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No. 97325-3

SUPREME COURT
OF THE STATE OF WASHINGTON

KIMBERLY J. GERLACH,

Respondent,

v.

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

Appellants,

and,

WEIDNER APARTMENT HOMES, a Washington
business entity, dba The Cove Apartments, and WEIDNER
ASSET MANAGEMENT LLC, a Washington corporation,

Defendants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Richard McDermott

**BRIEF OF AMICUS CURIAE WASHINGTON MULTI-FAMILY
HOUSING ASSOCIATION**

Sidney C. Tribe, WSBA No. 33160
Scott R. Weaver, WSBA No. 29267
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
*On Behalf of Washington Multi Family
Housing Association*

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington Multi-Family Housing Association (WMFHA) is the Washington state chapter of the National Apartment Association. It is a collection of Property Management companies, owners of multifamily properties, apartment communities, and industry suppliers. Working together, WMFHA promotes and advances the multifamily housing industry in Washington State to serve its valued residents.

WMFHA stays apprised of legislative and other legal developments to advocate equitably for our industry and the communities its members serve. It offers educational programs including national professional accreditation courses, continuing education, and skills building opportunities. WMFHA events offer numerous opportunities for networking, learning, idea exchange and relationship building with a robust network of multifamily housing professionals.

WMFHA has particular interest in this case as it raises issues of the rights and responsibilities of those in the multi-family housing sector regarding the intersection of statutory duties and common law premises liability.

II. ARGUMENT OF AMICUS CURIAE

Petitioner Kimberly Gerlach urges this Court to extend tort liability for violation of the statutory duties and obligations for repairs between

landlords and tenants to the social guests¹ of those tenants. While Washington has extended statutory rights and obligations to the landlord-tenant relationship, it has maintained the distinction between the tort duties property owners owe tenants and the tort duties property owners owe social guests. Washington has also distinguished between common areas controlled by the landlord, and leased premises, controlled by the tenant.

The legal distinction between the duties owed tenants and social guests is rooted in sound policy. Unlike landlord-tenant statutes, which impose strict duties and concurrent obligations between parties in a legal relationship, a landlord has no legal relationship with the social guest of a tenant. Current tort law, which already allows a social guest of a tenant to hold a landlord liable for failing to repair common areas and for direct acts of negligence, should not be altered to create a heightened statutory duty between landlords and the general public.

Likewise, the distinction between a landlord's duty as to common areas and the duty as to private premises should be maintained. Putting a higher duty on landlords to tenants' social guests than the tenants themselves owe is bad policy. Because tenants are in the best position to identify needed repairs and notify landlords, and because landlords have

¹ Gerlach, perhaps aware of the broader legal implications of her argument, emphasizes that she was "sharing the premises" with her fiancé who was the actual tenant, rather than a temporary social guest such as a partygoer or visiting relative. Petitioner Supp. Br. 19. However, her legal argument is replete with reference to "guests," and she acknowledges that the rule she advocates would extend to social guests. She also does not distinguish between herself and social guests who are living with the tenant in violation of the tenant's lease agreement, to whom landlords would also owe a statutory duty under her proposed legal regime.

limited power to enter a tenant's premises to inspect and repair, this Court should decline to extend landlords' tort liability under Restatement (Second) of Property § 17.6 to social guests of tenants.

A. Simply “adopting” a Restatement that imposes landlord liability to persons not contemplated by statute bypasses the *Bennett*² legal test for implying causes of action. This Court should not overrule long-established authority to imply a cause of action for social guests here.

This Court prescribes a three-part inquiry to determine if an implied common law cause of action exists based on a duty created by the Legislature in a statute:

[F]irst, whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Bennett, 113 Wn.2d at 920-21 (quoting *In re WPPSS Sec. Litig.*, 823 F.2d 1349, 1353 (9th Cir. 1987)). The first element of the *Bennett* test is particularly critical: this Court has held that a policy decision to extend statutory duties to other persons beyond those identified in the statute is for the Legislature. *Ducote v. State, Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 706, 222 P.3d 785 (2009).

Gerlach has asked this Court to imply a tort cause of action based on duties imposed by statute on landlords. However, rather than argue for why social guests who are injured on premises controlled by tenants meet the three part *Bennett* test for implying causes of action, the petitioner asks

² *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

this Court to simply adopt the Restatement (Second) of Property § 17.6. That Restatement purports to transform a landlord’s statutory duties to tenants into common law tort duties, and would create a tort remedy for anyone who is inside a tenant’s premises. Supp. Br. of Pet. 19-21. Although Gerlach acknowledges the three part *Bennett* test, Supp. Br. of Pet. 20, she does not actually *apply* the test. She merely contends, without explanation or reference to authority, that the statutory duty of repair in RCW 59.18.060(2) “should protect” all persons, including guests.

Gerlach’s argument ignores the first element of the *Bennett* test and is unsound. The first element of the *Bennett* test, that the person must be one of those “especially protected” by the statute is not met simply when a court or an advocate believes that person “should” be “protected” by it. *Bennett*, 113 Wn.2d at 920-21. It is not even met when that person is *similarly situated* to a person who is especially protected. *Ducote*, 167 Wn.2d at 706. In *Ducote*, a stepparent brought an action against the Department of Social and Health Services for negligent investigation of child abuse. *Id.* at 701. Despite their obvious similarity to “parents,” whom the statute did contemplate, this Court concluded that stepparents were not persons for whose “especial benefit” the statute was enacted. *Id.* at 706. The mere fact that a stepparent was similar to a parent, or that stepparents “should” have been included in the statute by the Legislature, was not enough. *Id.*

The *Ducote* analysis drew from long-standing authority that relied on the language of the statute, not public policy arguments, to determine the

correct class of tort plaintiffs under the *Bennett* “especial benefit” test. *Id.* at 703, citing *Tyner v. Dep’t of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000) and *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998).

This Court may imply a common law remedy for violation of a statutory duty, but it must “look to the language of the statute to determine to whom the remedy is available.” *Bennett*, 113 Wn.2d at 920-21. The landlord-tenant laws were enacted for the “especial benefit” of landlords and tenants. There is no language in RCW 59.18.060(2) identifying social guests as those for whose “especial benefit” that statute was enacted. If the Legislature wants to extend a duty to social guests, it may do so. This Court should not.

B. Judicially extending the statutory rights and obligations of landlords to the social guests of tenants would upend Washington’s premises liability law and create contradictions and inequities.

Under common-law premises liability in Washington, both landlords and tenants – who either own or occupy the subject premises -- owe differing duties to entrants onto land depending on the entrant’s status as a trespasser, a licensee, or an invitee. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 467, 296 P.3d 800 (2013). When the facts regarding entry onto the property are undisputed, legal status and the duty owed are questions of law. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

Historically, landlords and tenants owed social guests a duty to avoid willful or wanton misconduct as to the condition of their premises. *Memel v. Reimer*, 85 Wn.2d 685, 688, 538 P.2d 517 (1975). This Court abandoned that rule for a more modern iteration that elevated the duty, but did not require them to “seek out hidden dangers”:

We are not requiring that the occupier either prepare a safe place, or that he affirmatively seek out and discover hidden dangers. *What we do impose is a duty to exercise reasonable care where there is a known dangerous condition on the property and the occupier can reasonably anticipate that his licensee will not discover or realize the risks.* Under these circumstances, the landowner can fulfill his duty by either making the condition safe or by warning his licensee of the condition and its inherent risks.

Id. at 689.

With respect to the duties of owners and occupiers of land, Washington now follows the second Restatement of Torts and distinguishes between the duties owed to invitees, licensees, and trespassers. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 125, 52 P.3d 472 (2002) (citing *Younce v. Ferguson*, 106 Wn.2d 658, 662, 724 P.2d 991 (1986)). An invitee is either a public invitee or a business invitee. A business invitee ““is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.”” *Younce*, 106 Wn.2d at 667 (quoting RESTATEMENT (SECOND) OF TORTS § 332 (1965)). A licensee, in contrast, is ““a person who is privileged to enter or remain on land only by virtue of the possessor's consent.”” *Afoa*, 176 Wn.2d at 467 (quoting *Younce*, 106 Wn.2d at 667). A “licensee” enters the

occupier's premises with the occupier's permission or tolerance, either (a) without an invitation or (b) with an invitation but for a purpose unrelated to any business dealings between the two. *Thompson v. Katzer*, 86 Wn. App. 280, 285, 936 P.2d 421 (1997).

Currently, as both landlords and tenants, social guests of the tenants are licensees. *Id.* This licensee status is the same even when the social guest is not a direct social guest of the property owner, but a social guest of a business invitee who has a direct economic relationship to the property owner. *Id.* at 289 (social guest of a man who was "agent" housesitting for property owner was licensee because he had no economic relationship with property owner). In short, the social guest of an apartment dweller is a licensee vis-à-vis both the resident and the property owner.

Licensees are owed a lesser duty of care than invitees. When a person is a licensee, the owner and/or occupier of land owes a duty of ordinary care to repair, warn of, or otherwise make reasonably safe, a dangerous condition on the land. However, this duty only arises if the occupier knows or should know of the condition; the occupier should realize that the condition involves an unreasonable risk of harm to the licensee; and the occupier should expect that the licensee will not discover the condition or, upon discovering it, will not perceive the risk arising from it. *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975); RESTATEMENT (SECOND) OF TORTS § 342.

The difference between the duty of care owed to licensees and that owed to invitees is that, with respect to licensees, a landowner has no duty

to discover dangerous conditions and the provision of a warning about a dangerous condition or the taking of corrective action is sufficient to fulfill his or her duty. This is in contrast to the affirmative duty owed to invitees to ascertain dangerous conditions and to take corrective measures to protect the personal safety of invitees. *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 134, 875 P.2d 621 (1994) (quoting *Memel*, 85 Wn.2d at 689); *Younce*, 106 Wn.2d at 668–69.

Despite this reality of Washington common law, Gerlach argues that this Court should alter that law and rule that landlords, *and only landlords*, should owe the social guests of tenants the duty to “seek out” hidden dangers. Tenants, under Gerlach’s argument, would still only owe social guests the duty owed to licensees. Adopting Gerlach’s position would not only contravene the *Bennett* test for statutory duties in tort, it would upend Washington’s common law on premises liability going back decades.

A landlord (who does not control the tenant’s premises and may enter only by permission or agreement) should not have a *higher* duty to the social guest of that tenant than the tenant (who *is* occupying the premises). It is illogical and inequitable to impose a greater tort duty on the landlord – who has only limited power to learn of defects and repair premises by permission of the tenant – than on the tenant who directly controls the premises. This Court should decline to overrule not one but two well-established bodies of law: the *Bennett* test, and common law on premises liability.

- C. **As a policy matter, the harm to social guests sought to be prevented by imposing repair duties on landlords is already remedied by the tort duty owed to tenants. There is no allegedly dangerous condition on an occupied leasehold unique to social guests. Imposing a heightened duty on landlords would increase invasions of tenants' privacy.**

Gerlach argues that a common law extension of statutory duties from landlords to social guests is good policy because there is a public policy that premises should be made safe. Supp. Br. of Pet. 21. She argues that the fact that Gerlach “fell victim” to the balcony “is a mere fortuity,” and that her status as a social guest should be irrelevant. *Id.*

However, the duty she seeks to impose already exists between landlords and tenants, and there is no policy reason why extending it to social guests would increase the safety of premises. She does not explain how a defective condition that a landlord has a statutory duty to repair could *only* threaten social guests but not tenants. And she does not explain why a concurrent duty to warn should not be placed on tenants themselves. The persons who are most at risk from any defective conditions – tenants – are in the best position to (1) ascertain any hazards, (2) warn social guests of those hazards, and (3) notify landlords of defects to be repaired. There is no policy purpose served by placing all of the duty on landlords who are not occupying premises, and none on the tenants.

Finally, adopting Gerlach’s position would be a net negative for tenants. The landlord-tenant laws and common law already protect tenants from risk to themselves from dangerous conditions. Thus, they would suffer no increased risk of injury if Gerlach’s rule were rejected. However,

if Gerlach’s rule were adopted, landlords would have a continuing duty to inspect a tenant’s premises even for conditions *about which the tenant knows but does not raise concerns*. This is because Gerlach expressly argues that social guests should have a remedy because they are less likely than tenants to know of hazardous conditions. Petitioner Supp. Br. at 20. Yet she ignores that under her proposed legal regime, those who control the premises and are most likely to know of the condition – tenants – have a lesser duty to their own family members and guests than landlords.

Gerlach’s rule sets up a tension between landlords and tenants regarding keeping the tenant’s premises safe and in good repair. It would increase the landlord’s need for routine inspections that would potentially invade tenants’ privacy.³ There is a delicate balance to be drawn between tenants’ privacy rights and landlords’ need to reasonably inspect property in order to repair defects that even the tenants do not want repaired. It would increase the conflict between tenants and landlords over their need for inspections and the tenants’ right to privacy.

Finally, as a policy matter this Court should consider the impact of such a rule on affordable housing. Forcing increased inspections exacerbates the problem of housing affordability in Washington because Gerlach’s rule will increase costs to operate rental properties in order to maintain regular inspections to comply with this new duty.

³ Remember, a landlord would *already* be liable under the common law for any affirmative act of negligence that injured a person, regardless of their status as an invitee or licensee. Gerlach’s rule would require a more aggressive oversight of a tenant’s private premises than is currently contemplated under the landlord-tenants laws.

III. CONCLUSION

Gerlach's rule should be rejected. Implying a common law cause of action based on a statutory duty would contravene the *Bennett* test and subsequent applications of it. This Court would have to believe that *Bennett* and its progeny should be overruled. It would also contravene Washington's common law on premises liability and create inequities and contradictions in that law. It would also increase the potential harm to tenants' privacy while doing nothing to increase the safety of tenants or their guests.

Respectfully submitted this 6th day of January, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By 

Sidney C. Tribe, WSBA No. 33160
Scott R. Weaver, WSBA No. 29267
*Attorneys for Washington Multi-Family
Housing Association*

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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<p>Howard M. Goodfriend SMITH GOODFRIEND, PS 1619 8th Ave N Seattle WA 98109-3007 howard@washingtonappeals.com</p>	<p>Pauline V. Smetka HELSELL FETTERMAN LLP 1001 4th Ave Ste 4200 Seattle WA 98154-1154 psmetka@helsell.com hsims@helsell.com bkindle@helsell.com</p>
<p>Philip A. Talmadge TALMADGE/FITZPATRICK PLLC 2775 Harbor Ave SW Fl 3 Ste C Seattle WA 98126-2168 phil@tal-fitzlaw.com</p>	<p>Benjamin Franklin Barcus Paul Lindenmuth BEN F. BARCUS & ASSOCIATES PLLC 4303 Ruston Way Tacoma, WA 98402-5313 paul@benbarcus.com tiffany@benbarcus.com</p>
<p>Simon Henri Forgette THE LAW OFFICES OF SIMON H. FORETTE, P.S. 406 Market St Ste A Kirkland, WA 425-822-7778 simon@forgettelaw.com denise@forgettelaw.com</p>	

DATED this 6th day of January, 2020.



 Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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Sender Name: Patti Saiden - Email: saiden@carneylaw.com

Filing on Behalf of: Sidney Charlotte Tribe - Email: tribe@carneylaw.com (Alternate Email:)

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