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Division II, Docket No. 40194-1-II

Pierce County Superior Court No. 08-2-06664-4

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON**

**DIVISION II**

CATHERINE HILL, a single individual,

Plaintiff/Appellant,

v.

WINDSONG VILLAGE APARTMENTS, a business licensed to conduct  
business in the state of Washington, SONYA RENA SHORTER, an  
individual, and N.R.B. PROPERTY MANAGEMENT, a business  
licensed to conduct business in the state of Washington,

Defendants/Respondents.

**BRIEF OF APPELLANT**

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## **INTRODUCTION**

This appeal is brought by Catherine Hill (“Appellant”), an elderly tenant who was injured in her own apartment unit as a result of her landlord’s failure to make the necessary repairs she requested, which the landlord agreed it would make. Appellant sued Windsong Village Apartments, its owner, Sonya Shorter, and its property manager, N.R.B. Property Management (collectively referred to as “Respondents”) for negligence.

At the trial level, Appellant alleged that Respondents breached the covenant to repair and violated both the Restatement (Second) of Property §17.6 and the Washington Residential Landlord-Tenant Act of 1973.

Respondents moved for summary judgment. The trial court granted Respondents’ motion, stating in a decision letter that the defective carpet over which Appellant tripped was “not so unreasonable to cause [the] apartment owner to be liable in tort.” CP 201.

Appellant then moved for reconsideration. The trial court denied Appellant’s motion, stating in open court that reliance on the Supreme Court’s decision in Teglo v. Porter, 65 Wn.2d 772, 399 P.2d 519 (1965), would render the Washington Residential Landlord-Tenant Act of 1973 meaningless. RP 3. The trial court further stated that the “economic loss rule” is a significant barrier to Appellant’s claims, and that the case law,

particularly the more recent cases where there is a known defect, all support a finding of summary judgment in favor of Respondents. RP 8.

### **ASSIGNMENT OF ERROR**

The Trial Court erred in granting summary judgment in favor of Respondents and denying Appellant's motion for reconsideration, in an Order entered on December 31, 2009.

### **ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

1. Did the trial court err by improperly categorizing the breach of a covenant to repair as a contract claim rather than a tort claim, thereby barring Appellant from recovering damages for personal injury?

2. Did the trial court err by assuming the role of trier of fact in finding that (1) the carpet was worn, (2) the nature of the defect did not cause [the] apartment to be unfit for habitation; and (3) the defect was not so unreasonable to cause Respondents to be liable in tort?

3. Did the Washington Legislature intend that the Washington Residential Landlord-Tenant Act of 1973 (WRLTA) supersede common law, particularly as enunciated by the Washington Supreme Court decision in Teglo v. Porter, 65 Wn.2d 772, 399 P.2d 519 (1965), which provides for a tort remedy for the breach of a covenant to repair?

### STATEMENT OF THE CASE

On September 23, 1996, Appellant Catherine Hill and Respondents Sonya Shorter and Windsong Village Apartments entered into a lease agreement (“Lease”) for the rental of an apartment unit, located at 19012 B Street East #B, in Spanaway, Washington 98387 (“Leased Premise”). CP 112 – 115. Appellant qualified to receive housing assistance under the federal Section 8 Housing Program. The lease commenced on October 1, 1996. CP 112 – 115.

Appellant lived on the Leased Premise continuously for a number of years. She renewed her lease once and, at the time of renewal, Appellant signed a Pet Agreement, which required a pet fee deposit of \$650.00 to cover pet damage. CP 117. Appellant lived in her apartment with her cats. As in the old lease, the new lease contained a paragraph stating, in relevant part, as follows:

Tenant shall promptly notify landlord of any damage, defect or destruction of the Premises, or in the event of the failure of any of the appliances or equipment. Landlord will use his best efforts to repair or replace any such damaged or defective area, appliance or equipment.

*Windsong Village Apartments Residential Apartment Lease Agreement, Paragraph 7.8.*  
CP 113.

Some time in 2005, Appellant notified Respondents of damage to a part of her hallway carpet where the seams were coming apart. CP 119, CP 121 – 122. Appellant requested Respondents to repair the damaged carpet. Appellant made this request directly to Karen Curry, the property manager at that time. CP 119, CP 121 – 122. Ms. Curry admitted she was informed by Appellant on several occasions about the carpet problem which created a dangerous condition. CP 122. Ms. Curry further stated it was her opinion that the carpet needed to be repaired, and because it was unsafe, she contacted the owner, Respondent Shorter, to inform her of it. CP 122. Ms. Curry stated that she was in the process of getting a repair estimate for the carpet when she was terminated as the manager. CP 122.

Respondent Shorter subsequently hired Nash Alarcon, owner/manager of Respondent N.R.B. Property Management, to manage the apartment complex. In February of 2007, Mr. Alarcon inspected Appellant's unit. CP 124. At that time, Appellant informed Mr. Alarcon about the "hole" in the hallway carpet between the kitchen and her bedroom. Appellant asked Mr. Alarcon to repair the damaged carpet. CP 125. Mr. Alarcon informed Appellant that he believed the damage was caused by Appellant's cats and that it was her responsibility, not the Respondents to get it repaired. CP 126, CP 128. Mr. Alarcon stated that after he informed Appellant of this, she nevertheless asked him to fix the

damaged carpet. CP 127. Mr. Alarcon admitted that, after he saw the damaged carpet, he wanted to repair it and it should have been repaired. CP 127. Mr. Alarcon admitted that he knew the damage had not been repaired prior to Appellant's accident. CP 128.

Because the damaged carpet, which was a wide open slit in the center of the hallway, created a dangerous condition, Appellant attempted to address the situation by making every effort to avoid stepping over the damaged area. At one point, Appellant covered the damage with a runner, but had to remove the runner because it would not lay flat but would bunch up and ripple over the carpet hole, thereby creating another dangerous condition.

On or about September 21, 2007, Appellant came down with some flu-like illness and was not feeling well. She walked out of her bedroom and attempted to cross the hallway to the kitchen for a drink of water when her foot got caught in the damaged slit in the carpet and fell. CP 130. Appellant sustained a serious foot fracture which required serious and extensive medical treatment and still does.

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## ARGUMENT

### **A. The Standard of Review**

The court reviews summary judgment orders *de novo* and engages in the same inquiry as the trial court. Morin v. Harrell, 161 Wn.2d 226, 230, 164 P.3d 495 (2007). Summary judgment shall only be granted if the pleadings, affidavits, depositions, or admissions on file show that there is no genuine issue of material fact. Capitol Hill Methodist Church of Seattle v. Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958). A material fact is one upon which the outcome of the litigation depends. Clements v. Travelers Indem. Co., 121 Wash.2d 243, 249, 850 P.2d 1298 (1993). All facts and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 693, 169 P.3d 14 (2007).

### **B. Did the trial court err by improperly categorizing the breach of a covenant to repair as a contract claim rather than a tort claim, thereby barring Appellant from recovering damages for personal injury?**

The trial court erroneously stated that the “economic loss rule” was a significant barrier to Appellant’s claims, thus suggesting that the court considered the “covenant to repair” theory as a contract claim rather than a tort claim. The “economic loss rule” was discussed in detail in Alejandro v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007). “The rule applies to hold

parties to their contract remedies when a loss potentially implicates both tort and contract relief." Alejandre, 159 Wn.2d at 681. The rule is used to classify damages for which a remedy in both tort and contract is deemed permissible, but is more properly remediable only in contract. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 822, 881 P.2d 986 (1994).

This Court recently addressed the "economic loss rule" in Jackowski v. Borchelt, 151 Wn. App 1, 209 P.3d 514 (2009). In Jackowski, plaintiff purchasers sued the seller, the seller's real estate agent and plaintiff's own real estate agent (collectively referred to as "defendants") for fraud and misrepresentation resulting from their failure to inform plaintiffs that the waterfront property plaintiffs were purchasing was in a landslide hazard area. About a year and a half after the sale was closed, the house on plaintiffs' property slid, causing serious property damage. The plaintiffs sued to rescind the contract and for tort damages.

The defendants all moved for summary judgment. Of relevant importance to the instant case is the trial court's granting of summary judgment in favor of the sellers and plaintiff's real estate broker and agent based on the "economic loss rule." Plaintiffs appealed to this Court, in relevant part, contending that the economic loss rule did not apply to their

situation because their lives were at risk, thereby placing their claims inside the realm of tort law.

This Court disagreed with the Jackowskis' attempt to reclassify the circumstances in their case as "pure and life-threatening" and, therefore sounding in tort. This Court stated as follows:

All the claims the Jackowskis brought stem from their RESPA and the related Form 17 for the purchase of residential property and their relationships with the sellers and agents involved in the transaction. Accordingly, the Jackowskis' claims seek economic damages rather than redress for physical harm. The trial court did not err by finding that the economic loss rule applied to bar the Jackowskis' negligent misrepresentation claims. Jackowski, 151 Wn. App at 3.

The Court in Jackowski relied on Alejandre, supra, for the proposition that recovery for alleged breach of tort duties is barred where a contractual relationship exists and the losses are economic losses. Alejandre, 159 Wn.2d at 683. According to the Alejandre Court, "the key inquiry is the nature of the loss and the manner in which it occurs, in other words, are the losses economic losses, with economic losses distinguished from personal injury or injury to other property[?]" Id., 159 Wn.2d at 683 - 684. If the claimed loss is an economic loss and no exception applies to

the economic loss rule, then the parties will be limited to contractual remedies." Id.

Whereas contract law protects expectation interests, tort law redresses physical harm injuries." Borish v. Russell, 37596-6-II (WACA) (June 29, 2010), citing Alejandre, *supra*, 159 Wn.2d at 682. Unlike the Jackowskis, Appellant is not alleging economic loss, but physical injuries resulting from the breach of a covenant to repair, which is a tort claim allowing recovery of tort damages. Teglo v. Porter, 65 Wn.2d 772, 399 P.2d 519 (1965).

The general rule in Washington is that *caveat emptor* applies and a tenant takes the leased premises as he or she finds it. Hughes v. Chehails School Dist., 61 Wash.2d 222, 377 P.2d 642 (1963). However, in 1965, the Washington Supreme Court carved out an exception to the general rule. In Teglo, *supra*, the Supreme Court stated the following:

Where there is a covenant or agreement entered into, contemporaneously with commencement of the tenancy, whereby the landlord is to keep and maintain the premises in repair and the landlord acquires knowledge or notice of a condition, existing either before or arising during the tenancy, rendering the premises unsafe, and the tenant, a member of his family, or a guest, suffer personal injury therefrom, after a reasonable time for making the premises safe has elapsed from the time of the landlord's notice, **then the landlord is**

**liable in tort for the injuries sustained.**  
Id., 65 Wn.2d at 774. **(Emphasis added).**

The Teglo case involves a tenant who sued his landlord who orally agreed to repair and maintain the leased premises in a safe condition. The plaintiff tenant was injured when the floor on the leased premise collapsed under him because of weakness due to termites or rot. The jury rendered a verdict in favor of the defendant landlord and the trial court denied the plaintiff's motion for a new trial. Plaintiff appealed.

The case ultimately reached the Washington Supreme Court, which found sufficient evidence to support that plaintiff gave defendant timely notice of the substantial weakness in the floor, defendant agreed to repair the same, the repair would have revealed the cause of the weakness, and defendant failed to repair the floor within a reasonable time after notice of its condition. Id., 65 Wn.2d at 773. The Supreme Court then overturned the jury verdict and remanded the case for a new trial.

The Teglo ruling spelled out the landlord's duty in tort arising out of a covenant or agreement to make repairs. The Supreme Court recognized that landlords do not have unfettered access to the demised premises, so the lessee or tenant is required to provide notice of the need

for repairs. In justifying the rule, the Supreme Court reiterated *Comment a* of the Restatement of Torts § 357 with approval, as follows:

The lessor's duty to repair in so far as its breach subjects him to liability for bodily harm caused to the lessee and those upon the land in his right, is not contractual but is a tort duty based on the fact the contract gives the lessor ability to make the repairs and control over them. The lessor is not liable for bodily harm caused even to his lessee by his failure to make the premises absolutely safe. He is liable only if his failure to do so is due to a lack of reasonable care exercised to that end...Since the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty. Unless the contract stipulates that the lessor shall inspect the premises to ascertain the need of repairs, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if reasonable care is not exercised after the lessee has given him notice of the need of repairs. Teglo v. Porter, 65 Wn.2d at 774 – 775, citing Restatement of Torts § 357, *Comment a*.

In sum, although a covenant to repair involves an agreement or contract to make repairs, the breach of this covenant or agreement gives rise to tort liability because the agreement imposes a duty upon the tortfeasor landlord.

Here, the lease agreement Appellant signed with Respondents contained a covenant to repair. Paragraph 7.8 of the lease agreements states, in relevant part, as follows:

Tenant shall promptly notify landlord of any damage, defect or destruction of the Premises, or in the event of the failure of any of the appliances or equipment. Landlord will use his best efforts to repair or replace any such damaged or defective area, appliance or equipment.

*Windsong Village Apartments Residential Apartment Lease Agreement, Paragraph 7.8.*

The parties freely entered into this Agreement and it is the exact language in the contract that must be analyzed to determine the extent of Respondents' duty to Appellant. It is clear from the paragraph cited above that Respondents did not agree to make repairs only to damaged or defective areas that are unknown or latent to Appellant. To the contrary, the lease required Appellant to notify Respondents of the need for repairs, which presupposes that the damage or defect be known to Appellant. The record is clear that Appellant notified Respondents of the need for repairs, not once, but twice. Respondents' agent admitted the defective carpet needed to be repaired.

Whereas the Jackowskis alleged a breach of contract claim based on a breach of a contractual duty, in the instant case, even though the duty

being alleged by Appellant is imposed by contract, the breach of that duty gives rise to tort liability. Teglo v. Porter, *supra*, 65 Wn. 2d at 774.

The loss suffered by this Appellant is not economic nor are the damages she is seeking contractual in nature. She did not bring an action against Respondents to have the defective carpet repaired or her lease agreement rescinded. She is suing to redress the physical injuries she sustained as a result of Respondents' failure to repair the defective carpet, which they were obligated to do upon notification. Furthermore, there is clearly no level of economic recovery that will justify or compensate Appellant for the physical injuries she sustained. In short, Appellant's remedies lie in tort and none in contract.

This distinction was most recently addressed in Borish, *supra*, wherein this Court clearly distinguished tort law from contract law:

In general, the goal of tort law is to "restor[e] the plaintiff to the position he or she was in prior to the defendant's harmful conduct" whereas the goal of contract law is to "plac[e] the plaintiff where he or she would be if the defendant had performed." Borish, 37596-6-II (WACA) (June 29, 2010) *supra*, quoting Alejandre, *supra*, 159 Wn.2d at 682.

There is no doubt that Appellant will never be made whole again. However, she is requesting to be restored to as good a position as she was in prior to Respondents' negligent act which caused her to suffer serious

injuries. It would be error and unjust to limit Appellant's recovery to economic losses, none of which she requested in her prayer for relief.

At summary judgment, Respondents argue that Appellant cannot recover in tort because the defect complained of must be latent or hidden and since the defective carpet was known and obvious, Appellant cannot recover monetary damages. However, the rule enunciated by the Supreme Court in Teglo requires that the tenant give the landlord notice of the need for repairs. Obviously, this means that the item needing repair must be known to the tenant. This rule does not require that the defect be hidden or latent because the duty in this case is to make repairs, not to warn of defects or dangers that are known to the landlord and unknown to the tenant. This is not the analysis undertaken by the Teglo Court and is certainly not the allegation made by Appellant in the instant case.

The Teglo Court cautioned that the “covenant to repair” rule refers to the landlord’s agreement to keep the demised premises safe and it is the landlord’s actions that are to be analyzed as being reasonable or not. That is a jury question of fact.

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**C. Did the trial court err by assuming the role of trier of fact in finding that (1) the carpet was worn, (2) the nature of the defect did not cause [the] apartment to be unfit for habitation; and (3) the defect was not so unreasonable to cause Respondents to be liable in tort?**

The trial court wrongly assumed the role of the trier of fact when it determined that (1) the carpet was worn, (2) the nature of the defect did not cause [the] apartment to be unfit for habitation and there were no other life threatening conditions in the apartment; and (3) the defect was not so unreasonable to cause [the] apartment owner to be liable in tort. These are genuine factual issues disputed by the parties and should have been enough to preclude summary judgment.

Negligence, which is an issue of fact, may be decided as a matter of law when reasonable minds could reach but one conclusion. Ruff v. County of King, 125 Wn.2d 697, 704, 887 P.2d 886 (1995). The dual questions as to whether the defective carpet created an unreasonable risk of harm or whether it was a dangerous condition are both questions of fact that are clearly disputed by the parties and should have been left for the jury to decide.

“If there are justifiable inferences from the evidence upon which reasonable minds might reach conclusions that would sustain a verdict, then the question is for the jury, not for the court. Coleman v. Ernst

Home Ctr., Inc., 70 Wash.App. 213, 220, 853 P.2d 473 (1993) (citing Morton v. Lee, 75 Wash.2d 393, 450 P.2d 957 (1969)).

- (1) Under the covenant to repair theory, the issue of whether the unrepaired defect created an unreasonable risk of harm (“unreasonably dangerous”) is a question of fact for the jury.

The trial court incorrectly found that the defective carpet in Appellant’s apartment was caused by normal wear and tear (which will be discussed later) and “not so unreasonable” to hold Respondents liable in tort.

Dangerousness is a question of fact. See generally, Davis v. State, 102 Wn. App. 177, 193, 6 P.3d 1191 (2000), aff’d, 144 Wash.2d 612, 30 P.3d 460 (2001). Likewise, it is well-known case law that reasonableness is also a question of fact. A determination of whether or not the defective carpet was unreasonably dangerous also depends on certain other facts that must equally be considered by the fact finder.

A jury could find that Appellant cannot be required to stop using the hallway to move around her apartment, thereby rendering a part of the demised premises uninhabitable. It will be up to the jury to decide if this condition is unreasonable in light of the fact that Respondents have regularly accepted Appellant’s rent in full, which has always and continues to be subsidized by federal funds. With the

damaged/defective carpet in the middle of this hallway, and the constant need to use the hallway to move around the apartment complex, a jury could find that the defective carpet posed an unreasonable risk of harm.

The evidence in the record raises a question of fact as to how dangerous the defective carpet was. Respondents' former property manager, Karen Curry, thought the defective carpet was dangerous enough to warrant calling the owner of the apartment complex to inform her of the problem and subsequently putting in a request to get it repaired. Even Respondent's current property manager, Nash Alarcon, testified in his deposition that he felt the carpet needed to be fixed. All these facts provide sufficient evidence that could lead a trier of fact to conclude that the defective carpet was unreasonably dangerous.

- (2) Under the Restatement (Second) of Property § 17.6, the issue of whether the defective carpet was a dangerous condition is a question of fact for the jury.

Appellant also alleged tort liability against Respondents under the Restatement (Second) of Property § 17.6. That provision subjects a landlord to liability for physical harm caused to the tenant by a dangerous condition existing before or arising after the tenant has taken possession, if landlord has failed to exercise reasonable care to repair the condition, and the existence of the condition is in violation of either (1) an implied duty of habitability or (2) a duty created by a statute or

administrative regulation. Sjogren v. Properties of the Pacific Northwest, LLC, 118 Wn. App. 144, 75 P.3d 592 (2003); Restatement (Second) of Property § 17.6 (1977).

It is unclear as to whether the trial court, in the instant case, considered Appellant's cause of action under the Restatement (Second) of Property § 17.6, when it granted summary judgment dismissing all of Appellant's claims. But, the evidence in the record is sufficient to allow a jury to find a viable cause of action for Appellant under § 17.6.

The trier of fact may find, through the evidence, including the statements made by the current property manager regarding his failure to carry out the requested repairs, that Respondents failed to exercise reasonable care.

Furthermore, the evidence shows that (1) Respondents' participation in the Section 8 housing program, and (2) their acceptance of federal funds to supplement Appellant's rent, imposed upon Respondents the obligation to comply with federal laws and regulations, including the Code of Federal Regulations (CFR).

The jury may find that Respondents violated CFR § 982.401 (g)(2)(iv), which required Respondents to "make the dwelling units structurally sound so as not to present a danger of tripping or falling." If the jury finds that Respondents violated the CFR, this will satisfy the

second element required by § 17.6, where the existence of the defect or “dangerous condition” violates a duty created by a statute or administrative regulation. But, again, these are questions of fact for the jury and the trial court cannot disregard these facts or decide them in place of the jury.

Although the trial court addressed the “unreasonably dangerous” requirement as it related to the “covenant to repair” theory, it did not discuss the “dangerous condition” requirement, which is critical to the analysis of Appellant’s claim under Restatement (Second) of Property § 17.6.

The issue of “dangerous condition” is a question properly reserved for the trier of fact. See Pinckney v. Smith, 484 F.Supp.2d 1177, 1180 (W.D. Wash. 2007) (stating that the “dangerous condition” element is a question of fact). If the trial court evaluated Appellant’s arguments under § 17.6, it would not have been able to justify granting summary judgment because the evidence supports a finding by the jury of a dangerous condition.

The “dangerous condition” element was discussed in Lian v. Stalick, 115 Wn. App. 590, 62 P.3d 933 (2003) (hereinafter referred to as “Lian II”), a case involving a damaged or defective condition that was “known” to both the landlord and the tenant (it was plaintiff who

informed defendant of the defective stairs which ultimately caused her fall and subsequent injuries). In Lian II, the Court confirmed that “a finding that the condition is dangerous is foundational to a claim under § 17.6.” Id., 115 Wn. App. at 595. The Court did not require that the condition be unreasonably dangerous.

This element was also discussed in Pinckney v. Smith, *supra*, where the federal district court used current Washington law in this area to conclude that the determination of the level of dangerousness required under the rule is a question of fact, not law. Pinckney v. Smith, 484 F.Supp.2d at 1184. The issue should have gone to the jury.

Furthermore, in Pinckney, the Court correctly concluded that in order for a plaintiff to prevail in a claim asserted pursuant to Restatement (Second) of Property § 17.6, under the element requiring a violation of a statute or regulation, such as a building code, the plaintiff need not establish that the building be unfit to live in. Plaintiff must prove that the condition substantially endangers or impairs the health or safety of the tenant. Id. But, the issue itself, whether the damaged carpet substantially endangers or impairs Appellant’s health or safety is clearly a question for the trier of fact. Id.

- (3) The issue of whether the cause of the defective carpet was normal wear and tear was a question of fact for the jury.

As her third cause of action, Appellant alleged Respondents also violated the Washington Residential Landlord-Tenant Act (WRLTA) by failing to make repairs and arrangements necessary to put and keep the premises leased by Appellant in as good a condition as it by law or rental agreement should have been, at the commencement of the tenancy. **RCW 59.18.060(5)**. Appellant alleged Respondents' failure to maintain the premises to substantially comply with applicable laws, violated both the Washington Residential Landlord Tenant Act and the Code of Federal Regulations.

The trial court's determination that the damage to the carpet was caused by normal wear and tear was just an assumption, as the court admits, and effectively took the issue out of WRLTA; however, Appellant disputes that assumption as the cause of the damage to the carpet. Determination of that dispute is a question of fact, to be decided by a jury from the evidence presented, not from the subjective opinion of a trial court in summary judgment.

The parties did not raise this issue for determination during the summary judgment process because the parties clearly understood it to be a question of fact.

**D. Did the Washington Legislature intend that the Washington Residential Landlord-Tenant Act of 1973 (WRLTA) supersede common law, particularly as enunciated by the Washington Supreme Court decision in Teglo v. Porter, 65 Wn.2d 772, 399 P.2d 519 (1965), which provides for a tort remedy for the breach of a covenant to repair?**

At summary judgment, Respondents argued that, Appellant would not be entitled to monetary damages under the WRLTA. But, in their response to Appellant's motion for reconsideration, Respondents argued that Appellant's claim for personal injury damages based on WRLTA fails because the WRLTA changed the common law and superseded Teglo. The trial court agreed with Respondents, stating that reliance on Teglo would render the landlord/tenant act "meaningless."

Both the trial court and Respondents are incorrect. The WRLTA did not supersede Teglo and the applicability of the "covenant to repair" theory. The WRLTA created statutory duties for both landlords and tenants, which duties did not change or invalidate other duties grounded in contract or common law. It simply provided an additional source of remedy for aggrieved parties.

There is no evidence to suggest that the Washington Legislature created the WRLTA to replace the duties and remedies available under common law. There is nothing in the WRLTA that limits the causes of action available to tenants to those created by statute. To the contrary,

its provisions suggest that the WRLTA supplements other theories of recovery.

RCW 59.18.090(2) gives a tenant the right to bring an action in court “for any remedy provided under this chapter **or otherwise provided by law**. RCW 59.18.090(2) (**Emphasis added**). Those other remedies include remedies based in contract and common law, including Teglo.

Respondents incorrectly cited State v. Schwab, 103 Wn.2d 542, 693 P.2d 108 (1985) to support its argument that the WRLTA superseded Teglo. The issue in Schwab was whether a violation of WRLTA comes under the Consumer Protection Act. Respondents relied on the dissenting opinion, which did not address how the WRLTA changed the “covenant to repair” theory. What Justice Dore said in the dissent was that the WRLTA “modified the common law so as to require decent, safe and sanitary housing.” State v. Schwab, 103 Wn.2d at 554. Justice Dore also said that the WRLTA added a covenant to repair to most residential rental agreements. Id. These statements did not render Teglo meaningless; to the contrary, it confirmed an additional source or remedy based on statutory authority.

Division Three’s decision in Tucker v. Hayford, 118 Wn. App 246, 75 P.3d 980 (2003), is instructive as to this issue and Appellant

urges this Court to consider the Tucker case, which addressed the three ways in which a tenant may recover personal injury damages against his or her landlord.

In Tucker, the tenants sued their landlord for personal injury damages due to contaminated drinking water. The tenants brought an action, based on (1) their lease agreement; (2) WRLTA; and (3) negligent misrepresentation as to the water quality. The defendant landlord moved for summary judgment, which was granted.

The appellate court reversed the trial court's decision based on an analysis of the three areas in which to bring a cause of action. What is important in Tucker, a case decided long after the WRLTA was enacted, is that the appellate court deemed Teglo just as viable as the WRLTA. Its analysis, which supported its holding that the tenants had at least two causes of action, one based on the "covenant to repair" theory and the other on the WRLTA, is compelling. Appellant respectfully asks this Court to consider the Tucker case in its review of Appellant's case.

### **CONCLUSION**

Appellant is not alleging that Respondents failed in their duty to warn her of latent defects on the leased premises. Appellant is not alleging that Respondents had a common law duty to make the leased

premises absolutely safe. Appellant is not alleging that Respondents made the leased premises unfit to live in.

What Appellant is alleging is that Respondents contractually made it their duty to make repairs of damaged or defective areas on the leased premises. This created a tort duty on Respondent's part, taking it out of contract as a remedy and squarely placing it in tort.

It is for the jury to decide whether the landlord's actions were reasonable in ignoring the problem or whether the damage created was reasonably dangerous.

Appellant is a poor older woman who paid just a little over one hundred dollars a month for rent, the rest being subsidized by the federal government under Section 8 housing. The rental agreement created a duty on Respondents to use their best efforts to make repairs to damaged or defective areas after being notified of the need for repairs by Appellant.

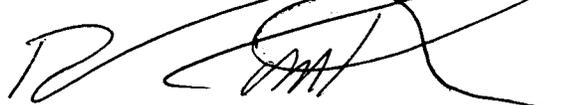
A tort action in this case for negligent remedies is not foreclosed by the "economic loss" rule because the issues do not involve contract constraints. Teglo has a defining decision that has withstood 45 years of scrutiny and is a viable decision for which the trial court should have taken under consideration prior to making its decision to categorize the

issues as contractual in nature. Furthermore, the ruling in Teglo was not superseded by WRLTA.

It is a jury question as to whether or not the damaged or defective carpet was unreasonably dangerous under the circumstances. Equally, the facts in this case, set before a jury, could support a finding that the landlord's actions were unreasonable.

Respectfully submitted this 14<sup>th</sup> day of July, 2010.

LAW OFFICES OF D. MICHAEL TOMKINS, INC., P.S.

A handwritten signature in black ink, appearing to read 'D. Michael Tomkins', written over a horizontal line.

D. MICHAEL TOMKINS - WSBA No. 4979  
Attorney for Appellant

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STATE OF WASHINGTON

COURT OF APPEALS DIVISION II OF THE STATE OF  
WASHINGTON

CATHERINE HILL, a single  
individual,

Appellant,

vs.

WINDSONG VILLAGE  
APARTMENTS, a business  
licensed to conduct business in the  
state of Washington, SONYA  
RENA SHORTER, an individual,  
and N.R.B. PROPERTY  
MANAGEMENT, a business  
licensed to conduct business in the  
state of Washington,

Respondents.

Pierce County Superior Court No.  
08-2-06664-4  
Court of Appeals, Division II No.  
40194-1-II

DECLARATION OF SERVICE  
OF APPELLANT'S BRIEF

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10 JUL 14 PM 4:28  
STATE OF WASHINGTON  
BY  
CHITTY

I, Sony Thach, declare and say as follows:

1. I am a citizen of the United States and resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein. My address is 8420 Dayton Avenue North, Seattle, WA 98103.

2. On July 14, 2010, I served the following document on the individuals named below, in the specific manner indicated:

**Appellant's Brief**

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Attorneys for Respondent

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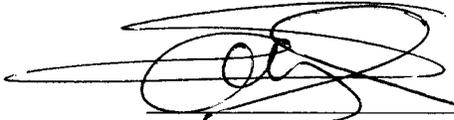
David C. Ponzoha  
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950 Broadway, Suite 300  
Tacoma, WA 98402

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 Other

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

EXECUTED this 14<sup>th</sup> day of July 2010, at Seattle, Washington.

  
\_\_\_\_\_  
Sony Thach