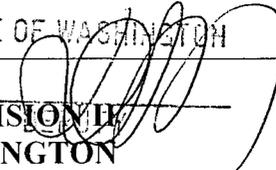


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STATE OF WASHINGTON

BY 
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN and JANET JOHNSON,
and the marital community comprised thereof,

Appellants,

v.

TOBIN and CRYSTAL MILLER,
and the marital community comprised thereof,

Respondents.

REPLY BRIEF OF APPELLANTS JOHN AND JANET JOHNSON

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INTRODUCTION

In his opening brief, John Johnson showed how existing law, applied straightforwardly to the facts of this case, makes the Millers liable to Johnson for his injuries. (Br. of Appellant (“App. Br.”) 9–10.)

The Millers, by contrast, ask this Court to tear four sizeable holes in the fabric of Washington law:

1. For at least a century, the Supreme Court has affirmed the doctrine that a landlord owes the same duties to a tenant’s guest as to a tenant. The Millers argue, without support from a single authority, that this doctrine should now be jettisoned.

2. In the teeth of the Supreme Court’s landmark decision in *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973), and in conflict with Division I, the Millers urge this Court to deny the existence of a common-law implied warranty of habitability.

3. The Millers say that because they had no notice of the defects on their property, they cannot be held liable for them. This ignores not only the record evidence, which indicates that the Millers had actual notice of the defects, but also the plain language of the RLTA, which does not make formal notice of defects a prerequisite to liability. Precedent also squarely rejects the notion that landlords must receive formal notice of a defect before they can be held liable for resulting injury.

4. The Millers ask this Court to create a gratuitous conflict with yet another Division of the Court of Appeals by rejecting Restatement (Second) of Property section 17.6 (1977), even though the section 17.6 is consistent—indeed, inherent in—the larger body of Washington law.

This Court should decline the Millers’ invitation to alter the law and should reverse and remand for trial.

ARGUMENT

I. Landlords owe a tenant’s guest the same duties they owe the tenant.

In Washington, landlords owe the tenant’s guest the same duties they owe the tenant. This has been the law for decades. (App. Br. 13–14.)

The Millers ask this Court to make an exception to this rule. They point out that the rule is old. (Br. of Respondents (“Resp. Br.”) 23.) Whether called “old” or “well-settled,” the rule’s consistent application across the years argues *against* making a new exception to it. Indeed, our research has uncovered no case—and the Millers have cited none—in which a jurisdiction that recognizes a landlord’s liability to a tenant has rejected a landlord’s liability to a tenant’s guest under the same circumstances. See *Shump v. First Cont’l-Robinwood Assocs.*, 644 N.E.2d 291, 296–97 (Ohio 1994) (“The proposition that a landlord owes the same duties to persons lawfully upon the rental property as the landlord owes to

the tenant is not unique to Ohio. . . . [W]e hold that a landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes to the tenant. . . . We do not believe that the Landlords and Tenants Act of 1974 alters this well-settled common-law principle.” (citation omitted)).

The Millers also say that the rule cannot apply to the common-law implied warranty of habitability, which is “contractual in nature.” (*Id.*) But that is exactly why this Court can be sure that the rule *does* apply. In *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962), a tenant’s guest fell off a porch because a rail was missing. Our Supreme Court held that the lease between the tenant and the landlord may have included an implied obligation to replace a railing. *Id.* at 727–28. The court ruled that the guest could recover in tort for the landlord’s breach of this contractual obligation by reversing a summary judgment entered against the injured guest. The same principle applies to a breach of the implied warranty of habitability that causes injury to a tenant’s guest.

The Millers maintain that, because the RLTA contains no affirmative statement that a guest can recover from a landlord in the same way as a tenant, the RLTA displaced the common-law principle that a landlord owes the same duties to both the tenant and the tenant’s guest. (Resp. Br. 26.) This assertion gets the law backwards. In the absence of a

contrary statement, courts presume that statutes preserve the common law. *See, e.g., Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). The lack of an affirmative statement that the common law is preserved means that the old principle—that a tenant’s guest can recover from the landlord if the tenant could also recover in the same circumstances—*does* apply to the RLTA.

II. The Millers would be liable to a tenant for violating the implied warranty of habitability and the RLTA.

The Millers admit that on appeal they have waived the question whether the manufactured home’s deficiencies violated the implied warranty of habitability and the RLTA.¹ (Resp. Br. 6 n.1.) Thus, they are forced to argue that liability is barred for other reasons: because the common-law implied warranty of habitability does not exist, because the Millers did not have actual notice of the deficiencies, because Baxter’s purported status as independent contractor forecloses liability, and because violations of the RLTA cannot give rise to tort liability. These arguments lack merit, and, if accepted, would transform the law.

¹ The Millers say that Johnson “failed to plead” the rotted condition of the steps to the manufactured home, one of the home’s four independent deficiencies. (Resp. Br. 10.) The Millers, however, have waived this issue, for when Johnson introduced evidence about the rotted condition of the steps, the Millers did not object. *See, e.g., Jensen v. Ledgett*, 15 Wn. App. 552, 555, 550 P.2d 1175 (1976) (“Where evidence raising issues beyond the scope of the pleadings is admitted without objection, the pleadings will be deemed amended to conform to the proof.”).

A. The Washington Supreme Court has recognized a common-law implied warranty of habitability.

In *Foisy v. Wyman*, the Supreme Court held that in Washington, “all contracts for the renting of premises” contain an implied warranty of habitability. 83 Wn.2d at 28. Urging this Court to create a conflict with Division I’s decision in *Landis & Landis Construction, LLC v. Nation*, 171 Wn. App. 157, 286 P.3d 979 (2012), the Millers argue that there is no common-law implied warranty of habitability in Washington. (Resp. Br. 17.)

According to the Millers, *Foisy* is no longer good law because “the events that gave rise to *Foisy*” happened before the RLTA took effect. (Resp. Br. 18.) The decision in *Foisy*, however, came down *after* the RLTA’s effective date. *See Foisy*, 83 Wn.2d at 28. Under the Millers’ reading, then, the decision applied only to past events—it had only retroactive and not prospective effect. But the Supreme Court’s holdings *always* have prospective effect. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 267, 208 P.3d 1092 (2009) (quoting *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 671, 384 P.2d 833 (1963)). The Millers’ reading of *Foisy* cannot be right.

The Millers say that the RLTA was a thoroughly considered piece of legislation. (Resp. Br. 15-16.) Precisely for that reason, the RLTA’s

plain language, under which common-law remedies are preserved, *see* RCW 59.18.070, must be taken seriously; that language did not slip into the statute by accident. The Millers dismiss this plain language, but their argument on this point is circular. They say that preserving “remedies otherwise provided by law,” *id.*, does not preserve the common-law warranty of habitability, since the RLTA overrides that warranty. (Resp. Br. 20.) But this assumes the answer to very point in dispute: whether or not the RLTA preserves the warranty.

The Millers are not helped by the cases they cite to support their position that the RLTA displaced the common-law warranty of habitability. *Howard v. Horn*, 61 Wn. App. 520, 522–23, 810 P.2d 1387 (1991), and *Wright v. Miller*, 93 Wn. App. 189, 200, 963 P.2d 934 (1998) (both cited by Resp. Br. 16), confirm that the common law—which, after *Foisy*, includes the common-law implied warranty of habitability—remains a valid theory of recovery. The plain language of the statute in *In re Parentage of M.F.*, 168 Wn.2d 528, 533, 228 P.3d 1270 (2010) (quoting RCW 26.10.010, 26.10.100) (cited by Resp. Br. 17) explicitly rejected the de facto parentage rule that a stepparent asked the Supreme Court to create. The Supreme Court faithfully applied that plain language, just as Johnson asks this Court to faithfully apply the plain language of the RLTA’s common-law preservation clause, RCW 59.18.070. The statute in

Washington Water Power Co. v. Graybar, 112 Wn.2d 847, 853–55, 774 P.2d 1199 (1989) (cited by Resp. Br. 17), contrary to the Millers’ contention, did expressly preempt the common law: the statute not only contained a clear statement of its broad scope, but also provided that it modified the law within that scope. *Aspon v. Loomis*, 62 Wn. App. 818, 816 P.2d 751 (1991) (cited by Resp. Br. 18–19), holds merely that the RLTA’s warranty of habitability is limited. As the recent decision in *Landis* shows, *Aspon* does not speak to the *common-law* warranty of habitability—other than mentioning that it is preserved by the RLTA. *Landis*, 171 Wn. App. at 162 (quoting *Aspon*, 62 Wn. App. at 825).²

B. The Millers had actual notice of the defects.

The record evidence demonstrates four independent defects in the manufactured home: (1) the lack of a landing—an enlarged area in which to stand and gain balance—at the top of the stairs; (2) rotted steps; (3) a nonfunctioning exterior light; and (4) missing handrails. (App. Br. 4–5.) If just one of these defects constituted an actionable violation of the implied warranty of habitability or the RLTA, reversal of the trial court is

² The Millers also rely on a passing comment in a treatise that does not cite any authority other than *Foisy* itself. See William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 6.38 at 301 & n.26 (3d ed. 2000) (cited by Resp. Br. 17). This is not persuasive.

required. The Millers, however, assert that they lacked actual notice of the defects.

The Millers do not support this assertion with respect to the first defect, the lack of a landing. The Millers say nothing about why they had no actual notice that the manufactured home's stairway lacked a landing. In fact, under their own theory, they had actual notice. The Millers say that as a frequent visitor to the manufactured home, Johnson "undoubtedly was aware that there was no landing." (Resp. Br. 9.) The Millers too were frequent visitors (CP 356 at 20:16–20; CP 375 at 21:11–13), so they too undoubtedly were aware that there was no landing.

The same goes for the second defect, the rotted steps. The Millers visited the property while the steps were visibly rotting, so by their own reasoning they were undoubtedly aware of the defect. (CP 383 at 50:9–15.) Trying to dodge this inevitable conclusion, they claim that while they may have been aware of the rot, they were not aware that the steps were slippery. (Resp. Br. 12.) The Millers, though, are confusing knowledge with causation. There is no genuine dispute that the Millers knew of the rot. The rot is the defect that Johnson is suing over. Even if the Millers did not know about the steps' slipperiness, that ignorance is significant only if the slipperiness and not the rot was the defect that caused Johnson's injury—only if his injury's "real" cause was the rain, which made the

rotting steps slippery. This is a tenuous argument about causation, given rain's inevitability in western Washington. *See Herberg v. Swartz*, 89 Wn.2d 916, 927--28, 578 P.2d 17 (Wash. 1978) (“[T]he theoretical underpinning of an intervening cause which is sufficient to break the original chain of causation is the absence of its foreseeability.”). In any event, the Millers have not developed the argument, so it is waived. *See, e.g., Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990).

The Millers argue that they could not have known of the nonfunctioning exterior light—the third defect—because they “mostly” visited the manufactured home in the daytime. (Resp. Br. 11 (citing CP 358 at 22:12).) “Mostly,” however, necessarily means that the Millers visited the property at night as well. Sandy Caldwell testified that, at the time of Johnson’s fall, the light had not been working for months (CP 362 at 27:4–6)—months during which the Millers had made regular visits (CP 356 at 20:16–20; CP 357 at 21:11–13). A reasonable jury could easily put two and two together and find that the Millers had visited the property at night while the light was not working, and hence had notice of the

defect.³ The Millers say that the light might have been working when they visited (Resp. Br. 11), but on summary judgment all inferences must be drawn in favor of Johnson and not the Millers. *E.g., Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 840–41, 28 P.3d 802 (2001).

Last, the Millers make no argument that they lacked actual notice of the fourth defect, the missing handrails. They simply argue that they were not given formal written notice of that defect. (Resp. Br. 11–12.)

C. Formal written notice of a defect is not a prerequisite to tort liability.

The Millers next maintain that even if they had actual notice, they can only be liable if they first had formal written notice of the defects under RCW 59.18.090. Their position misreads the RLTA, creates absurd consequences, and ignores precedent.

The Millers rely on RCW 59.18.090, which states that a tenant may seek remedies under the RLTA “or otherwise provided by law” if the tenant, “*as provided in RCW 59.18.070,*” has given the landlord written notice of a defect and a “cure” period has expired. RCW 59.18.090 (emphasis added). RCW 59.18.090 thus incorporates the procedural requirements of RCW 59.18.070, which in turn explicitly provides that the

³ This inference is made even clearer by Sandy Caldwell’s testimony that the Millers had visited the property at least once while the light was “erratic.” (CP 383 at 50:18–19.)

notice-and-cure procedure is not exclusive—that a tenant may pursue other remedies “otherwise provided . . . by law”:

If at any time during the tenancy the landlord fails to carry out the duties required by RCW 59.18.060 or by the rental agreement, the tenant may, *in addition to pursuit of remedies otherwise provided him or her by law*, deliver written notice to [the landlord or a designated agent], or to the person who collects the rent The landlord shall commence remedial action . . . as soon as possible but not later than [three specified time periods, depending on the kind of defect at issue].

RCW 59.18.070 (emphasis added). This provision makes clear that “remedies otherwise provided him or her by law”—i.e., common-law or other remedies that are not explicitly included in the RLTA—are not subject to the RLTA’s notice-and-cure requirements. Thus, Johnson’s claims, which all arise under the common law,⁴ are not subject to those requirements. In arguing otherwise, the Millers read RCW 59.18.090 in isolation, without reading RCW 59.18.070, the provision whose requirements it incorporates. That is error. *See, e.g., W. Petroleum Imps., Inc. v. Friedt*, 127 Wn.2d 420, 428, 899 P.2d 792 (1995) (“When construing a statute we must read it in its entirety, not piecemeal, and interpret the various provisions of the statute in light of one another.”).

⁴ As was discussed in the opening brief and is discussed below, Johnson’s claim based on the Millers’ RLTA duties is a common-law negligence claim, rather than a cause of action arising directly from the RLTA. *See* App. Br. 19; *infra* pp. 16–17. Johnson’s claim based on the implied warranty of habitability is also, of course, a common-law claim.

The structure of the RLTA, and not just its text, shows the Millers' interpretation to be wrong. Under the RLTA's notice-and-cure period, a tenant notifies a landlord of a defect and then waits a statutorily provided period before seeking judicial relief. This structure presumes that the harm that the tenant is suffering is ongoing, rather than past personal injury. Because the notice-and-cure period presumes that the harm can be remedied purely through repair work, it is not meant to apply to a tort claim for personal injury.

The Millers' reading of the RLTA also creates exceedingly "strange" results. *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994) (courts "avoid constructions that yield unlikely, strange or absurd consequences"). The Millers had actual notice of the four independent defects at the manufactured home. *See supra* pp. 7–10. In these circumstances, formal written notice on top of actual knowledge of the defects would be an empty formality. Washington courts do not attribute to the Legislature an intent to impose meaningless rules. *See Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748, 754, 675 P.2d 592 (1984). This principle is all the stronger here, where both text and structure contradict the Millers' statutory interpretation.

Finally, if the Millers were right that compliance with the RLTA's notice-and-cure requirements were a prerequisite to liability, then a whole

slew of precedents would have to be rejected. The recent decision in *Landis*, for example, squarely rejected the Millers’ argument. *See Landis*, 171 Wn. App. at 163–65.⁵ This Court would also have to reject *Tucker v. Hayford*, 118 Wn. App. 246, 75 P.3d 980 (2003), and *Pinckney v. Smith*, 484 F. Supp. 2d 1177 (W.D. Wash. 2007), both of which imposed liability on landlords in the absence of formal written notice. Not even this Court’s decision in *Sjogren v. Properties of Pacific Northwest, LLC*, 118 Wn. App. 144, 75 P.3d 592 (2003), which imposed common-law liability on a landlord without requiring notice, could survive. *See* Brief of Respondent at 7, *Sjogren*, 118 Wn. App. 144 (No. 29003-1-II) (“[T]here is absolutely no evidence in the record that the [landlords] knew or should have known that the lights had burned out.”). Once again, the Millers ask this Court to steamroll precedent. This Court should decline the request.

⁵ *Landis* holds that—at least where the defect existed at the beginning of the lease between the parties—compliance with the notice-and-cure requirements is not necessary. The Millers concede that at least two of the independent defects in the manufactured home (the lack of a landing and the rotting steps) existed at the beginning of the lease. (Resp. Br. 9, 10.) While *Landis* does not address whether compliance with those requirements is necessary if the condition arises after the lease, the plain language of RCW 59.18.070 sufficiently answers that question: any claim under the common law need not comply with the RLTA’s notice-and-cure procedure. *See supra* pp. 10–12.

D. Because the Millers breached their own independent duties, their liability is direct and not vicarious.

The Millers did not contract away their duties under the implied warranty of habitability or the RLTA. (App. Br. 21–23.) Nor do the Millers claim that they contracted away those duties. Because the Millers retained those duties, they are directly—not vicariously—liable for breaching them by failing to correct the manufactured home’s four independent defects. The Millers’ extended discussion of vicarious liability, therefore, is largely irrelevant. (Resp. Br. 13–15.) Even if there were no vicarious liability here, the Millers would still be directly liable, because the mere existence of an independent contractor did not relieve the Millers of their own, independent duties. It is those independent duties on which this lawsuit is predicated.

Further, while there is some evidence that Taurus Baxter was an independent contractor for the Millers, Tobin Miller continued to make repairs to the manufactured home. (CP 36, § 7; CP 52, ¶ 3; CP 97:10; CP 350 at 13:24–14:3.) In other words, not only did the Millers not contract away their duties, but it also appears that whatever understanding existed between Baxter and the Millers coexisted with the Millers’ own continued repairs to the premises.

The question of vicarious liability comes into play solely in one narrow circumstance that involves only one of the four independent defects: assuming that the Millers themselves cannot be held liable for *failing to replace* the missing handrails on the manufactured home's stairway, may the Millers be held vicariously liable for Baxter's negligence in *removing* them?⁶ Restatement (Second) of Property section 19.1 and Restatement (Second) of Torts section 419 (1965) would both recognize vicarious liability in those circumstances. If, however, this Court should hold that a landlord could not be vicariously liable in those circumstances, it would encourage landlords to hire cheap, unskilled contractors to do as much work as possible, thereby outsourcing any potential liability. This result would be contrary to Washington's strong public policy in favor of safe housing. *See Foisy*, 83 Wn.2d at 28. Thus, while this Court need not reach the vicarious liability issue in order to reverse the district court, if the Court does reach the issue, it should follow the Restatements.

⁶ Johnson does not assert that the Millers could be held liable under the RLTA for Baxter's negligent removal of the handrails. Liability for this defect is asserted only under the nonstatutory warranty of habitability. (*Cf. Resp. Br.* 32–33.)

E. The RLTA creates a duty of care that is enforceable in tort.

As Johnson showed in his opening brief, the RLTA creates a duty of care flowing from landlord to tenant. (App. Br. 17–19.) This conclusion is clear under Restatement (Second) of Torts section 286—a conclusion that the Millers never try to rebut, and thus need not be repeated here. Instead, the Millers change the subject. They contend that the RLTA does not provide an implied private right of action. (Resp. Br. 27–30.)

Whether the RLTA creates an implied private right of action, however, is different from whether it creates a duty of care that is enforceable through an already-existing action, i.e., the common-law negligence action. There are a couple of sure indications that the two inquiries—whether a statute creates an implied private right of action and whether a statute creates a standard of care—are distinct.

First, precedent keeps the two inquiries distinct. Courts deciding whether a statute creates a standard of care use the test set out in Restatement (Second) of Torts section 286, *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 474–75, 951 P.2d 749 (1998), while courts deciding whether a statute includes an implied private right of action use a “similar” but different test, *Tyner v. State Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 78, 1 P.3d 1148 (2000). Remarkably, the Millers claim that the Supreme Court precedents using the Restatement test—one decided as

recently as 2004, *see Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269–72, 96 P.3d 386 (2004)—have been silently overruled. (Resp. Br. 27 n.3.) This claim cannot be accepted. *See State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) (“We will not overrule such binding precedent *sub silentio*.”).

Second, the two inquiries are conceptually distinct. Necessarily, a plaintiff asserting a private right of action need only prove that a statute was in fact violated; fault need not be involved. By contrast, a plaintiff asserting that a statute creates a standard of care, and that the defendant violated that standard of care, must prove negligence in addition to the existence of a duty. *See Schooley*, 134 Wn.2d at 473.

Regardless of whether the RLTA creates an implied private right of action, it does create a tort duty that can be enforced through a negligence action like this one.

III. Because the Millers owed the same duties to Johnson as they did to a tenant, the Millers are liable to Johnson for the injuries he suffered.

The Millers have not shown why the Court should create an exception to the venerable principle that a landlord owes the same duties to both a tenant and a tenant’s guest. *See supra* Argument, Part I. They have not shown why they could escape liability to a tenant in Johnson’s position who suffered injuries due to the Millers’ violations of the implied

warranty of habitability or the RLTA. *See supra* Argument, Part II. These holes in their argument are dispositive and require reversal.

Independently of simple logic, section 17.6 of the Second Restatement of Property also calls for liability in these circumstances. But even though section 17.6 has been adopted by *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001), *Pinckney*, 484 F. Supp. 2d 1177, and *Tucker*, 118 Wn. App. 246, the Millers argue that this Court should create a conflict with those decisions and reject section 17.6. Their arguments against section 17.6 are unpersuasive.

The Millers, citing no authority, first say that because Johnson “first mentioned” section 17.6 “in resp[o]nse to” the Millers’ own motion for reconsideration, this Court cannot consider section 17.6. (Resp. Br. 20.) But in opposing the first motion for summary judgment, Johnson prominently relied on *Lian v. Stalick*, which adopts section 17.6. (CP 91–92.) And RAP 2.5(a) requires only that a party “raise[]” the relevant issue “in the trial court.” Johnson raised, and the trial court considered, the section 17.6 issue. (VRP 113–14 (court discussing the issue).) This was more than enough to preserve the issue. *See Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992) (“[T]he purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority.”).

The Millers say that adopting section 17.6 would be “impermissible judicial legislating” (Resp. Br. 21), but in adopting the rule of section 17.6, this Court would not be usurping the Legislature. It would simply be doing what courts do best: applying precedent consistently and logically. By contrast, in *Burkhart v. Harrod*, 110 Wn.2d 381, 385–86, 755 P.2d 759 (1988) (cited by Resp. Br. 21), the Supreme Court was rejecting a candid plea to abandon precedent and adopt a wholly new rule. Similarly, in *Carnation Co. v. Hill*, 115 Wn.2d 184, 189, 796 P.2d 416 (1990) (cited by Resp. Br. 21), the losing party “refuse[d] to accord” precedent “a continuing vitality.” Here it is the Millers, and not Johnson, who are guilty of refusing to accord binding precedent a continuing vitality. *See supra* pp. 2–4, 5–7, 12–13.

The Millers next insist that section 17.6 does not apply here because it adopts a negligence per se standard. (Resp. Br. 21–22.) While one comment to section 17.6 does mention negligence per se, *see* Restatement (Second) of Property § 17.6 cmt. a, the text of section 17.6 *itself* does not adopt “negligence per se,” as that term is used in Washington.⁷ Section 17.6 provides for a tort claim based on a statutory

⁷ As used in Washington, the term “negligence per se” has assumed a narrow and specific meaning: it refers to the doctrine, now abrogated, that breach of a statutory duty is by itself conclusive proof of a failure to exercise reasonable care. *See* RCW 5.40.050.

violation of the RLTA (as well as an independent claim based on the violation of the nonstatutory warranty of habitability). But unlike a claim asserted under negligence per se, the tort claim of section 17.6 cannot be based merely on a defect that violates a statute or nonstatutory warranty. For in addition to the mere existence of that defect, the landlord must have “failed to exercise reasonable care” to repair that condition. *Id.* § 17.6. That requirement of negligence, in other words, is an element that must be proven separately from the statutory violation. Indeed, comment (c) to section 17.6—the only comment to section 17.6 that discusses what the standard of care is—explicitly states that a landlord is only liable under 17.6 if he fails to exercise reasonable care. *Id.* § 17.6 cmt. c. Section 17.6 does not impose negligence per se.

The case law in Massachusetts proves that section 17.6 jibes with existing Washington law. Massachusetts, like Washington, has abandoned the doctrine that a breach of a statutory duty is conclusive proof of negligence. *Bennett v. Eagle Brook Country Store, Inc.*, 557 N.E.2d 1166, 1168 (Mass. 1990) (citing *LaClair v. Silberline Mfg. Co.*, 393 N.E.2d 867, 871 (Mass. 1979)). Despite this, the Massachusetts high court had little trouble adopting section 17.6. *Scott v. Garfield*, 912 N.E.2d 1000, 1005 (Mass. 2009).

Thus, when one of the comments to section 17.6 speaks of “negligence per se,” it is not using that term as it is used in Washington. Outside of Washington, “negligence per se” often refers to any statute that creates a standard of care enforceable in tort.⁸ This broader meaning of “negligence per se” is what section 17.6’s commentary is referring to.

Next, the Millers seize on a statement from the commentary to section 17.6: “Ordinarily, the landlord will be chargeable with notice of conditions which existed prior to the time that the tenant takes possession.” Restatement (Second) of Property § 17.6 cmt. c. From this statement, they appear to conclude that, under section 17.6, a landlord cannot have notice of conditions that existed while the current tenants were on the property but before the current landlord owned the property. (Resp. Br. 22.) Nowhere does section 17.6 hint at this conclusion, since the inquiry is always whether the landlord “had a reasonable opportunity to discover the condition and to remedy it.” Restatement (Second) of Property § 17.6 cmt. c. From the fact that a landlord is typically on notice of conditions that existed before a tenant took possession, it does not

⁸ For example: “Each jurisdiction’s version of negligence per se has different procedural effects on a negligence action, ranging from strict liability, with a very limited number of judicially recognized excuses, to simply allowing the statute to be considered as evidence of negligence.” Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What’s the Difference?*, 77 Or. L. Rev. 497, 530 (1998).

follow that a landlord is not on notice of conditions that existed before the landlord himself takes ownership of the property. Quite the contrary is true, since one would expect that before buying real estate, a landlord would carefully inspect the property for defects. At any rate, the record evidence here shows not merely that the Millers had constructive notice of the manufactured home's four defects, but that they had actual notice of those conditions. *See supra* pp. 7–10. That is *more* than what section 17.6 requires before imposing liability.

Finally, the Millers claim that if a defect develops after a lease begins, the landlord is not liable under section 17.6 until the tenant formally notifies the landlord of the defect. (Resp. Br. 22–23.) That is not what section 17.6 provides. The relevant statement from the commentary to section 17.6 says that if a defect develops after a lease begins, the landlord “may” be unable to discover and correct the defect without the tenant’s notification. Restatement (Second) of Property § 17.6 cmt. c. Thus, formal notification is a prerequisite to liability under section 17.6 only if the landlord is not able, in the exercise of reasonable care, to discover the defect on his own:

Where the condition arises after the tenant takes possession, the landlord *may* not be able, in the exercise of reasonable care, to discover the condition, *in which case* the landlord will not be liable under the rules of this section

until he has had a reasonable opportunity to remedy the condition after the tenant notifies him of it.

Id. (emphasis added). Conversely, “[w]here the landlord is able to discover the condition by the exercise of reasonable care, he is subject to liability after he has had a reasonable opportunity to discover the condition and to remedy it.” *Id.* The dispositive question under section 17.6 is always whether the landlord had actual or constructive notice—and here the Millers had actual notice of the manufactured home’s four defects. They are liable under section 17.6.

IV. Common sense, justice, and policy strongly favor allowing injured guests to recover against landlords who negligently violate their statutory duties or the implied warranty of habitability.

As Johnson pointed out at length in his opening brief, reversal of the trial court is not only required by logic and precedent, but also favored by common sense, justice, and public policy. (App. Br. 35–39.) The Millers hardly muster a response to Johnson’s arguments on these points.

They do say, however, that the “unusual facts of this case militate against” recognizing liability. (Resp. Br. 24.) They emphasize that their tenants possessed (but did not own) the property two years before the Millers owned it and that the tenants knew of the manufactured home’s defects. (*Id.*) But the tenants’ knowledge of the defects does not somehow erase the Millers’ knowledge of them. At most, the Millers’ emphasis on their tenants’ knowledge is an argument in favor of *also* imposing liability

on tenants, not an argument against recognizing landlord liability.

Recognition of landlord liability does not preclude recognition of tenant liability; joint and several liability is, after all, a familiar concept in tort law. But this appeal does not present the question whether liability should be imposed on tenants, so the Millers' arguments about their tenants' knowledge have no bearing here.

Knowing of a defect, moreover, does not necessarily enable a tenant to remedy that defect—and this case shows why. As the Millers knew, Taurus Baxter's job absented him from the property for weeks at a time, weeks during which the Millers could have made the needed repairs. (CP 333 at 36:19–22.) Neither Baxter nor Sandy Caldwell had the technical know-how to perform necessary maintenance. (*See* CP 352 at 16:5 (“We’re not electricians.”).) It would have been easier for the Millers than their tenants to make repairs. If anything, this case shows why landlords and not tenants are best suited to minimize risks of injury.

The Millers also point out that “many” of the manufactured home's defects predated the Millers' purchase of the property. (Resp. Br. 24.) It is hard to see how this fact lets the Millers off the hook. Prospective buyers of real estate normally inspect the property they are about to purchase. The fact that the defects predated the Millers' purchase gave them all the more reason to know about them.

Finally, the Millers complain that it would not be fair to hold them liable when their tenants never formally notified them of the defects. (Resp. Br. 24.) But whether or not they received a formal notification, the record indicates that they had actual notice of the defects. Fairness does not require useless formalities.

CONCLUSION

Applying well-established precedents and principles, and rejecting the Millers' request to alter the law, this Court should hold that when landlords negligently fail to correct a dangerous condition that violates the RLTA or the implied warranty of habitability, and that condition injures a tenant's guest, landlords are liable to the guest. Here, the Millers negligently failed to correct four independently dangerous conditions that violated the RLTA or the implied warranty of habitability. As a result, John Johnson was injured. This Court should therefore reverse the Superior Court's judgment and remand for trial, with costs to Johnson.

Respectfully submitted this February 28, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on February 28, 2013, I caused a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS JOHN AND JANET JOHNSON to be delivered as follows:

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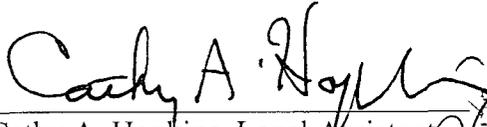
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