

NO. 36510-3-II  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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**CHRISTOPHER NEELY; STEFANI NEELY; and JEFFREY L. JACOBS, as  
Guardian ad Litem for MAKENNA D. NEELY, a minor,**

**Respondents,**

**vs.**

**THE REID COMPANY, LLC; MARK W. VUKANOVICH and KRISTINA M.  
VUKANOVICH, husband and wife,**

**Appellants.**

---

**THE REID COMPANY, LLC; MARK W. VUKANOVICH and KRISTINA M.  
VUKANOVICH, husband and wife,**

**Third-Party Plaintiffs,**

**vs.**

**HAYDEN ENTERPRISES, INC., a Washington corporation; HLM, INC., an  
Oregon corporation; BARRY R. SMITH, P.C., ARCHITECT, an Oregon  
professional corporation; and MILGARD MANUFACTURING, INC., a  
Washington corporation,**

**Third-Party Defendants.**

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**APPEAL FROM CLARK COUNTY SUPERIOR COURT  
Honorable Diane Woolard, Judge**

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**REPLY BRIEF OF APPELLANTS**

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DIVISION II  
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The commissioner of this court granted discretionary review because the trial court committed obvious error in denying appellants/defendants' motion for summary judgment. Plaintiffs' brief confirms that the commissioner was right.

## I. ARGUMENT

This court reviews denial of a summary judgment motion de novo. *See Heg v. Alldredge*, 157 Wn.2d 154, 160, 137 P.3d 9 (2006). Such a review demonstrates defendants were entitled to judgment as a matter of law.

Plaintiffs do not dispute that “a landlord generally is not liable to a tenant for personal injuries caused by a defective condition in the premises.” *Brown v. Hauge*, 105 Wn. App. 800, 804, 21 P.3d 716 (2001). Nor do they dispute that typically a landlord has no duty to protect a tenant from dangers that are open and obvious and that any defect in the window at issue was open and obvious. *Sjogren v. Properties of Pacific Northwest, LLC*, 118 Wn. App. 144, 148-49, 75 P.3d 592 (2003).

Instead, plaintiffs attempt to call an apple an orange by claiming the window violated building code provisions applicable to open-sided raised walking surfaces. They seek to invoke RESTATEMENT (SECOND) OF PROPERTY § 17.6, even though this court has previously declined to adopt that section. And they do not even try to refute that defendants were not

“possessors of land” as required by RESTATEMENT (SECOND) OF TORTS § 343A. As will be discussed, defendants were entitled to judgment as a matter of law.

**A. SECTION 17.6 DOES NOT APPLY.**

Plaintiffs rely most heavily on RESTATEMENT (SECOND) OF PROPERTY § 17.6. That section provides:

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.

As will be discussed, this court has declined to adopt this section and should continue to do so. But even if the court were to adopt the section, it would not apply here. It would not apply because there was no building code violation and no breach of the implied warranty of habitability.

**1. There Was No Building Code Violation.**

Plaintiffs claim that the window at issue violated the building code, so that there was a violation of duty created by statute or administrative regulation, as required by section 17.6(2). According to plaintiffs, the building code mandated that the window have a guard rail. Wrong.

The building code provisions in effect at the time and on which plaintiffs rely provide:

IBC 1012.1:

**Where required.** Guards shall be located along open-sided walking surfaces, mezzanines, industrial equipment platforms, stairways, ramps and landings which are located more than 30 inches (762 mm) above the floor or grade below. Guards shall be adequate in strength and attachment in accordance with Section 1607.7. Guards shall also be located along glazed sides of stairways, ramps and landings that are located more than 30 inches (762 mm) above the floor or grade below where the glazing provided does not meet the strength and attachment requirements in Section 1607.7.

IBC 1012.2:

**Height.** Guards shall form a protective barrier not less than 42 inches (1067 mm) high, measured vertically above the leading edge of the tread, adjacent walking surface or adjacent seatboard.

**Exceptions:**

1. For occupancies in Group R-3, and within individual dwelling units in occupancies in Group R-2, both as applicable in Section 101.2, guards whose top rail also serves as a handrail shall have a height not less than 34 inches (864 mm) and not more than 38 inches (965 mm) measured vertically from the leading edge of the stair tread nosing.

....

IRC R312.1:

**Guards required.** Porches, balconies or raised floor surfaces located more than 30 inches (762 mm) above the floor or grade below shall have guards not less than 36 inches (914 mm) in height. Open sides of stairs with a total rise of more than 30 inches (762 mm) above the floor or

grade below shall have guards not less than 34 inches (864 mm) in height measured vertically from the nosing of the treads. . . .

None of these code provisions mention either windows or sills or use any term that could reasonably be interpreted to include windows or sills.

Nonetheless, plaintiffs claim the second floor of their rented unit qualified as a walking surface approximately 10 feet above the ground “that was ‘open sided’ when the window was open.” According to plaintiffs, the second floor thus qualified as a “raised floor surface” or “open sided walking surface” requiring a guard. (Brief of Respondents 14)

Plaintiffs’ theory is untenable. Under their theory, *any* floor, from the second floor up, in any building subject to these building code provisions would require window guards across windows that open. This is absurd.

Plaintiffs counter by claiming “it is only because the bottom sill of the window was less than 30 inches above the finished floor, which was in turn approximately 10 feet above grade, that a guard was required by code.” (Brief of Respondents 14) Where in the code provisions applicable at the time or in any other authority does it say that? Nowhere.

Indeed, amendments to the building code expressly regulating window sills did not go into effect in Washington until July 1, 2007,

nearly three years *after* the August 2004 accident.<sup>1</sup> Those provisions show that when the authorities intended to regulate windows and sills, they knew how to do so.

Plaintiffs, however, claim that the provisions were enacted merely to clarify and “slightly relax” the earlier code provisions on open-sided walking and raised floor surfaces. (Brief of Respondents 15) Plaintiffs

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<sup>1</sup> Specifically, the provisions provide:

IBC 1405.12.2:

**Window sills.** In Occupancy Groups R-2 and R-3, one- and two-family and multiple-family dwellings, where the opening of the sill portion of an operable window is located more than 72 inches (1829 mm) above the finished grade or other surface below, the lowest part of the clear opening of the window shall be a minimum of 24 inches (610 mm) above the finished floor surface of the room in which the window is located. Glazing between the floor and a height of 24 inches (610 mm) shall be fixed or have openings such that a 4-inch (102 mm) diameter sphere cannot pass through.

IRC R613.2:

**Window sills.** In dwelling units, where the opening of an operable window is located more than 72 inches (1829 mm) above the finished grade or surface below, the lowest part of the clear opening of the window shall be a minimum of 24 inches (610 mm) above the finished floor of the room in which the window is located. Glazing between the floor and 24 inches (610 mm) shall be fixed or have openings through which a 4-inch-diameter (102 mm) sphere cannot pass.

**Exceptions:**

1. Windows whose openings will not allow a 4-inch-diameter (102 mm) sphere to pass through the opening when the opening is in its largest opened position.
2. Openings that are provided with window guards that comply with ASTM F 2006 or F 2090.

cite no authority for this proposition because there is none. Only by seriously distorting the English language could anyone think that a window or a sill or a floor of an apartment with windows was an open-sided walking surface or a raised floor surface.

Plaintiffs argue that the open-sided walking and raised floor surface code provisions must apply because if they did not, no guard would be required across sliding glass patio doors raised a step from the floor. Precisely! No guard is required in such a situation. If the door led to a balcony more than 30 inches above the floor or grade below, the *balcony* would require a guard. But nowhere in the code provisions is there a requirement that the *door* requires a guard.

*Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001), the case on which plaintiffs most rely, does not apply. There, Division III noted that “the uncontroverted facts show the steps failed to comply with the UBC [Uniform Building Code].” *Id.* at 818. Here, there was no failure to comply with any applicable building code.

In short, plaintiffs’ code violation argument is totally without merit. There was no code violation. Consequently, even if this court were to adopt section 17.6, the window here would not violate that section unless there was a breach of the implied warranty of habitability.

**2. There Was No Breach of the Implied Warranty of Habitability.**

There was no breach of the implied warranty of habitability either, whether viewed in conjunction with section 17.6 or independently. Because the situation here involves a residential landlord and tenant, the implied warranty of habitability is limited to the duties specified in RCW 59.18.060 of the Residential Landlord-Tenant Act, RCW ch. 59.18. *Aspon v. Loomis*, 62 Wn. App. 818, 825, 816 P.2d 751 (1991), *rev. denied*, 118 Wn.2d 1015 (1992) (“the Legislature intended the duties enumerated in subsections (1) through (11) to be comprehensive and, thus, exclusive”). *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001), relied heavily upon by plaintiffs, is in accord:

RCW 59.18.060 does not create a generally actionable duty on the part of the landlord to ‘keep the premises fit for human habitation.’ Rather, the landlord’s duties are limited to those specifically listed in RCW 59.18.060.

*Id.* at 816 (citing *Aspon*, 62 Wn. App. at 825-26).

As plaintiffs recognize, the only potentially relevant sections of RCW 59.18.060 require landlords to:

- (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 substantially endangers or impairs the health or safety of 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;

(Brief of Respondents 16-17) As discussed *supra*, there was no code violation, so RCW 59.18.060(1) does not apply. Plaintiffs have not even discussed whether RCW 59.18.060(5) applies. (Brief of Respondents 19)

It is *not true* that *Lian* held there is a breach of the implied warranty in the residential landlord-tenant context whenever defects pose an actual or potential safety hazard. (Brief of Respondents 18-20). Any language to that effect was pure dicta. What *Lian* held was this:

In the RLTA [Residential Landlord-Tenant Act] context, the defects must constitute violations of the landlord's specific duties as set forth under RCW 59.18.060. Here, the uncontroverted facts show the steps failed to comply with the UBC [Uniform Building Code].

106 Wn. App. at 818 (citing *Aspon*, 62 Wn. App. at 825-26).

Since *Lian* involved building code violations, there was no need for the court to discuss RCW 59.18.060(5). And in any event, RCW 59.18.060(5) requires the landlord to “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” (emphasis added). No one claims the rental agreement required anything.

Since *Lian*, unlike the instant case, involved violation of a building code, there was a law in that case. Here, the building codes plaintiffs cite do not apply. Thus, there was no violation of RCW 59.18.060(5).

Unlike the instant case, *Pinckney v. Smith*, 484 F. Supp. 2d 1177 (W.D. Wash. 2007), also involved building code violations. Correctly recognizing that building code violations are not always dangerous, the court observed that liability under RESTATEMENT (SECOND) OF PROPERTY § 17.6 requires the tenant to show *three* different elements:

(1) the condition was dangerous; (2) the landlord was aware of the condition or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition; *and* (3) the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation.

484 F. Supp. 2d at 1180 (emphases added). The court went on to explain that “*a condition must be more than simply dangerous to violate the warranty*, otherwise the first and third elements of the restatement test merge.” *Id.* at 1184 (emphases added). Most significantly, the court held:

In Washington, *the warranty of habitability has been legislatively codified in the RLTA*. See RCW 59.18.060 (2004). . . .

. . . [A] landlord is in breach of Washington’s statutory warranty of habitability if she fails to maintain the premises *in compliance with applicable building ordinances*. . . .

To implicate the warranty of habitability, a defective condition *that violates building code requirements* must also be dangerous. . . .

*Id.* at 1181-82 (emphases added). Thus, *Pinckney* recognized what *Aspon* and *Lian* both held: that the implied warranty of habitability is limited to the duties specified in RCW 59.18.060 of the Residential Landlord-Tenant Act, RCW ch. 59.18.

Consequently, *Pinckney* did not involve a breach of the implied warranty of habitability apart from a building code violation. The discussion in *Pinckney* on which plaintiffs rely involved only whether the building code violation was dangerous, *i.e.*, the first of the three elements of a section 17.6 violation.

Here, plaintiffs have not shown the third element, a violation of a building code. Indeed, there was no violation of the building code. Without such a violation, *Pinckney's* discussion on whether the violation was dangerous is irrelevant.

Plaintiffs' reliance on a builder/vendor case, *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990), and *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987), is misplaced. Neither involved the Residential Landlord-Tenant Act, so neither was subject to the *Aspon/Lian* ruling that a landlord's breach of the implied warranty of habitability is limited to breach of the statutory duties set forth in RCW 59.18.060.

In addition, unlike the instant case, *Atherton* involved a dangerous **building code violation**. And, if anything, *Stuart* supports defendants' position here, even if the common law implied warranty of habitability applied. *Stuart* held that that implied warranty applies only to "defects which profoundly compromise the essential nature of the subject property **as a dwelling**." 109 Wn.2d at 416 (emphasis added). For example, in *Stuart*, rotten decks did not violate the implied warranty. Here, any defect in the window did not profoundly compromise the essential nature of the property as a dwelling.

### **3. This Court Should Not Adopt Section 17.6.**

In any event, as discussed in the Brief of Appellants, this court has already declined to adopt section 17.6. See *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005); *Sjogren v. Properties of Pacific Northwest, LLC*, 118 Wn. App. 144, 75 P.3d 592 (2003). Plaintiffs have not even addressed this issue. This court need not revisit it.

In any event, the Legislature has preempted such claims by enacting a comprehensive Residential Landlord-Tenant Act—

RCW 59.18.060(3) provides that landlords must keep *common areas* "reasonably clean, sanitary, and safe from defects." However, ***there is no provision creating a similar duty with respect to noncommon areas.***

*Aspon*, 62 Wn. App. at 827 (boldface emphasis added); *see also State v. Schwab*, 103 Wn.2d 542, 550, 693 P.2d 108 (1985).

**B. SECTION 343A DOES NOT APPLY.**

Plaintiffs claim the trial court properly denied summary judgment because there is a genuine issue of material fact whether RESTATEMENT (SECOND) OF TORTS § 343A applies. This argument is also baseless. Defendants were not “possessors of land” as required by that section.

Section 343A provides:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

“Possessor of land”, as used in section 343A is a term of art. Section 328E of the RESTATEMENT defines the term to mean:

(a) a person who is in occupation of the land with intent to control it or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Here, the rental agreement gave plaintiffs the right to possess the leased premises starting on August 19. (CP 103) The leased premises included the window at issue. The accident occurred on August 21. (CP

4) Plaintiff mother began occupying the premises a few days before the accident. (CP 60)

The landlord-tenant relationship is triggered when exclusive control of the premises passes to the tenant. *See Sunde v. Tollett*, 2 Wn. App. 640, 642, 469 P.2d 212 (1970). By the time the accident here occurred, exclusive control had already passed to the tenant. Defendants were therefore not “possessors of land” within the meaning of RESTATEMENT section 328E or 343A. Section 343A thus does not apply.

This court recognized these principles in *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005). There plaintiff was hit by the garage door at the leased premises. The garage door was part of the demised premises. This court ruled that neither the landlord nor the property manager was a “possessor of land” within the meaning of section 343 of the Restatement:

By its terms, this section applies only to one who is a “possessor of land.” As landlords, the Savages [the landlords] could enter only if the Jacksons [the tenants] gave permission. The same was true for their property manager . . . The Jacksons [the tenants], not the Savages or McMenemy’s [the landlords and property manager], were the possessors of the home in issue here.

128 Wn. App. at 331. This court went on to explain that “by definition a landlord is not the ‘possessor’ of noncommon areas.” *Id.*

There is no dispute that the premises in question here—including the window and sill—were noncommon areas. Plaintiffs have not even attempted to explain why *Pruitt*'s “possessor of land” holding does not apply. Thus, their section 343A argument—which is based primarily on cases involving defendants who did qualify as “possessors of land”<sup>2</sup>—must fail.

The one case plaintiffs cite that did not involve a defendant who was a possessor of land is *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001). But *Lian* was not decided under section 343A. As the court itself later acknowledged, *Lian* was decided under RESTATEMENT (SECOND) OF PROPERTY § 17.6. See *Lian v. Stalick*, 115 Wn. App. 590, 593, 62 P.3d 933 (2003) (106 Wn. App. 811 “determined that . . . the *Restatement (Second) of Property* [§ 17.6 (1977)] provided a remedy”). Section 17.6 applies, if at all, to landlords, not to possessors of land. As discussed *supra*, a landlord need not be a possessor of land.

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<sup>2</sup> See *Mucsi v. Graoch Associates Ltd. Partnership No. 12*, 144 Wn.2d 847, 31 P. 3d 684 (2001) (common area); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 914 P.2d 728 (1996) (common area); *Tincani v. Island Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994) (zoo visitor sued zoo); *Sjogren v. Properties of Pacific Northwest, LLC*, 118 Wn. App. 144, 148-49, 75 P.3d 592 (2003) (common area); *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 866 P.2d 1272 (1994) (visitor sued hospital); *Lettengarver v. Port of Edmonds*, 40 Wn. App. 577, 699 P.2d 793 (1985) (common area); *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 666 P.2d 392 (1985) (real estate agent); *Van Gordon v. Herzog*, 410 N.W.2d 405 (Minn. App. 1987) (tavern patron sued tavern).

Moreover, any dicta in *Lian* about section 343A's applicability when the injury occurs on leased premises occupied by the tenant is not even supported by the case *Lian* cited. In *Anglin v. Oros*, 257 Ill. App. 3d 213, 628 N.E.2d 873 (1993), whether a landlord was the "possessor of land" as to the leased premises was not raised. Indeed, it did not need to be raised because the court there found section 343A inapplicable because the landlord had no reason to know of the dangerous condition.

## II. CONCLUSION

This case is before this court because the trial court committed obvious error in denying defendants summary judgment. RAP 2.3(b)(1). Nothing in plaintiffs' brief makes that error any less obvious, let alone demonstrates the absence of error. Indeed, plaintiffs' arguments border on the frivolous.

No one doubts the accident in question was tragic. However, that does not mean defendants are liable. This court should reverse and remand for entry of judgment as a matter of law in favor of defendants.

DATED this 26<sup>th</sup> day of January, 2008.

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That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on the date herein listed below, affiant served via United States mail, postage prepaid, copies of:

- (1) *Reply Brief of Appellants*; and
- (2) *Affidavit of Service by Mail* addressed to the following

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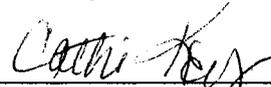
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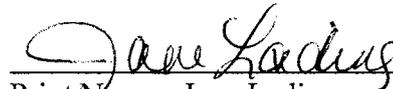
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Print Name: Jane Lading

Notary Public Residing at

My appointment expires:

Seattle, WA  
8-11-2010

