made Gerlach's BAC results *relevant* here.

examination." *Schmerber v. Cal.*, 384 U.S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

As Division I noted, op. at 9-10, a person's intoxication may be proved in one of two ways under RCW 46.61.502. The first is a *per se* showing that the person's BAC is 0.08 or higher based on a blood or breath test performed pursuant to state toxicology standards. RCW 46.61.502(1)(a). The second is a showing using other evidence that the person is "under the influence of or affected by intoxicating liquor." RCW 46.61.502(1)(c). BAC tests performed for medical purposes are such "other evidence" of intoxication. *State v. Curran*, 116 Wn.2d 174, 185, 804 P.2d 558 (1991), *abrogated on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *State v. Charley*, 136 Wn. App. 58, 65, 147 P.3d 634 (2006), *review denied*, 161 Wn.2d 1019 (2007).

The key distinction for admissibility is who performs the test. When the State performs a test for purposes of convicting a person of DUI, it must follow toxicology standards promulgated by the state toxicologist. *Charley*, 136 Wn. App. at 67 (medical test by the State had to conform to RCW 46.61.506). But when a test is performed by medical staff for medical reasons, it is admissible as other evidence of intoxication, particularly in a civil case. *Curran*, 116 Wn.2d at 185; *State v. Donahue,* 105 Wn. App. 67, 75, 18 P.3d 608, *review denied*, 144 Wn.2d 1010

(2001).

Washington courts have routinely approved the admission of BAC results from tests performed for medical purposes over objections that they do not meet state toxicology standards. "[M]edical tests are presumed to be particularly trustworthy because the hospital relies on its staff members to competently perform their duties when making often crucial life and death decisions." *Tennant v. Roys,* 44 Wn. App. 305, 312, 722 P.2d 848 (1986). Hospital BAC results are admissible under RCW 46.61.502 as evidence of a person's intoxication. *Charley*, 136 Wn. App. at 65. The rules regarding admissibility of BAC results are less stringent in civil cases. *Donahue*, 105 Wn. App. at 75 (finding that if all blood test evidence had to conform to State toxicology standards, "evidence of a medical blood draw would never be admissible, *even in a civil case.*") (emphasis added).[12]

Critically, here, Gerlach's BAC results were the best evidence regarding Gerlach's alcohol consumption.[13]

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[12] *See also*, *State v. Reed*, 114 Wn. App. 1019, 2002 WL 31440166 at *3 (2002), *review denied*, 148 Wn.2d 1012 (2003) (upholding the trial court's decision to admit hospital BAC report for impeachment purposes because the statutory elements for BAC admissibility are only required when "intoxication is a statutory element the State is required to prove"). In the civil context, "[a]ny challenge to the reliability goes to the weight rather than the admissibility of the [hospital BAC] test which can be addressed in the cross examination." *Tennant*, 44 Wn. App. at 314.

[13] One of the friends out with Gerlach the night of the incident could not remember how long they were out or what the group drank; when asked if Gerlach was

The So-Called "Stipulation." Gerlach spends very little time arguing that the one-sided "stipulation" should have foreclosed admission of her BAC results. Pet. at 9-10. Division I correctly rejected this view. Op. at 5-6.

But, as noted *supra*, there simply was no "stipulation" that Gerlach was under the influence the night she was injured. *State v. Parra*, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993) ("[A] stipulation is an agreement between the parties to which there must be mutual assent."). The "stipulation" in this case was an entirely one-sided proposal by Gerlach's counsel after the trial court indicated that it was admitting the BAC evidence. RP 1335-36. Cove never agreed to the "stipulation" and vigorously opposed its admission in lieu of Gerlach's actual BAC results. RP 1550-60.

Gerlach tries to argue that the trial court's error in allowing a one-sided "stipulation" in lieu of her BAC results did not materially prejudice Cove. Pet. at 13-14. That argument is unpersuasive, as it ignores the critical fact that the *degree* of her intoxication, not just the fact of her

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drinking he could only answer "I know we all had a drink." RP 1496-97. When asked if Gerlach was drinking, Miller answered, "I can't speak for sure, because I didn't – I don't remember a moment I saw her, but I would guess that she was." RP 2353. Miller could not recall his own level of intoxication that night. RP 2354. Brodie, who was near to Gerlach when she fell, testified that he "[did] not remember" whether Gerlach was drinking that night and denied that he was drinking "pretty heavily" himself. RP 738-39, 756. And the officer at the scene of the accident could not "remember well enough" to testify why he wrote that Gerlach had been drinking in his report. RP 2554-55.

intoxication, was a critical aspect of Cove's defense the jury never got to hear. Washington courts have long held that when a person's intoxication is at issue, the degree to which a party is intoxicated is vitally important for the jury to consider. For example, in criminal law, a defendant's voluntary intoxication may be taken into consideration in determining whether the defendant acted with a required mental state, such as intent. RCW 9A.16.090; *State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987). Likewise, in a civil case, the degree of a plaintiff's intoxication is relevant to fault.[14]

Under RCW 5.40.060, the question is not merely whether a plaintiff was intoxicated. Rather, the jury had to determine to what degree the intoxication proximately caused her injuries. Cove could not fully present its case regarding the degree of Gerlach's negligence when it could not argue the degree to which she was intoxicated, limiting it to arguing only that Gerlach was "under the influence."

In fact, the mere stipulation to being "under the influence" fundamentally *misled the jury*. Any lay person can understand that there

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[14] *See, e.g., Geschwind*, 121 Wn.2d at 836 (BAC of passenger and driver were relevant to apportioning negligence for passenger's injury in drunken driving accident); *Morse v. Frank*, 1 Wn. App. 871, 872, 466 P.2d 166 (1970) (driver's .28 BAC test was relevant to apportioning fault to passenger who chose to ride with the obviously drunk driver).

is a difference between a BAC of .08, the *per se* threshold for driving under the influence, and .238, Gerlach's extreme intoxication.[15]

ER 403. Gerlach argues in her petition at 13 that ER 403 properly restricted the presentation of evidence of her intoxication to the jury and whether it was a proximate cause of her injuries. Division I correctly rejected that argument. Op. at 6. The Legislature determined as a matter of public policy that Gerlach's intoxication, the extent of her intoxication, and the effects of her intoxication on her actions are probative of the statutory defense, and such evidence should have been presented to the jury.

ER 403 allows a court to exclude evidence *only* where it is so *unfairly* prejudicial as to substantially outweigh the evidence's probative value. Under ER 403, the relevance of the evidence sought to be admitted is assumed. *Carson v. Fine*, 123 Wn.2d 206, 222, 867 P.2d 610 (1994). Further, the fact that the evidence may merely be prejudicial to a party is not enough to warrant its exclusion. It is important to recognize that "nearly all evidence will prejudice one side or the other in a lawsuit." *Id.*

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[15] "[I]ntoxication…is a broad and relative term. It embraces varying degrees of insobriety from 'under the influence of intoxicants' to 'dead drunk.'" *Provins v. Bevis*, 70 Wn.2d 131, 137, 422 P.2d 505 (1967) (discussing the since repealed host-guest statute); *see also*, *Lundberg v. Baumgartner*, 5 Wn.2d 619, 627, 106 P.2d 566 (1940) ("To be 'under the influence' of liquor is one thing, but to be so drunk as to necessitate [police intervention] is something quite different.").

at 224.

Proximate cause and percentages of fault under RCW 5.40.060(1) were questions for the jury. *Hansen v. Friend*, 118 Wn.2d 476, 484, 824 P.2d 483 (1992). Cove's evidence of Gerlach's voluntary intoxication, both documentary and testimonial, bore on the proof of the elements of the intoxication defense. Op. at 6. Cove therefore should have been allowed to present full evidence of Gerlach's intoxication, its degree and its effect, as both are central to proving the elements of the intoxication defense and contributory negligence more generally. The level of Gerlach's intoxication, not just the fact that she was at or above 0.08 BAC, is highly relevant to the central issues in this case. There were no grounds present to limit or restrict Cove's presentation of intoxication evidence, and it was a question of fact for the jury whether Gerlach's alcohol consumption and resulting severe intoxication were a proximate cause of her injuries, and if so, to what degree. That evidence, by its nature and given the defense of RCW 5.40.060, was not *unfairly* prejudicial within the meaning of ER 403.[16]

Cove's Experts. The trial court abused its discretion in restricting expert testimony on the effect of Gerlach's extreme intoxication on her

[16] Gerlach argued below that ER 611 foreclosed admission of the intoxication evidence. By not referencing that rule anywhere in her petition, she has abandoned the argument.

decisionmaking in connection with her fall. Division I found that the trial court erred in excluding Dr. Vincenzi's testimony, but not Dr. Carhart's. Op. at 10.[17]

Division I correctly determined Dr. Vincenzi's exclusion was error. Op. at 11-13. Dr. Vincenzi was qualified to testify. RP 1530. He was prepared to testify on the effect of Gerlach's extreme intoxication. CP 508-13, 932-37. He concluded that her intoxication more probably than not caused her fall because such an extreme level of intoxication "impaired her ability to recover from an impending fall and thus contributed to the tragic outcome." CP 512, 936. Her judgment and psychomotor function were adversely impacted by her intoxication. CP 511, 935. Nevertheless, the jury was not permitted to consider Dr. Vincenzi's testimony at all.

Washington law on the admissibility of expert testimony is set forth in three core rules. ER 702 generally establishes when expert

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[17] Cove disagrees about the significance of Dr. Carhart's testimony, and would so argue to this Court only if review were granted. *See* n.6, *supra*. Dr. Carhart was prepared to testify on the biomechanical effects of Gerlach's fall. CP 520-36. His credentials are extensive. CP 521-23. In addition to his testimony on whether Gerlach's fall occurred as a result of a rail breaking or her attempting to climb from a walkway onto a balcony, he would have testified on the significance of Gerlach's extreme intoxication on her judgment and psychomotor skills. CP 528-29. The testimony of biomechanical experts is broadly admissible. *E.g., L.M. by and through Dussault v. Hamilton*, 193 Wn.2d 113, 436 P.3d 803 (2019) (biomechanical expert's testimony on forces involved in childbirth admissible).

testimony may be utilized at trial. ER 704 authorizes an expert to testify on an ultimate fact issue the trier of fact must resolve. ER 703 allows an expert to base his or her testimony on facts received before the hearing in the case and may even include facts not otherwise admissible. Since *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), Washington has employed a three-part test to determine if expert testimony is admissible: (1) is the witness qualified to testify as an expert? (2) is the expert's theory based on a theory generally accepted in the scientific community? and (3) would the testimony be helpful to the trier of fact? *Accord, Philippides v. Bernard,* 151 Wn.2d 376, 393, 88 P.3d 939 (2004); *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013). Washington decisional law on these rules expresses a liberal policy in favor of admission.[18]

Division I correctly recognized that the trial court improperly limited Dr. Vincenzi's testimony. Op. at 11-13. His testimony on the

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[18] *See, e.g., Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014) (expert testimony on biomechanical forces admissible); *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 393 P.3d 776 (2017) (trial court abused its discretion in excluding the expert testimony of an advanced registered nurse practitioner on proximate cause in a medical negligence case). *See also, Gonzalez-Mendoza v. Burdick*, 175 Wn. App. 1038, 2013 WL 3477281 (2013) (biomechanical forces expert testimony admissible); *Taylor v. Bell*, 185 Wn. App. 270, 286-87, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012 (2015) (trial court erred in excluding testimony of law professor who was not licensed in Washington although he had extensive experience on multi-jurisdictional corporate practice); *Ponce v. The Mountaineers*, 190 Wn. App. 1048, 2015 WL 6684507 (2015), *review denied*, 185 Wn.2d 1019 (2016) (expert testimony on industry custom in winter recreation industry).

effect of Gerlach's extreme intoxication on her behavior should have been admitted. This evidence was plainly relevant to how Gerlach fell, but more critically, it was highly relevant as to whether her intoxication was a proximate cause of her fall and injuries and the percentage of fault attributable to her own conduct, the key elements of an RCW 5.40.060 defense.

Instructional Error. Rather than give the WPI instructions on the RCW 5.40.060 defense requested by Cove, CP 1532-38, the trial court gave a single instruction on the statutory defense, Instruction 20 (*see* Appendix), CP 1225, and it is an incorrect statement of the law on a plaintiff's voluntary intoxication under RCW 5.40.060. Cove was entitled to instructions like the ones it proposed based on WPIs[19] (*see* Appendix) that advised the jury of the significance of Gerlach's voluntary intoxication *under the statute*. The trial court refused to give those instructions. RP 3513-14. Division I did not find that the trial court's failure to give these specific WPI instructions on the RCW 5.40.060, or similar instructions derived from the statute or case law,[20] was prejudicial

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[19] For example, WPI 16.03 discloses the existence of the defense to the jury, as did Cove's proposed instruction 18. CP 1223. Similarly, WPI 16.04 defines for the jury proof of being under the influence of alcohol, as did Cove's proposed instruction 19. CP 1224. WPI 16.05 defined being under the influence, as did Cove's proposed instruction 20. CP 1225.

[20] *See, e.g.*, Cove's proposed instruction 21 and supplemental instructions. CP 1226, 1749-50. Cove offered those proposed supplemental instructions after the trial

error, op. at 16-18, but it indicated that WPI 16.03 has "a more succinct statement of elements" of the statutory defense and should be used on remand. *Id.* at 18.

Gerlach only addresses the trial court's instructional error in a footnote. Pet. at 17 n.2. The trial court's treatment of the jury instructions was yet another example of how the trial court had its "thumb on the scale" as to Cove's presentation of its RCW 5.40.060 defense.[21]

In sum, in multiple ways, the trial court severely hobbled Cove's presentation of its RCW 5.40.060 defense. Division I was correct in determining that Cove was entitled to a new trial, and review is not merited. RAP 13.4(b).

(2) Division I Correctly Ruled That the Trial Court Erred in Basing Any Duty Cove Owed to Gerlach on the RLTA

Gerlach also contends that Division I erred in determining that the trial court erred in denying Cove's motion for partial summary judgment. CP 676-77. Pet. at 17-20. In particular, the trial court erred in concluding that an action for damages could arise out of an alleged violation of the

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court decided to allow Gerlach's admission that she was under the influence. The court declined to explain the significance of the admission by those instructions. RP 1792-93, 2785-87.

[21] Cove will present this issue only if the Court grants review. *See* n.6, *supra*.

RLTA, particularly for a person who was not a tenant.[22] Division I correctly determined that the trial court erred. Op. at 18-20.

Gerlach was not Cove's tenant. She never signed a written lease agreement with Cove; only Miller did so.[23] That lease expressly stated and required that Miller would be the *only* person to occupy the apartment. CP 222. The terms of the lease agreement were never modified to include Gerlach as a tenant. CP 161. She never made an application to reside at the Cove Apartments. *Id.* She never signed a lease agreement with Cove. *Id.*[24]

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[22] The trial court so instructed the jury on the implied warranty of habitability in Instruction 13. CP 1873. The trial court compounded its error by instructing the jury that a landlord could be liable in tort to third persons for violation of statutes and codes. The trial court instructed the jury on Cove's potential negligence based on statute in Instructions 15 and 16. CP 1875-76. That liability was only predicated on RLTA landlord obligations. *Id.* *See* Appendix.

[23] On May 1, 2009, Miller entered into a lease agreement with Cove Apartments to rent the apartment at issue. His lease agreement was for one adult (himself). He paid a separate fee for Gerlach's black lab, which he expected she would bring with her when she visited. CP 159-60, 163-83. The next year, on May 1, 2010, Miller signed a new lease agreement with Cove. His lease agreement was for himself and one dog. CP 160, 185-202. His 2011 lease, signed on December 27, 2010, was again for himself and one pet. CP 160, 203-21. On September 1, 2011, Miller signed a lease with Cove, again, for himself and the dog. CP 160-61, 222-40. This was the lease agreement in effect at the time of Gerlach's fall.

[24] That Gerlach was not a Cove Apartments tenant is amply supported on the record. Gerlach and Miller conceded that neither of them remember ever telling Cove management that Gerlach was living in Miller's apartment. CP 53, 59-60, 61-62, 66. Gerlach generally received all of her mail at her parents' house. CP 52-53, 57-58. On one occasion, Cove received a package addressed to Gerlach at Miller's address. CP 70-71. When Cove's former community director, Doris Johnson, asked Miller whether Gerlach was living with him, Miller denied it and said she had her own place. CP 53, 71. The police report from the night of the accident listed Gerlach's address as her parents' address. CP 53, 73.

Gerlach confuses the RLTA's purpose with the general purposes of premises liability law. Washington premises liability law is well-developed in our common law. *Adamson v. Port of Bellingham*, 193 Wn.2d 178, 438 P.3d 522 (2019). But the RLTA addresses relationships between landlords and tenants. The RLTA itself does not specifically afford a non-tenant any right to relief in tort. It is not meant to be a general statute supplanting common law premises liability law.

The trial court correctly discerned on summary judgment that Cove did not breach a lease agreement with Gerlach, an agreement that did not exist, CP 676-77, but it erred in broadly applying the remedies of the RLTA to a non-tenant like Gerlach, as Division I noted. Op. at 18-20.

The RLTA defines a tenant as "any person who is *entitled to occupy a dwelling unit* primarily for living or dwelling purposes *under a rental agreement*." RCW 59.18.030(27) (emphasis added).[25] The RLTA provides *a tenant* various remedies for problems associated with the tenant's premises. RCW 59.18.060.[26]

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[25] A "rental agreement" is defined as "all agreements which establish or modify the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit." RCW 59.18.030(25).

[26] The RLTA is the exclusive basis for tenant remedies, *Aspon v. Loomis*, 62 Wn. App. 818, 816 P.2d 751 (1991), *review denied*, 118 Wn.2d 1015 (1992) (landlord's duties are exclusively articulated in the RLTA and because it was not expressly referenced in the RLTA, a tenant could not recover for burns incurred from brushing up against a hot pipe in a common area; insulation of pipes was not a landlord duty in RCW 59.18.060).

In *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001), a split Division III addressed the question of the remedies afforded a tenant injured in a case involving a fall on steps outside the tenant's apartment. That court noted that the RLTA did not create a generally actionable duty on the part of the landlord to keep the premises fit for habitation; rather, the landlord's duties were limited to those set forth in RCW 59.18.060. *Id.* at 816. But the court expanded common law relief available to a tenant, however, by adopting the *Restatement (2d) of Property* § 17.6 under an implied warranty of habitability analysis. *Accord*, *Lian v. Stalick*, 115 Wn. App. 590, 62 P.3d 933 (2003).

Gerlach cites *no Washington case*, however, that has applied the *Lian* analysis to a *non-tenant*. She acknowledges this fact in her petition at 18 n.3. *See also*, *Pruitt v. Savage*, 128 Wn. App. 327, 332, 115 P.3d 1000 (2005) (the *Lian* court "was not asked to decide, and did not decide, whether the implied warranty of habitability should be extended to persons other than the tenant."); *Johnson v. Miller*, 178 Wn. App. 1045, 2014 WL 129263 (2014) (Division II declines to extend § 17.6 to non-tenants); *Phillips v. Greco*, 7 Wn. App. 2d 1, 433 P.3d 509 (2019) (same).

The RLTA was designed to regulate the contractual relationships between Washington landlords and tenants. It was not intended to create a general premises liability statute allowing non-tenants to recover damages

in tort. Gerlach had ample grounds under common law premises liability principles against which to proceed against Cove. Division I correctly concluded that the trial court should have granted summary judgment to Cove on the RLTA and should not have instructed the jury in Instructions 13-16 based on the RLTA. Op. at 20.[27]

D. CONCLUSION

The Court of Appeals correctly determined that the trial court deprived Cove of a fair trial by frustrating its presentation of its RCW 5.40.060 defense and mischaracterizing its duty to Gerlach under the RLTA. This Court should deny review. Costs on appeal should be awarded to Cove.

DATED this 8th day of July, 2019.

Respectfully submitted,

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[27] Those instructions were prejudicial to Cove. While Cove has not challenged the trial court's other instructions on its duty to Gerlach, the jury found liability against Cove on an undifferentiated basis as between Gerlach's theories of negligence. CP 1888. This Court cannot know if the reason for the jury's decision was common law premises liability or the incorrect statements of law found in Instructions 13-16.

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APPENDIX

RCW 5.40.060:

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

RCW 59.18.060:

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

(1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition endangers or impairs the health or safety of the tenant;

(2) Maintain the structural components including, but not limited to, the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable;

(3) Keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident;

(4) Provide a reasonable program for the control of infestation by insects, rodents, and other pests at the initiation of the tenancy and, except in the case of a single-family residence, control infestation during tenancy except where such infestation is caused by the tenant;

(5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the

commencement of the tenancy;

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

(7) Maintain and safeguard with reasonable care any master key or duplicate keys to the dwelling unit;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(15) Designate to the tenant the name and address of the person who is the landlord by a statement on the rental agreement or by a notice conspicuously posted on the premises. The tenant shall be notified immediately of any changes in writing, which must be either (a) delivered personally to the tenant or (b) mailed to the tenant and conspicuously posted on the premises. If the person designated in this section does not

reside in the state where the premises are located, there shall also be designated a person who resides in the county who is authorized to act as an agent for the purposes of service of notices and process, and if no designation is made of a person to act as agent, then the person to whom rental payments are to be made shall be considered such agent. Regardless of such designation, any owner who resides outside the state and who violates a provision of this chapter is deemed to have submitted himself or herself to the jurisdiction of the courts of this state and personal service of any process may be made on the owner outside the state with the same force and effect as personal service within the state. Any summons or process served out-of-state must contain the same information and be served in the same manner as personal service of summons or process served within the state, except the summons or process must require the party to appear and answer within sixty days after such personal service out of the state. In an action for a violation of this chapter that is filed under chapter 12.40 RCW, service of the notice of claim outside the state must contain the same information and be served in the same manner as required under chapter 12.40 RCW, except the date on which the party is required to appear must not be less than sixty days from the date of service of the notice of claim.

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

Instruction 13:

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

(1) An implied warranty of habitability or

(2) The condition was dangerous, and violated one or more of the

following statutory duties:

(A) [To] maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition endangers or impairs the health or safety of the tenant;

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

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

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

CP 1873.

Instruction 14:

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

CP 1874.

Instruction 15:

Administrative Rules provides that:

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

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

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

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

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

...

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

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

CP 1875.

Instruction 16:

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

CP 1876.

Instruction 20:

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

CP 1880.

Defendants' Proposed Number 18:

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

CP 1223.

Defendants' Proposed Number 19:

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

CP 1224.

Defendants' Proposed Number 20:

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

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

CP 1225.

Defendants' Proposed Number 21:

To establish the defense that the person injured was under the

influence, the defendant has the burden of proving each of the following propositions:

First, that the person injured was under the influence of alcohol or any drug at the time of the occurrence causing the injury;

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

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

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

CP 1226.

Defendants' Proposed Supplemental Instruction:

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

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

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

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

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

CP 1750.

Defendants' Proposed Supplemental Instruction:

A person is under the influence of alcohol or any drug if, as a

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

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

CP 1749.

5/13/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KIMBERLY J. GERLACH, Respondent, v. THE COVE APARTMENTS, LLC, a Washington corporation; and WEIDNER PROPERTY MANAGEMENT, LLC, a Washington corporation, Appellants, and WEIDNER APARTMENT HOMES, a Washington business entity, dba The Cove Apartments, and WEIDNER ASSET MANAGEMENT LLC, a Washington corporation, Defendants.	No. 77179-5-I DIVISION ONE PUBLISHED OPINION FILED: May 13, 2019

SMITH, J. — Kimberly Gerlach sued The Cove Apartments LLC and Weidner Property Management LLC (collectively Cove) after she fell from a second story apartment balcony with a rotted railing and suffered life threatening injuries. Gerlach was extremely intoxicated at the time of the fall. At trial, Cove sought to limit its liability by proving that Gerlach's intoxication was the proximate cause of her damages and that she was more than 50 percent at fault, in accordance with the affirmative defense of voluntary intoxication under

RCW 5.40.060(1). Because the trial court abused its discretion by excluding evidence of Gerlach's blood alcohol level at the time of the accident and that exclusion prejudiced Cove's ability to prove Gerlach's intoxication proximately caused her injuries, we reverse and remand for a new trial.

FACTS

On October 26, 2012, Gerlach and her boyfriend Nathan Miller, along with Colin and Brodie Liddell,[1] went to a birthday party and then to a bar within walking distance of Miller's apartment. Miller lived in a second story unit at The Cove Apartments in Federal Way, which were owned by The Cove Apartments LLC and managed by Weider Property Management LLC. After the bar closed in the early hours of October 27, Miller and Colin stopped by a convenience store to buy beer, while Gerlach and Brodie returned to Miller's apartment. Brodie stopped to smoke a cigarette before going inside. While he was smoking, he heard a snap and turned in time to see Gerlach in midair, just before she landed head-first on a concrete step on the ground floor. A rotted railing from Miller's balcony also fell near Gerlach. Gerlach suffered a life threatening head injury as a result of the fall.

Gerlach sued Cove, alleging breach of contract, violations of the Residential Landlord-Tenant Act of 1973 (RLTA), chapter 59.18 RCW, and negligence. The breach of contract claim was dismissed on summary judgment because Gerlach was not a tenant and had no contractual relationship with Cove.

[1] Because Colin and Brodie Liddell have the same last name, this opinion refers to each by his first name.

Although no one witnessed how Gerlach fell and Gerlach does not remember the events of that night, her theory at trial was that the severely rotted railing on Miller's balcony gave way while she was leaning on it, causing her to fall to the ground. Relying on testimony from a biomechanical expert, Cove proffered an alternative theory: that Gerlach did not have a key to the front door, tried to enter the apartment via the balcony, and fell while trying to climb over the balcony railing from the outside. This theory supported Cove's affirmative defense under RCW 5.40.060(1) that Gerlach was intoxicated at the time of the accident, her intoxication was a proximate cause of her injuries, and she was more than 50 percent at fault. To this end, Cove attempted to introduce evidence that Gerlach's blood alcohol concentration (BAC) at the time of the accident was .238 and expert testimony on how a BAC of that level would affect a person's judgment, psychomotor functions, and cognitive abilities. The trial court excluded this evidence and testimony because it found they were more prejudicial than probative. Instead, the trial court instructed the jury that Gerlach "was under the influence of intoxicating liquor at the time of the accident."

The jury found that Cove was negligent and that its negligence proximately caused Gerlach's injuries. It also found that Gerlach was contributorily negligent and seven percent at fault. The jury verdict was $3,799,793.78, and the net award to Gerlach was $3,533,808.23.

Cove appeals.

ANALYSIS

Exclusion of Gerlach's Blood Alcohol Level

Cove argues that the trial court abused its discretion by excluding evidence of Gerlach's blood alcohol level and that the exclusion was prejudicial. We agree.

We reverse a trial court's evidentiary rulings only upon a showing of abuse of discretion. Subia v. Riveland, 104 Wn. App. 105, 113-14, 15 P.3d 658 (2001). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). But an error does not require reversal unless it is prejudicial, and "[e]rror will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

"All relevant evidence is admissible unless its admissibility is otherwise limited." Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 669, 230 P.3d 583 (2010); ER 402. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Salas, 168 Wn.2d at 669 (quoting ER 401). ER 403 allows a trial court to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." Salas, 168 Wn.2d at 671.

Where evidence is undeniably probative of a central issue in the case, the ability of the danger of unfair prejudice to substantially outweigh the probative value of the evidence is "'quite slim.'" Sisley v. Seattle Sch. Dist. No. 1, 171 Wn. App. 227, 232, 286 P.3d 974 (2012) (internal quotation marks omitted) (quoting Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994)).

Here, Cove asserted a voluntary intoxication defense against Gerlach. This defense, codified as RCW 5.40.060(1), provides a complete defense to Gerlach's action for personal injury if she was intoxicated, her intoxication was a proximate cause of her injury, and she was more than 50 percent at fault. RCW 5.40.060(1) states:

> [I]t is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault.

Before trial, Gerlach moved in limine to exclude evidence of a blood test taken by the hospital less than an hour after the accident. The test showed that her serum alcohol measurement was 252 mg/dL, which roughly translates to a BAC of .238. After several hearings, the trial court granted Gerlach's motion because Gerlach offered to stipulate to the jury that she was intoxicated at the time of the accident. The court determined that if Gerlach admitted she was intoxicated, evidence of her blood alcohol level was not necessary to establish a defense under RCW 5.40.060(1). The trial court explained that, under Peralta v. State, 187 Wn.2d 888, 389 P.3d 596 (2017), an admission of intoxication was sufficient to establish intoxication under RCW 5.40.060(1) and the admission of

Gerlach's blood alcohol level would have been more prejudicial than probative under ER 403. Because the trial court misapplied Peralta and ER 403, its exclusion of the blood alcohol evidence was an abuse of discretion.

ER 403 does not support the exclusion of the blood alcohol evidence. Although evidence of Gerlach's blood alcohol level was irrelevant to establish intoxication once she admitted that she was intoxicated, that evidence was still relevant to prove the extent to which her intoxication proximately caused her injuries. To that end, Cove was prepared to offer expert testimony that a person's physical and cognitive limitations at a BAC of .238 make it less likely that she could safely stand on a balcony or climb over a railing. Although Gerlach's high blood alcohol level could stimulate an emotional response in a jury, it is not so prejudicial that its probative value is outweighed. Because Gerlach's percentage of fault was reserved for the jury, the jury should have been able to consider Gerlach's level of intoxication and how it may have affected her physical and cognitive abilities. Geschwind v. Flanagan, 121 Wn.2d 833, 837-38, 854 P.2d 1061 (1993) (the determination of the percentage of total fault attributable to each party is specifically reserved for the trier of fact).

Furthermore, the trial court's error in excluding the blood alcohol evidence affected the outcome of the trial. Because of the error, Cove did not have the opportunity to present evidence on a key factual issue: whether Gerlach was predominantly liable for her injuries due to her level of intoxication. See Geschwind, 121 Wn.2d at 839 ("[W]hen a person has voluntarily engaged in behavior which increases the risk of injury, he or she may be held to be

predominantly liable for the injuries occurring as a result thereof."). Therefore, the error was not harmless.

Additionally, the trial court's reliance on Peralta was misplaced. In Peralta, a Washington State Patrol car hit Deborah Peralta after she walked directly into the street and in front of the car. Peralta, 187 Wn.2d at 892. Peralta sued the State for damages, and the State raised the voluntary intoxication defense in its answer. Peralta, 187 Wn.2d at 892. During discovery, the State sent Peralta a request to admit or deny that at the time of the collision, she "'was under the influence of intoxicating liquors.'" Peralta, 187 Wn.2d at 893. Peralta admitted without qualification that she was. Peralta, 187 Wn.2d at 893. Based on this admission, the trial court concluded as a matter of law that the first element of RCW 5.40.060(1) was met and it excluded Peralta's evidence that she did not appear intoxicated before the accident. Peralta, 187 Wn.2d at 893-94. The Supreme Court held that Peralta's admission was clearly an admission of intoxication under RCW 5.40.060(1). Peralta, 187 Wn.2d at 899. It also held that if she did not intend to admit "intoxication" as that term is statutorily defined (i.e., having a BAC greater than .08 or being unable to drive a motor vehicle), Peralta was required to clarify her admission to reflect that distinction. Peralta, 187 Wn.2d at 904-05. Because it was not relevant to the issues on appeal, the court did not address whether Peralta's level of intoxication contributed to the jury's finding that her intoxication was a proximate cause of her injuries or its finding that she was more than 50 percent at fault. But the Supreme Court did note that there was ample evidence to support the State's voluntary intoxication

defense, meaning there was evidence, other than Peralta's admission, of her intoxication presented at trial. Peralta, 187 Wn.2d at 900 n.6. Here, by contrast, the exclusion of Gerlach's blood alcohol evidence resulted in a complete absence of evidence as to the extent of her intoxication. For this reason, Peralta does not support the trial court's decision to exclude Gerlach's blood alcohol level.

Gerlach argues that even if the trial court erred in excluding the blood alcohol evidence, the error did not prejudice Cove because Cove "extensively examined Gerlach's companions concerning the extent and degree of their alcohol consumption before returning to the Cove." The record does not support this contention. None of Gerlach's companions testified as to how many drinks Gerlach consumed that night or that she was extremely intoxicated. For example, Brodie testified that Gerlach was drinking that night but that he could not remember what she had to drink. Colin testified that they all "had a drink" at the birthday party and shared a pitcher of beer at the bar and that based on his own observations, he had no reason to believe Gerlach was impaired that night. Finally, Miller testified that he couldn't remember Gerlach drinking but "would guess that she was." The lack of evidence of Gerlach's degree of intoxication prejudiced Cove's ability to prove its affirmative defense.

Alternatively, Gerlach argues that evidence of her blood alcohol level was properly excluded because there was no evidence that the required standards were met. This argument is not persuasive.

RCW 5.40.060(1) provides that for purposes of the voluntary intoxication defense,

> [t]he standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

RCW 46.61.502 states:

> (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
>
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
>
> . . . .
>
> (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
>
> (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

Notably, only subsection (1)(a) of RCW 46.61.502, which sets forth the standard for "per se" intoxication, refers to specific testing standards that must be met for a person's measured level of intoxication to be used against him or her at trial. These testing standards, which are set forth in RCW 46.61.506, need not be met to show that someone is intoxicated under a non-per-se method such as that described in subsection (1)(c) of RCW 46.61.502. State v. Donahue, 105 Wn. App. 67, 76-77, 18 P.3d 608 (2001) (holding that evidence of intoxication from an Oregon hospital blood alcohol test that did not comply with RCW 46.61.506 standards was admissible to prove a non-per-se offense under RCW 46.61.502).

At trial, Cove specifically argued that Gerlach's blood alcohol evidence could be proved using the non-per-se method under RCW 46.61.502(1)(c). Because the blood alcohol evidence in this case could be evidence of intoxication under that non-per-se method, the test used need not comply with the requirements of RCW 46.61.506 to be admissible. This was not a proper basis for excluding the evidence.

Because the trial court abused its discretion in excluding the evidence of Gerlach's blood alcohol level at the time of the accident and the exclusion prejudiced Cove's ability to prove its affirmative defense of voluntary intoxication, reversal is required. We address the following issues, also raised on appeal, because they are likely to arise again on remand.

Expert Testimony

Cove argues that the trial court abused its discretion by limiting the testimony of Cove's experts, Dr. Frank Vincenzi, Dr. Michael Carhart, and Dr. Thomas Wickizer. We agree that the trial court erred in limiting Dr. Vincenzi's testimony but disagree as to the testimony of Dr. Carhart and Dr. Wickizer.

"Generally, expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact." Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 352, 333 P.3d 388 (2014). "When applying this test, trial courts are afforded wide discretion, and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion." Johnston-Forbes, 181 Wn.2d at 355.

If a witness does not have the specialized training or experience necessary to draw the inference offered, the opinion lacks a proper foundation and is inadmissible under ER 702. Simmons v. City of Othello, 199 Wn. App. 384, 392-93, 399 P.3d 546 (2017). Accordingly, even if an expert witness is qualified, testimony from that witness is not admissible if the issue lies outside the witness's area of expertise. Simmons, 199 Wn. App. at 392. "'Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.'" Simmons, 199 Wn. App. at 393 (quoting Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 103, 891 P.2d 718 (1995)).

Dr. Vincenzi

On appeal, the parties do not dispute that Dr. Vincenzi was a qualified expert as to the effects of alcohol upon the human body. Dr. Vincenzi completed an analysis that included a conversion of Gerlach's serum alcohol measurement of 252 mg/dL at the hospital to the more commonly used BAC number of .238 at the time of the accident. He also testified in an offer of proof as to the effect of the consumption of alcohol on a person based on his or her blood alcohol level. He opined that a person with a BAC of .200 or higher would experience severe psychomotor impairment.

The trial court excluded Dr. Vincenzi's testimony at the same time that it erroneously excluded the evidence of Gerlach's blood alcohol level. Dr. Vincenzi's testimony would have been helpful to the jury in understanding the effects of intoxication on a person with a high blood alcohol level. To the extent

that the trial court excluded Dr. Vincenzi's testimony based on its erroneous ruling on Gerlach's blood alcohol level, that exclusion was in error.

Gerlach argues that Dr. Vincenzi's testimony was speculative and without foundation because it was based on the hospital blood test that did not comply with the testing standards of RCW 46.61.506. As explained in the previous section, those testing standards do not bar admission. Therefore, this argument is not persuasive.

Gerlach also argues that Dr. Vincenzi's testimony was properly excluded based on Purchase v. Meyer, 108 Wn.2d 220, 737 P.2d 661 (1987), because evidence of how alcohol affected a person's behavior cannot be based on a blood alcohol test alone. But Purchase was a dramshop liability case and is distinguishable. To find an establishment liable for over-serving alcohol under a dramshop theory, a plaintiff must prove that a server furnished intoxicating beverages to an obviously intoxicated person. Purchase, 108 Wn.2d at 225. In Purchase, the relevant issue was whether or not it was obvious to a server that the person being served was intoxicated. Purchase, 108 Wn.2d at 227. The court held that evidence of a person's blood alcohol level alone could not support a finding that a person was "obviously intoxicated" because people can exhibit the effects of intoxication differently. Purchase, 108 Wn.2d at 225-27.

This is not a dramshop liability case, and here, there is no requirement that Cove prove Gerlach's intoxication was obvious to others. Rather, the issue in this case is the extent to which Gerlach's extreme intoxication contributed to her injuries. Therefore, Purchase does not control.

Finally, Gerlach argues that Dr. Vincenzi's testimony was properly excluded because testimony explaining that alcohol impairs a person's judgment is a matter of common knowledge understood by the average juror and, therefore, not helpful. But, Dr. Vincenzi's testimony was not limited to this basic fact. He explained that a person with a blood alcohol level of .200 or above will have a decrease in inhibitions, psychomotor impairment, and cognitive impairment. He also opined that "[p]sychomotor impairment really starts at levels of .05 (unintelligible), about .05 to .06 or thereabouts and gets worse and worse, more and more impairment, and severe impairment in essentially everyone at levels of [.]200 or above." Dr. Vincenzi's opinion on how a person's physical and cognitive abilities are affected by his or her BAC would have been helpful to the jury and should have been admitted.

Dr. Carhart

The trial court did not err in limiting Dr. Carhart's testimony. Dr. Carhart is an expert "in the biomechanics of human injury and accident reconstruction, specializing in the areas of musculoskeletal dynamics, occupant dynamics, human injury tolerance, vehicular rollover, and occupant-to-glazing interaction." Dr. Carhart was prepared to testify that Gerlach's intoxication would have caused her to have "diminished stability, psychomotor functioning, reaction time performance, and ability to manage complex motor tasks, such as trying to maneuver over a railing." He based this opinion on two studies that he cited as authoritative sources. But Dr. Carhart is not an expert in how alcohol affects the

human body, and his testimony on this issue would have been speculative. Therefore, the trial court properly excluded Dr. Carhart's testimony on this issue.

Dr. Wickizer

The trial court also did not abuse its discretion by excluding Dr. Wickizer's expert testimony on the reasonable value of Gerlach's medical expenses.

A plaintiff "may recover only the reasonable value of medical services received, not the total of all bills paid." Patterson v. Horton, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997). "Thus, the plaintiff must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills." Patterson, 84 Wn. App. at 543. "In other words, medical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and the bills were both necessary and reasonable." Patterson, 84 Wn. App. at 543.

Here, Cove intended to call Dr. Wickizer, a health economist, as an expert witness to testify about the medical billing process and provide a comparative analysis of the cost of medical services. Specifically, Dr. Wickizer authored an analysis on the reasonableness of Gerlach's medical expenses, in which he explained that billing for the same procedures can vary greatly from hospital to hospital and the billed amount is not necessarily reasonable. In the analysis, he recalculated the "reasonable value" of all of Gerlach's medical expenses by applying a cost-to-charge ratio from the hospital's Federal Cost Report to each hospital inpatient charge. The Federal Cost Reports are compiled by the federal government and include cost and revenue information for all patients receiving

care at that hospital. Additionally, Dr. Wickizer estimated the reasonable value of Gerlach's physician charges by applying the physician's agreed Medicare reimbursement rate to each physician charge. Cove intended this testimony to assist the jury in evaluating the reasonableness of Gerlach's medical bills.

The trial court properly excluded Dr. Wickizer's testimony. Evidence of what Gerlach's physicians accept from Medicaid and how the inpatient charges are affected by Dr. Wickizer's cost-to-charge ratio is not proof that Gerlach's medical expenses were unreasonable. In Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 616, 20 P.3d 496 (2001), the Court of Appeals held that the trial court did not abuse its discretion in refusing to admit evidence of the amount a plaintiff's doctor actually accepted as payment from the insurance company to refute the reasonableness of the billed medical expenses. It reasoned that "[t]he fact that the doctor accepted the first party insurance carrier's limit for his services does not tend to prove his charge for these services was unreasonable." Hayes, 105 Wn. App. at 616.

The same is true here. Evidence that, on average, a procedure costs less than the amount charged or that Gerlach's physicians accept a lesser payment for services from Medicare is not helpful to the jury in determining whether her medical expenses were reasonable. Furthermore, Gerlach met her burden to prove the reasonableness of her medical expenses under Patterson because she presented expert testimony other than the medical records and bills themselves. Dr. Lowell Finkleman testified that the medical treatment Gerlach received and the resulting charges were reasonable and customary for this community and

consistent with charges he had seen over the years. Therefore, the trial court did not abuse its discretion by refusing to allow Dr. Wickizer to testify.

Cove argues that Hayes is distinguishable because Dr. Wickizer was not testifying on what was charged versus what was paid. We disagree. Although it is not clear from Dr. Wickizer's analysis whether the revenue figure used in the cost-to-charge ratios reflects the amounts billed or the amounts ultimately received for inpatient services, Dr. Wickizer's analysis of Gerlach's physician charges was based on the physicians' agreed Medicare reimbursement rate. Therefore, the court did not abuse its discretion in refusing to allow Dr. Wickizer to testify as to his analysis.

Instruction on Voluntary Intoxication

Cove argues that the trial court erred by failing to give Cove's proposed jury instruction on its voluntary intoxication defense, which closely followed the pattern instruction. We disagree.

Jury instructions are sufficient when they allow a party to argue their theory of the case, are not misleading and, when read as a whole, properly inform the jury of the applicable law. Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). As long as these conditions are met, the trial court may refuse to give augmenting instructions or instructions that are cumulative, collateral, or repetitive. Bodin, 130 Wn.2d at 732; Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 165-66, 876 P.2d 435 (1994). "'The pattern [jury] instructions are not authoritative primary sources of the law' and are not binding on trial courts." Univ. of Wash. v. Gov't Emps. Ins. Co., 200 Wn. App. 455, 475, 404

P.3d 559 (2017) (alteration in original) (quoting 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 0.10, at 3 (6th ed. 2012)).

Whether a jury instruction reflects an accurate statement of law is reviewed de novo. Joyce v. Dep't of Corrs., 155 Wn.2d 306, 323, 119 P.3d 825 (2005). But "'[t]he number and specific language of the instructions are matters left to the trial court's discretion.'" Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 809, 872 P.2d 507 (1994) (quoting Douglas v. Freeman, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991)).

The pattern instruction for the voluntary intoxication defense under RCW 5.40.060(1) states:

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

6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 16.03, at 213 (6th ed. 2012) (WPI). This instruction is an accurate statement of the law.

Here, the trial court instructed the jury that

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

The court also instructed on contributory negligence:

> If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Cove did not object to either of these instructions. But Cove did object to the trial court's failure to give its proposed instruction on the voluntary intoxication defense, which closely followed WPI 16.03.

Although the instructions given by the trial court were not an inaccurate statement of the law, they were not particularly clear. To establish its voluntary intoxication defense, Cove was required to prove that (1) Gerlach was under the influence of intoxicating liquor, (2) her condition was a proximate cause of her injury, and (3) she was more than 50 percent at fault. RCW 5.40.060(1). Instructions 20 and 21, as given, allowed Cove to argue its voluntary intoxication defense. The jury was already instructed that Gerlach was "under the influence of intoxicating liquor at the time of the accident," satisfying the first requirement. Instruction 20 instructed the jury to consider whether Gerlach was negligent as a result of that intoxication, satisfying the second requirement of the defense. And, instruction 21 instructed the jury to determine the percentage of fault attributable to Gerlach, satisfying the third requirement. Given these instructions, Cove was able to argue that Gerlach's intoxication was a proximate cause of her accident and that she was more than 50 percent at fault. But, WPI 16.03 contains a more succinct statement of the elements of the voluntary intoxication defense, and while the trial court did not abuse its discretion by giving instructions 20 and 21, WPI 16.03 is a more appropriate instruction and should be used on remand.

Cove's Duty to Gerlach under the RLTA

Cove argues that because Gerlach was not Cove's tenant, the trial court erred in instructing the jury that Cove owed a duty to Gerlach based on the RLTA. We agree.

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 this court reviews de novo. Munich v. Skagit Emergency Commc'n Ctr., 175 Wn.2d 871, 877, 288 P.3d 328 (2012).

Under the RLTA, landlords have an implied warranty of habitability to tenants. See RCW 59.18.060; Foisy v. Wyman, 83 Wn.2d 22, 28, 515 P.2d 160 (1973). This duty to keep the premises in habitable condition provides tenants with a negligence cause of action against landlords who fail to do so. See Lian v. Stalick, 106 Wn. App. 811, 818, 25 P.3d 467 (2001). But *Restatement (Second) 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.) Arguably, the language of section 17.6 permits a tenant's guest to recover from a landlord directly for breach of an implied warranty of habitability, a statute, or a regulation. But, we recently held that Washington has only adopted section 17.6 in cases where a landlord's negligence is alleged by a tenant and that the section has not been adopted in the context of claims by nontenants. Phillips v. Greco, __ Wn. App. 2d __, 433 P.3d 509, 511 (2019). Therefore, Gerlach cannot base any duty owed by Cove upon section 17.6.

Here, Gerlach sued Cove for negligence, claiming it breached its implied and statutory warranty of habitability to Gerlach by failing to repair the rotted railing. Cove moved for partial summary judgment, arguing that Gerlach's negligence claim could not proceed because Gerlach was not a tenant and the implied and statutory warranty of habitability only applies to tenants under the RLTA. The trial court denied Cove's motion for summary judgment and instructed the jury on a landlord's duties under the RLTA. Because no Washington law has extended section 17.6 to apply to nontenants, the trial court erred by denying Cove's motion for summary judgment on this cause of action and instructing the jury that Cove could be liable to Gerlach for a violation of the RLTA. We hold that this cause of action cannot go forward on remand.

We reverse the jury verdict in favor of Gerlach and remand for retrial of the issues of liability and allocation of fault in Gerlach's negligence action against Cove.

WE CONCUR:

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 16.03 (6th ed.)

Washington Practice Series TM December 2017 Update
Washington Pattern Jury Instructions--Civil
Washington State Supreme Court Committee on Jury Instructions

Part II. Negligence—Risk—Misconduct—Proximate Cause
Chapter 16. Defenses

WPI 16.03 Intoxication of Person Injured or Killed—Defense

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

[This defense does not apply, however, in an action against the driver of a motor vehicle if you find that:

(1) the driver was then under the influence of *[alcohol] [or] [any drug]*;

(2) such condition of the driver was a proximate cause of the *[injury] [death]*;

(3) the *[person injured] [person killed]* was also under the influence of *[alcohol] [or] [any drug]*; and

(4) such condition of the *[person injured] [person killed]* was not a proximate cause of the occurrence causing the *[injury] [death]*.]

NOTE ON USE

Use this instruction only if there is an issue of intoxication on the part of the person injured or killed. Use WPI 16.04 (Under the Influence of Alcohol or any Drug—Definition), WPI 21.09 (Burden of Proof on the Issues—Intoxication Defense), and WPI 15.01 (Proximate Cause—Definition) with this instruction.

Use the bracketed second paragraph only if there is an issue of intoxication on the part of both a defendant driver of a motor vehicle and the person injured or killed. It may aid juror comprehension to use a more fact-specific term than "occurrence" in the second paragraph.

Use other bracketed material as applicable. Use the person's name instead of "person injured" or "person killed" whenever doing so will make the instruction easier to understand.

COMMENT

RCW 5.40.060.

RCW 5.40.060(1), enacted as part of the 1986 Tort Reform Act, states the general rule that it is a complete defense in a personal injury or wrongful death action that the person injured or killed "was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault."

In 1994, the Legislature added RCW 5.40.060(2), creating an exception to that general rule:

> In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, [RCW 5.40.060(1)] does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death.

By enacting RCW 5.40.060(2), the Legislature effectively abrogated the holding of Geschwind v. Flanagan, 121 Wn.2d 833, 854 P.2d 1061 (1993), that RCW 5.40.060 can provide a complete defense in an action against an intoxicated driver for injuries to an intoxicated passive passenger.

RCW 5.40.060 applies only to cases based on fault as defined in RCW 4.22.015 and, thus, is inapplicable in an intentional tort case. Morgan v. Johnson, 137 Wn.2d 887, 976 P.2d 619 (1999).

[Current as of June 2009.]

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Respondent's Answer to Petition for Review*** in Supreme Court Cause No. 97325-3 to the following parties:

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

DATED: July 8, 2019 at Seattle, Washington.

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Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK/TRIBE

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