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No. 97325-3

SUPREME COURT
OF THE STATE OF WASHINGTON

KIMBERLY J. GERLACH, individually

Petitioner,

v.

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

Respondents.

PETITIONER'S ANSWER TO AMICUS CURIAE BRIEFS

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A. Introduction.

Petitioner Kimberly Gerlach submits this answer to the amicus curiae briefs addressing 1) the admissibility of an expert's testimony of Gerlach's likely blood alcohol based on his interpretation of the results of a hospital blood draw¹ and 2) to whom a landlord may be liable in tort for breach of the implied and statutory warranties of habitability.²

B. Amici's blanket rule of admissibility ignores the trial court's broad discretion in ruling on the admission of intoxication evidence given the specific factual context in which injury occurred.

Amici Cities and Counties advocate a blanket rule of admissibility for BAC numbers, regardless of provenance or the facts and other evidence in the case, that would strip trial courts of their discretion in ruling on the admissibility of evidence. Because Gerlach's hospital blood draw was not admissible per se to establish respondent Cove's intoxication defense under RCW 5.40.060(1) and RCW 46.61.502, the issue on appeal is not whether results from a hospital blood draw may be admitted in support of a defendant's

¹ See amicus briefs of Washington Cities Insurance Authority ("Cities") and Washington Counties Risk Pool ("Counties").

² See amicus briefs of Washington State Association for Justice Foundation ("Foundation"), the Residential Housing Association of Washington ("RHAWA") and the Washington Multi-Family Housing Association ("WMFHA")

intoxication defense (Cities Br. 2-9), but whether the trial court manifestly abused its discretion in excluding the results of a hospital blood draw and related “expert” speculation on the ground that the potential for misuse, confusion and jury prejudice outweighed its probative value in the circumstances of this particular case.

1. **No blanket rule compels admission of “other evidence of intoxication” when a defendant raises an intoxication defense; the appellate courts review a trial court’s evidentiary ruling for manifest abuse of discretion.**

This Court has repeatedly emphasized the broad discretion trial courts have in making evidentiary rulings at trial. *State v. Arndt*, ___ Wn.2d ___, 453 P.3d 696, 706 (2019) (“When the relevance and helpfulness of expert testimony is debatable, there is no abuse of discretion in excluding the testimony on tenable grounds.”); *Gilmore v. Jefferson Cty. Pub. Transportation Benefit Area*, 190 Wn.2d 483, 495, ¶ 21, 415 P.3d 212 (2018) (reversing Division Two’s grant of new trial based on trial court’s refusal to admit defense biomechanical expert’s testimony). A trial court abuses that discretion only “when the trial court “relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *Arndt*, 453 P.3d at 704.

Amici's assertion that the result of a hospital blood draw is always admissible when intoxication is raised as a defense ignores these well-established principles. It also ignores the legislatively mandated distinction between a blood alcohol concentration (BAC) test meeting the State toxicologist's standards, which is admissible "per se" to establish intoxication, and "other evidence of intoxication," including the blood draw for medical treatment at issue in this case. RCW 46.61.502(1)(a), (2)(c). The admission of the results of blood draws for medical treatment are "subject to the same usual evidentiary checks" as any other evidentiary ruling. *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 49, 93 P.3d 141 (2004), *superseded by regulation as recognized by Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 664, ¶ 14, 174 P.3d 43 (2007). (Gerlach Supp. Br. 10-11)

The trial court did not abuse its broad discretion by ruling that while the *fact* of intoxication was relevant to Cove's defense, the *degree* of Gerlach's intoxication as established by a non-conforming blood draw had scant probative value and would have confused and prejudiced the jury. As does Cove, the Cities and Counties ignore the factual context in which Cove asserted Gerlach's intoxication as a defense to the indisputable evidence that the balcony from which Gerlach fell was dangerously compromised by rot, by alleging that

the balcony railing broke off only because Gerlach had climbed on it after a night of drinking with her friends.³ Cove and its amici make much of the trial court’s difficulty in reaching a final decision concerning the admissibility of Gerlach’s hospital blood draw, but that only highlights its careful consideration of the specific facts and circumstances of this case in ultimately exercising its discretion to exclude both the level of Gerlach’s intoxication and Dr. Vicenzi’s testimony that a high blood alcohol level would have caused “severe impairment of psychomotor function.” (RP 1531)

2. The trial court carefully exercised its discretion after considering the particular facts and circumstances of how Gerlach’s alleged intoxication could have caused the railing to fail.

The trial court carefully considered that factual context in ruling that while the fact of intoxication “may explain [Gerlach’s] bad decision” (RP 50-51), the level of Gerlach’s intoxication did not. (RP 1562) Amici Cities and Counties never explain how the level, as opposed to the admitted fact, of Gerlach’s intoxication, would have helped the jury determine causation and apportion fault under these

³ The jury accepted Cove’s defense, finding Gerlach partially at fault based on Cove’s expert reconstruction and its extensive cross-examination and argument about Gerlach’s intoxicated state when the balcony railing failed. (Arg. § B.3, *infra*; Gerlach Supp. Br. 5-6, 16-18)

particular facts, and neither *Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993) nor *Peralta v. State*, 187 Wn.2d 888, 389 P.3d 596 (2017) (both cited Cities Br. 7-10) require the jury to be informed of the precise level of a plaintiff's intoxication under RCW 5.40.060.

Both amici fail to acknowledge the undisputed physical evidence that Cove's balcony railing was so decayed that it failed to support Gerlach's weight and prevent her from falling from the second story onto the concrete below. Instead, amici parrot Cove's assertion that Gerlach's fall had nothing to do with "any defect in Cove's balcony" (Cove Supp. Br. 11) even though at trial Cove's biomechanical engineer conceded it was rotten (RP 3121-25), and it was irrefutable from the physical evidence that Gerlach fell when the balcony railing sheared off from its rusted, rotten supports. Neither the level of Gerlach's intoxication nor an expert's speculation based on a hospital blood draw of "how the plaintiff was acting immediately before she fell" (RP 1562), could rebut the unrefuted evidence that Cove's rotten balcony railing, which fell along with Gerlach to the pavement below, could not withstand Gerlach's weight when she "engaged with the railing" (RP 3127), regardless whether, drunk or sober, she was leaning or climbing on the railing. (RP 2067-68, 2108, 2246; Exs. 36, 52-54)

Further, the trial court did not “refuse” to allow the jury to consider the fact of Gerlach’s intoxication or Cove’s theory that her intoxication was a proximate cause of the accident, as Cove and its amici assert. (Cove Supp. Br. 4, Cities Br. 2, Counties Br. 3) The trial court *instructed the jury* that “the plaintiff, Ms. Gerlach, was under the influence of intoxicating liquor at the time of the accident.” (RP 2799-2800) The jury is presumed to follow the trial court’s unambiguous instruction. *Hizey v. Carpenter*, 119 Wn.2d 251, 269–70, 830 P.2d 646 (1992). The instruction (from the court, not the plaintiff or her counsel) was not a “vague concession” (Cities Br. 3), an evidentiary “admission” (Counties Br. 4), or a “one-sided nullity” (Cities Br. 2), as Cove reminded the jury in closing. (RP 3639: “You have been instructed that [Gerlach] was intoxicated that night.”)

The Cities concede that the trial court must consider the “nature of the Plaintiff’s conduct and its connection to her injuries” in considering whether to admit the results of a hospital blood alcohol draw. (Cities Br. 4) But its argument that refusing to admit evidence of the level of Gerlach’s intoxication deprived the jury of valuable proximate cause and comparative fault evidence (Cities Br. 6) ignores the nature of the fault that the jury was required to compare. The particular conduct alleged by Cove, as it repeatedly

emphasized in closing argument, is that Gerlach “took a risk and [made] a bad choice to climb” the balcony (RP 3643) because “she was intoxicated that night.” (RP 3639: “People make mistakes when they are intoxicated . . . It affects your judgment. It affects risk taking. It affects the way you do things.”) The jury did not need an expert toxicologist to tell them that an intoxicated person may be physically or mentally impaired.

The Cities also concede that the “degree of impairment . . . may have greater significance” in some contexts than in others, for instance where a plaintiff is injured while climbing a rock wall versus being struck from behind by a bicycle on a sidewalk. (Cities Br. 7) The trial court was correct that expert testimony would not tell the jury how Gerlach was acting immediately before she fell from a rotten balcony. The trial court carefully balanced the marginal relevance of the precise level of Gerlach’s intoxication against the likelihood that the jury would misuse the evidence to tar Gerlach as a drunken party girl – the real “defense” Cove was pursuing.⁴

⁴ Cove’s proposed “intoxication evidence” was largely directed to proving that Gerlach was not morally worthy of an award of damages for her serious injuries. Why else did Cove attempt to introduce into evidence images from Gerlach’s Facebook account showing her drinking alcohol, or videos of her using foul language? (CP 673, 968, 1552; RP 210, 251-52, 660, 3358)

After considering Cove's offer of proof, the trial court was well within its discretion to rule that it was enough for the jury to consider the *fact of her intoxication*, but that the *precise level of intoxication* did not provide significant information about what Ms. Gerlach did or did not do before her fall when the rotten railing failed:

We don't have a very clear understanding of exactly what – of what occurred in this accident, except that we know that the railing failed, and we know that because it was on the ground along with the plaintiff and we can see the holes and the rot in the guardrail and that seems to be without any question.

So we don't know what the plaintiff did immediately prior to the railing failing. We know that she – well, we now know that she had had a significant amount of alcohol to drink, enough to make her intoxicated at the time of the event.

But whether or not that intoxication has anything at all to do with the actual accident, until we have something further, facts further to support that allegation, it's more prejudicial than probative to allow Dr. Vincenzi to come in and opine how the plaintiff was acting immediately before she fell.

(RP 1562) The trial court carefully exercised its discretion to make a reasonable evidentiary decision under these particular facts.

3. Admission of Gerlach's hospital blood draw would not have changed the jury's verdict.

The trial court's exclusion of evidence is not grounds for a new trial if the evidence would not have affected the jury's verdict. *Brown*

v. Spokane Cty. Fire. Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Neither the Cities nor Counties support Cove’s assertion that the jury was prevented from finding “that Gerlach fell while negligently attempting to climb over the railing.” (Cove Supp. Br. 4) Cove’s theory that Gerlach climbed on the railing was Cove’s only theory of comparative fault, and the jury not only *considered* Gerlach’s voluntary intoxication – it *accepted Cove’s theory* when it assigned Gerlach 7% of the total fault. (CP 1890)

The evidentiary issues raised by Cove in no way undermine the jury’s factual findings, supported by substantial evidence, that Cove was negligent under either or both of Gerlach’s theories of premises liability and breach of the warranty of habitability. (See CP 1871-72 (landowner’s duty to invitees); CP 1873-74 (landlord’s warranty of habitability); see Arg. § C.1, *infra*) The jury clearly adopted Cove’s theory of comparative fault; otherwise it would not have assigned Gerlach any fault whatsoever. But given the overwhelming evidence that the balcony railing was an accident waiting to happen, it reasonably limited Gerlach’s fault to 7%. Whether Gerlach was merely intoxicated or severely intoxicated would not have changed that allocation because the jury accepted that Gerlach’s injury happened as Cove alleged.

- C. A landlord’s warranty of habitability to maintain premises in a safe condition extends to an apartment resident who has not signed the lease.**
- 1. Cove’s liability for breach of the implied warranty of habitability is unnecessary to affirm the jury’s undifferentiated verdict.**

The jury reached an undifferentiated general verdict, on a verdict form proposed by Cove (CP 1233-35), that did not distinguish between Gerlach’s two theories of liability – that Cove breached its duty to an invitee as an owner and occupier of land and that it breached its warranty of habitability as a landlord. (CP 1888-90) Cove has not challenged the trial court’s instructions on common law premises liability for breach of its duty to Gerlach as an invitee.⁵ As Cove proposed a verdict form that failed to distinguish between the two theories of liability, this Court may affirm on the unchallenged ground that Cove breached its common law duty to an invitee.

This Court must affirm the jury’s undifferentiated verdict if either of Gerlach’s liability claims is supported by substantial evidence. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003). As Tegland summarizes the rule:

⁵ In particular, this Court should disregard amicus WMFHA’s contention that Gerlach was a “mere licensee.” Cove never made this argument on appeal. This Court will not consider an argument raised for the first time on appeal by an amicus. *Fields v. Dep’t of Early Learning*, 193 Wn.2d 36, 41 n.1, 434 P.3d 999 (2019); *State v. Gonzalez*, 110 Wn.2d 738, 752 n. 2, 757 P.2d 925 (1988).

In a multitheory case, i.e., a case in which the jury may base its verdict on one of a number of theories of liability asserted by the plaintiff, an appellate court will be obligated to remand if one of the theories is later invalidated on appeal, but only if the defendant objected to the use of a general verdict and proposed a clarifying special verdict form.

Tegland, 15A Wash. Prac., *Handbook Civil Procedure* § 88.6 (2010-2011 ed.), citing *Davis*, 149 Wn.2d 521; see also, *Collings v. City First Mortgage Services, LLC*, 177 Wn. App. 908, 924, ¶ 34, 317 P.3d 1047 (2013) (“remand for a new trial is required only if the defendant objected to the use of a general verdict and proposed a clarifying special verdict form”), *rev. denied*, 179 Wn.2d 1028 (2014). Review of Cove’s liability for breach of the warranty of habitability is unnecessary should this Court determine that the trial was untainted by the evidentiary error alleged by Cove.

2. This Court should follow the *Restatement to hold a landlord liable in tort to an apartment resident on the property with the consent of the named tenant for breach of its warranty of habitability.*

If necessary, this Court should adopt *Restatement (Second) of Property: Landlord & Tenant* § 17.6 (1977), and allow a tort action based on the landlord’s breach of its warranty of habitability by tenants and “others upon the leased property with the consent of the tenant.” The trial court’s instructions were correct statements of the

law and supported by substantial evidence that Cove should have discovered and repaired the rotten railing that failed to protect Gerlach from a near fatal fall. (Exs. 24-25, 28 at pp. 29-30; RP 841-47, 875-80, 954-57, 3185-86)

The trial court instructed the jury to determine whether Cove breached either the implied warranty of habitability or the statutory warranty under the Residential Landlord-Tenant Act (or both). (CP 1873) The trial court required the jury to find that Cove knew or should have known of a dangerous condition and that it failed to exercise ordinary care to repair it.⁶ The trial court told the jury that

⁶ A landlord is liable for damages proximately caused by a condition on the rented property if it is in violation of:

- (1) An implied warranty of habitability or
- (2) The condition was dangerous, and violated one or more of the following statutory duties:
 - (A) [To] maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition endangers or impairs the health or safety of the tenant;
 - (B) [To] maintain the structural components, including but not limited to roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable.
- (3) The landlord was aware of the condition or had a reasonable opportunity to discover the condition; and
- (4) The landlord failed to exercise ordinary care to repair the condition.

(Instruction 13; CP 1873)

a “condition on a property rented violates the implied warranty of habitability when it creates an actual or potential safety hazard to a tenant or to the tenant's invitees, including guests.” (CP 1874)

As the Foundation argues (Foundation Br. 6-11, 17-20), a tort action in favor of any persons injured by an unsafe condition on the premises is consistent with the *implied* warranty of habitability, which is based on the landlord’s control over the premises and superior ability to investigate and eliminate threats to health and safety. While focusing on the *statutory* warranty under RCW 59.18.060, the Landlord Amici fail to advance any salutary policy in limiting the cause of action to the signator of a lease, as the Court of Appeals held below.

a. No public policy supports RHAWA’s argument that not even a tenant may sue for breach of the warranty of habitability.

Cove argued, and the Court of Appeals held, that the landlord may be held liable for damages for breach of the warranty of habitability only “in cases where a landlord’s negligence is alleged by a tenant” and not “in the context of claims by nontenants.” (Op. *8) Cove makes the same argument in this Court. (Cove Supp. Br. 24-33) Ignoring Cove’s concession, RHAWA argues that no one – not tenants or their guests – should recover in tort for a landlord’s failure to maintain the premises in a habitable condition. Leaving aside that

such a rule would be unwise, unjust, and unprecedented,⁷ this Court should reject this argument because it is raised for the first time on appeal by amicus. *Fields*, 193 Wn.2d at 41 n.1.

b. The implied warranty of habitability protects both tenants and their guests.

In arguing that a landlord's sole obligation is to comply with its lease obligations to the tenant, RHAWA and WMFHA assert that a tenant's sole remedy lies in enforcing the lease under the Residential Landlord-Tenant Act, RCW ch. 59.18. These arguments ignore that almost half a century ago this Court adopted a common law implied warranty of habitability in residential leases, imposing extra-contractual duties upon landlords to provide for safe housing as a matter of public policy, that is separate and distinct from the statutory remedies in the RLTA.

In *Foisy v. Wyman*, 83 Wn.2d 22, 28, 515 P.2d 160 (1973), this Court held that, as a matter of common law, "in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability." The Court rejected the doctrine of *caveat emptor*, finding "little justification for following a rule that was developed for

⁷ As does Cove, WMFHA concedes that a common law tort duty "already exists between landlords and tenants." (WMFHA 9)

an agrarian society and has failed to keep pace with modern day realities,” and adopted the implied warranty as a matter of public policy, reasoning that unsafe housing conditions pose a threat not just to the tenant, but to the community as a whole:

Housing conditions, such as the record indicates exist in the instant case, are a health hazard, not only to the individual tenant, but to the community which is exposed to said individual. . . . [S]uch housing conditions are at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for the conscientious landowners.

Foisy, 83 Wn. 2d at 28.

Ignoring the basis for this Court’s decision in *Foisy*, RHAWA and WMFHA seek a return to the days of *caveat emptor*. They ask this Court to hold that a landlord’s sole obligation is to repair an unsafe condition on the rental property only after receipt of notice from the tenant, and that the sole remedy is to hold landlords to the “benefit of their bargain” under the RLTA even though this Court has consistently rejected the contention that “the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else” as inconsistent with the fundamental policies of deterrence and allocation of risk that underlie modern tort law. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 418, ¶ 7, 150 P.3d 545, 547 (2007), quoting

MacPherson v. Buick Motor Co., 217 N.Y. 382, 397, 111 N.E. 1050 (1916) (Cardozo, J.).

RHAWA's contention that the RLTA "comprehensively alter[s] existing common law rules" (RHAWA Br. 3-4) ignores the plain language of the statute. The Legislature expressly provided that the tenant's remedies under the RLTA are not exclusive, allowing "an action in an appropriate court . . . for any remedy provided under this chapter or otherwise provided by law." RCW 59.18.090(2).⁸ And contrary to WMFHA's contention (WMFHA Br. 3-4), this Court does not limit a *common law* remedy by looking to *statutory* language to determine whether the Legislature intended the plaintiff to be within a protected class. See *Ducote v. State, Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 706, 222 P.3d 785 (2009) (Court does "not engage in the statutory construction required by the *Bennett* test" when examining a "common law doctrine"), citing *Zellmer v. Zellmer*, 164 Wn.2d 147, 169, 188 P.3d 497 (2008).

⁸ See *Tucker v. Hayford*, 118 Wn. App. 246, 257, 75 P.3d 980, 985 (2003); William H Clarke, *Washington's Implied Warranty of Habitability: Reform or Illusion*, 14 Gonz L Rev 1, 39 (1978) (other remedies include "a common law tort action for personal injuries caused by the defective premises"); Bothell, *Washington Tenant Remedies and the Consumer Protection Act*, 10 Gonz. L. Rev. 559, 573 (1975) ("landlord-tort liability [for breach of the warranty of habitability] . . . would seem a natural development of Washington's present law.").

As the Foundation persuasively argues, tort remedies further, rather than hinder, the public policy to alleviate conditions that create “an actual or potential safety hazard to the occupants.” (Foundation Br. 10, quoting *Landis & Landis Constr. LLC v. Nation*, 171 Wn. App. 157, 165-66, 286 P.3d 979 (2012), *rev. denied*, 177 Wn.2d 1003 (2013)). The Landlord Amici offer no sound policy basis to deprive a tenant’s guest of that tort remedy based on nothing more than pure happenstance that the guest was injured by an unsafe condition before the tenant was. This Court should adopt *Restatement (Second) of Property: Landlord & Tenant* § 17.6 (1977) and hold that the implied of warranty of habitability may be enforced in a tort action by both tenants and their guests who are injured because of an unsafe condition.

c. The statutory warranty of habitability protects both tenants and their guests.

This Court also should hold that both tenants and their guests may sue a landlord in tort for personal injuries arising from breach of the statutory duty in RCW 59.18.060 to maintain the premises in a safe condition. Both tenants and their guests are “within the class for whose ‘especial’ benefit the statute was enacted; second, . . . legislative intent, explicitly or implicitly, supports creating or

denying a remedy; and third, . . . implying a remedy is consistent with the underlying purpose” of the RLTA. *Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 1258, 1261 (1990).

Conceding the second and third factors of the *Bennett* test, WMFHA takes issue with only the first factor, arguing that guests are not within the protected class based on the “language of the statute.” WMFHA ignores that the landlord’s duties under RCW 59.18.060 are not delineated in terms of protecting only “tenants,” but phrased as mandatory duties to maintain the safe condition of the premises. With few exceptions the landlord’s primary duties under RCW 59.18.060 are directed not to the tenant, but with respect to “the premises,” RCW 59.18.060(1), its “structural components,” RCW 59.18.060(2) and its “common areas.” RCW 59.18.060(3). This language reflects the Legislature’s intent to protect all persons from suffering an injury because of a hazardous condition on the premises or its structural components.

Unlike many statutes, RCW ch. 59.18 does not have a “declaration of purpose” making plain those for whose benefit the statute was enacted. See *Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 78, 1 P.3d 1148 (2000) (“RCW 26.44.010, the declaration of purpose section, makes it clear that a

parent's interests were contemplated by the Legislature.”). But the Legislature’s failure to expressly state its intent to protect a designated class is no impediment to implying a cause of action where that intent is plain from other provisions of the statute. *See Beggs v. State, Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 77, ¶ 15, 247 P.3d 421, 425 (2011) (“victims of child abuse are certainly within the class for whose ‘special’ benefit” mandatory reporting statute was enacted).

In arguing that the RLTA does not protect anyone other than the signator to the lease, RHAWA notes that landlords are not subject to per se liability under the Consumer Protection Act. (RHAWA Br. 5, citing *State v. Schwab*, 103 Wn.2d 542, 693 P.2d 108 (1995)) But that the RLTA is intended to protect those who may be injured by unsafe conditions in residential housing, rather than to further the broader “public interest,” actually indicates the legislature’s intent to protect a designated class. *Compare Keodalah v. Allstate Ins. Co.*, 194 Wn.2d 339, 347, ¶ 16, 449 P.3d 1040 (2019) (“RCW 48.01.030 is expressly stated to be in the ‘public interest,’ . . . Accordingly, it cannot be said that the statute was enacted for the particular benefit of insureds.”). This Court should hold tenants as well as their guests may sue for

personal injuries caused by a landlord's breach of the warranty of habitability under both the common law and under RCW 59.18.060.

D. Conclusion.

A defendant's invocation of RCW 5.40.060 does not require a court to relinquish its discretion under the rules of evidence. The trial court exercised its discretion on tenable grounds in excluding an expert's speculation, based on a hospital blood draw, how Gerlach was acting before she fell from Cove's rotten balcony. This Court should affirm the trial court's discretionary evidentiary rulings, hold that Gerlach as an apartment resident could sue in tort for injuries sustained as a result of Cove's breach of the warranty of habitability, and reinstate the judgment on the jury's verdict.

Dated this 4th day of February, 2020.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 4, 2020, I arranged for service of the foregoing Petitioner's Answer to Amicus Curiae Briefs, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 4th day of February, 2020.



Sarah N. Eaton

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