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NO. 681451

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

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EVANGELINE SALDE and MAGNO SALDE, husband and  
wife and the marital community do composed, *Appellants*,

v.

ARNOLD YAGEN and ELIZABETH YAGEN, husband and  
wife and the marital community do composed, *Respondents*,

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BRIEF OF APPELLANT

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*Appellant*

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## I. INTRODUCTION

Evangeline Salde suffered serious injury from being struck by a falling rock in her rented residence. A rock from the face of the living room fireplace fell on Ms. Salde, breaking her clavicle. Visible cracks were present on the chimney in the area of the rock prior to the time the rock fell, and prior to the time Mr. and Mrs. Salde rented the residence from Mr. and Mrs. Yagen.

At issue in this case is whether under Washington State law a landlord can be liable for a defective condition where there is no actual notice to the landlord.

## II. ASSIGNMENT OF ERROR

1. The trial court erred in dismissing Evangeline Salde's complaint for damages as not containing any issues of material fact with respect to liability.

### Issues Pertaining to Assignment of Error

1. Were the Yagens, as landlords, liable for Mrs. Salde's injury?
2. Can a landlord be liable for personal injury to a tenant where the landlord failed to properly maintain the structural

components of a rented dwelling if the landlord did not have actual notice of the defects?

### III. STATEMENT OF THE CASE

Mr. and Mrs. Salde rented their home from Elizabeth and Arnold Yagen, who occupied the residence as their personal residence until renting it to the Saldes, commencing December 1, 2007. On June 6, 2009, Mrs. Salde was in her home, tending to her daycare duties. Mrs. Salde noticed a large stone from the fireplace wall became unsecured and start to fall near a child playing under her supervision. (CP at 8). Cracks were visible in the chimney surface near the area of the loose stone. Mrs. Salde held the child with her left hand to keep him out of harm's way, and attempted to secure the loose stone with her right hand. Mrs. Salde was unable to support the stone, due to its size and weight, and it fell on her clavicle causing a fracture. (CP at 8) Mrs. Salde immediately reported the incident to Mr. Yagen. Mr. Yagen came to the scene, looked at the stone, and without comment loaded the stone into his truck and left. (CP at 20). Inspection of the hole where the stone was located revealed glue residue, indicating the stone had been glued back into place on a previous occasion. (CP at 19, 20, and 36). An expert witness retained by the Salde's opined that the cracks were likely related to the falling stone, and

that the cracks had likely been in plain view for some time prior to the Yagens renting the house to the Saldes. (CP at 59-60).

The Yagens moved for summary judgment, arguing that the case should be dismissed because they did not have actual knowledge of the defect in the chimney. On December 2, 2011, the Court, agreeing with the Yagens' argument, granted summary judgment on the basis that actual knowledge of the defect was required to sustain liability (CP at 68-69). This appeal follows.

#### IV. ARGUMENT

##### 1. Standard of Review

An appellate court engages in the same inquiry as the trial court when reviewing an order granting summary judgment, treating all facts and reasonable inferences in the light most favorable to the nonmoving party. *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn, 2d 342, 144 P.3d 276 (2006). The burden is on the party seeking summary judgment to show that there are no genuine issues of material fact. *Id.* Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Civil Rule 56. The court's treatment of the facts of this case should include the assumption the visible cracks existed prior to the

Saldes leasing the house from the Yagens. The Yagens, as the previous full-time tenants of the house, would have seen the cracks. The Yagens therefore had actual notice of the hazardous condition. This makes summary judgment inappropriate. In addition, the Yagens, in their capacity as landlords, had constructive notice of the cracks, because the cracks are in violation of RCW 59.18.060 of the Residential Landlord Tenant Act (“RLTA”). This also makes summary judgment inappropriate for this case.

It is well established that a landlord is liable for injuries caused by defective conditions where, as here, the existence of the condition is in violation of the implied warranty of habitability or a duty created by statute or administrative regulation. The Restatement (Second) of Property § 17.6, adopted by the Court of Appeals in *Liam v. Stalick*, 106 Wn.App. 811, 25 P.3d 467 (2001). In Washington the warranty of habitability is codified in RCW 59.18.060 of the Residential Landlord Tenant Act (“RLTA”). *Pickney v. Smith*, 484 F.Supp.2d 1177 (2007). RCW 59.18.060 provides in relevant part:

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 reasonable good repair

[Emphasis added].

Here, the Yagens failure to maintain the chimney is a violation of both Sections (1) and (2) of the RLTA.

The existence of the defective chimney also violated the SeaTac Municipal Code. The home where the incident occurred is within the SeaTac City limits. The City of SeaTac has adopted the International Property Maintenance Code (“IPMC”). SeaTac Municipal Code, Section 13.210.010. Section 305.3 of the IPMC provides:

**All interior surfaces**, including windows and doors, shall be **maintained in good, clean and sanitary condition**. Peeling, chipping, flaking or abraded paint shall be repaired, removed or covered. **Cracked or loose plaster**, decayed wood **and other defective surfaces conditions shall be corrected**.

[Emphasis added].

Here, the cracks in the chimney and the stone repaired with glue violate Section 305.3 of the IPMC.

Landlords are deemed to have constructive notice of all building code violations. *Pickney*, 484 F.Supp.2d at 1181. In *Pickney*, the Court rejected the landlord's argument that she could avoid liability because she did not have actual notice of the defective condition. The Court states: "Defendant's argument runs counter to sound public policy, it would be inappropriate to permit Defendant to insulate herself by relying on her own willful blindness about the defective condition of the rental property." *Id.* The Court continues to explain that the Defendant admitted that she had not entered and inspected the interior of the home for defective conditions in many years. The Court stated that "[l]essors may not shield themselves from liability by consciously ignoring the condition of the property before renting to tenants." *Id.* "Accordingly, constructive notice of a defective condition provides sufficient notice to satisfy the second element of the restatement test." *Id.*

Further illustrating that actual notice of a defective condition is not required is the Court of Appeals decision in *Tucker v. Hayford*, Wn.App 256, 75 P.3d 980 (2003). In *Tucker* the Court of Appeals reversed the trial court's summary dismissal of a tenant's personal injury claim caused by defects (contaminated water) that were in violation of the landlord's duties

under RCW 59.18.060 even though the trial court determined that the landlord had no notice of the defective condition.

Because the defective chimney violated the RLTA and the SeaTac Municipal Code, Defendants had constructive notice of the violation and are liable for Mrs. Salde's injuries despite the alleged lack of actual notice.

Furthermore, discovery has not yet concluded in this matter. For example, in the deposition of Mrs. Yagen, it was learned that there was an inspection report of the home at the time of its purchase, which has been informally requested, and will be formally requested through further discovery. This (and other information) may still be produced in the course of discovery, and the Plaintiffs may still learn facts that will prove the Yagens' had notice of the defective chimney prior to the incident. To dismiss the case before the Saldes have concluded discovery would unfairly prejudice their ability to conduct discovery, of which approximately six months remain.

## V. CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that the Court reverse the trial court's decision granting Defendants' Motion for Summary Judgment, with instructions that further fact-finding is

necessary, and remand this case for trial. The evidence shows that there are genuine issues of material fact that preclude summary judgment.

By:  \_\_\_\_\_  
Edward J. Callow

WSBA No. 41966

Attorneys for Plaintiffs Evangeline Salde  
and Magno Salde

## PROOF OF SERVICE

I, Jade S. Robertson, declare that I am over the age of eighteen years and am not a party to this action.

I caused to be served via U.S. Mail, Certified Delivery, Return Receipt Requested; and facsimile a true and correct copy of the attached Appellant's Brief on Timothy Reid, attorney for Defendants, and the same document with the Court of Appeals of the State of Washington, Division I.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12nd day of July 2012 at Seattle, Washington.

Signed,

  
\_\_\_\_\_  
Jade S. Robertson  
Assistant to Edward Callow

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