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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.

REVISED SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

The jury in petitioner Kim Gerlach's action against respondents Cove Apartments and Weidner Property Management ("Cove") found Cove negligent based on undisputed physical evidence that Cove's second story balcony railing was so compromised by rot and decay that it could not support Gerlach's 125 lb. weight. Cove could not and did not dispute the rotten condition of its balcony, so it asked the jury to assign fault to Gerlach, alleging the railing gave way only because Gerlach tried to climb over it to enter her apartment after a long night of drinking with friends. The trial court allowed Cove to prove that Gerlach had been drinking, and upon Gerlach's stipulation, instructed the jury that Gerlach was intoxicated, excluding only the result of a hospital blood draw and the related testimony of Cove's toxicologist that Gerlach's intoxication compromised her judgment.

A properly instructed jury accepted Gerlach's theory that the Cove was negligent in maintaining its premises in a condition unsafe for any invitee, drunk or sober, and also accepted Cove's theory that intoxication comprised Gerlach's judgment, assigning her 7% fault. Cove's challenge to the trial court's discretionary evidentiary rulings provides no basis to reverse the judgment on the jury's verdict.

II. SUPPLEMENTAL STATEMENT OF ISSUES

1. Did the trial court commit reversible error in excluding evidence of the result of a hospital blood draw that did not comply with the State toxicologist's standards, and in excluding related expert evidence based on that test result, after instructing the jury to consider the undisputed fact of Gerlach's intoxication in assigning her comparative fault?

2. Whether only a tenant who signed the lease can bring a tort action for breach of the implied and statutory warranty of habitability or whether a tenant's invitee, who has lived in the apartment and paid utility charges, can bring such an action?

3. Did respondents waive any complaint to a host of discretionary rulings, alleging the trial court's "less than even handed approach" (Ans. 3, n. 2; Ans. 6, n. 5) by not assigning error or arguing these new issues in their opening brief below, and by not arguing them as grounds for review in their answer to the petition for review?

4. If the Court nevertheless reaches these issues, did the trial court abuse its discretion in prohibiting collateral source evidence to challenge the cost of Gerlach's medical treatment or in its wording of instructions that allowed the jury to consider Gerlach's voluntary intoxication in assigning fault?

III. SUPPLEMENTAL STATEMENT OF THE CASE

Cove's recitations of the "facts" in both this Court and the Court of Appeals consistently contradicts the evidence the jury relied upon in reaching its verdict after a 15-day trial, flouting the rule that this Court views the facts in the light most favorable to the prevailing party. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). Ignoring the testimony the jury actually heard, Cove relies instead on pleadings filed on summary judgment and other motions and counsel's statements in argument. (*e.g.*, Ans. 2-3) Gerlach summarizes here the facts that support the jury's verdict:

A. Gerlach suffered serious head injuries in a fall from the second story of the Cove Apartments when a rotted wood balcony railing broke.

Kim Gerlach suffered serious head injuries when she fell from the second story balcony of the apartment where she lived with her fiancé in the Cove Apartments. While she had not signed the lease, Gerlach paid Cove for utility charges and Cove accepted her checks. (CP 268-71) Gerlach alleged that she fell because her apartment's decayed and rotten balcony railing gave way when she leaned against it. Cove did not and could not dispute that the bulkhead to which the balcony railing was attached was extensively decayed and the screws attaching the railing to the bulkhead had rusted, as reflected in

numerous photographic exhibits. (Ex. 36 (Appendix A); Ex. 54 (Appendix B); RP 2084-85) The railing was so compromised that it “failed to support Gerlach’s [125 lb.] weight and snapped off.” (RP 1459, 2542; Exs. 135, 138) The police dispatch report admitted into evidence reflects that witnesses at the scene reported “female leaned against a rail and it broke causing her to fall”. (RP 2551-52; Ex. 140)

Unconscious and unresponsive when the paramedics arrived, and comatose upon arrival at Harborview (RP 1381, 2542), Kim suffered multiple skull fractures, brain hemorrhage, and cerebral swelling that required brain surgery and removal of a portion of her skull. (RP 1386-87, 2452-53; Ex. 22) On appeal, Cove did not challenge Kim’s severe, permanent injuries.

Faced with irrefutable physical evidence that its balcony was decayed and rotten, Cove offered two defenses to liability. First, Cove alleged that it lacked notice of the unsafe condition. The jury heard evidence that in fact, Cove had previously performed inspections that put it on notice that its balconies and railings suffered from rot and decay, but had then inexplicably discontinued safety inspections of railings. (RP 876-79, 979, 1233-42; Exs. 24-25, 28)

Cove’s primary defense at trial, however, was its allegation that Gerlach was responsible for her own injuries because she was drunk

when she fell. Cove claimed that Gerlach made the poor decision to attempt to enter her apartment by climbing onto the balcony railing from an exterior walkway after a night spent drinking with friends because she was intoxicated. (Ans. 3-4) Cove argued on summary judgment that Gerlach's intoxication led "her to make the choice to try, in her impaired state, to climb from the walkway onto the balcony." (CP 306, 528) When the trial court concluded that this defense raised a factual issue for trial, Cove's accident reconstructionist showed the jury animations to refute Gerlach's assertion that she was leaning on the railing when it gave way, claiming that the rotten railing was unable to support the force of someone climbing on it. (RP 2997-3000; 3045-48, 3126-35; Exs. 60-63; CP 1191)

B. Cove established through each fact witness that Gerlach had been drinking. The trial court instructed the jury that Gerlach was intoxicated when she fell.

Contrary to Cove's assertion that the trial court "placed its thumb on the scales of justice" by "fail[ing] to address the evidence of Gerlach's intoxication," and "severely restricted the scope of witness examination" (Ans. 5; Ans. 6, n.5; Ans. 20), the trial court gave Cove substantial latitude to establish Gerlach's intoxication. The Medic One responder who first treated Gerlach testified to "the smell of alcohol," and that Gerlach specifically, as well as "everybody there,"

had been drinking. (RP 2555) The police officer on the scene testified that he was responding to “a call with sounds of people drinking in . . . the background, so that’s why they sent police.” (RP 1416) Kim’s companions, who were on their way to purchase more alcohol when she fell, testified that they had chosen to walk rather than drive to two local restaurant bars to celebrate a birthday, where they drank until the early morning hours. (RP 1355-56, 1496, 1556-57, 1560-62, 2353-54, 2361-63, 2629)

After Gerlach stipulated to the fact that she was intoxicated (RP 1561), the trial court then 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 trial court did exercise its discretion to exclude some of the evidence of Gerlach’s intoxication preferred by Cove. The trial court did not allow Cove to place into evidence photos on Gerlach’s social media account showing her drinking alcohol. (CP 673, 968, 1552) After finding that the inflammatory nature exceeded its negligible probative value, the trial court also excluded a defense expert’s opinion that “any person” with Gerlach’s estimated blood alcohol level of .238% would be “severely impaired” (RP 1535, 1540-41, 1556-57, 1560-62), and prevented Cove’s reconstruction expert from speculating “how the plaintiff was

acting immediately before she fell.” (RP 1562) The trial court reasoned that while “we know that she had a significant amount of alcohol to drink, enough to make her intoxicated at the time of the event,” “we don’t know what the plaintiff did immediately prior to the railing failing,” and that it was “more prejudicial than probative to allow Dr. Vincenzi to come in and opine how the plaintiff was acting immediately before she fell.” (RP 1562)¹

C. The jury found Cove liable but accepted Cove’s argument that Gerlach’s intoxication made her partially responsible for her injuries.

The trial court instructed the jury that it could find Cove negligent under either the common law duty of care owed to an invitee by an owner and occupier of land, or a landlord’s statutory duty under the Residential Landlord Tenant Act (RLTA) to refrain from creating “an actual or potential safety hazard” and to use ordinary care to discover and repair a dangerous condition that violates health and safety regulations. (CP 1870-75) The jury found Cove negligent without distinguishing between the two theories of liability. (CP 1888)

¹ Cove did not assign or argue error in the Court of Appeals to the trial court’s refusal to introduce Gerlach’s purported deposition “admission” that she was intoxicated when she fell. (App. Br. 2-3) Cove’s untimely complaint (Ans. 6, n.5) mischaracterizes the record. Gerlach suffers retrograde amnesia (RP 2867); she actually testified that she did not remember. (RP 2717)

The trial court also instructed the jury that it should consider Gerlach's voluntary intoxication in allocating fault to her:

A person who becomes voluntarily intoxicated is held to the same standard of care as one who is not so affected. The intoxication of the plaintiff at the time of the occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.

(Inst. 20, CP 1880) Cove relied on this instruction to argue in closing that Gerlach's alcohol-fueled decision "was not the right thing to do" (RP 3656), and that on the night in question Gerlach's voluntary intoxication "affects [her] judgment . . . affects [her] risk taking." (RP 3639) Cove urged the jury to assign fault to Gerlach, who "was in the best position to control her conduct . . .[;] she took a risk and it was a bad choice to climb there in that condition". (RP 3643)

The jury accepted Cove's argument, finding Gerlach negligent and then allocating Cove 93% and Gerlach 7% of combined fault. (CP 1890) After deducting for Gerlach's comparative fault, the trial court entered judgment against Cove for \$3,533,808.22. (CP 1902)

The Court of Appeals reversed, remanding for a new trial on liability and allocation of fault, but not on damages. The Court held that the trial court abused its discretion by excluding evidence of the result of the hospital blood draw and expert testimony that "a BAC of

.238 make[s] it less likely that she could safely stand on a balcony or climb over a railing,” thereby depriving Cove of “the opportunity to present evidence on a key factual issue: whether Gerlach was predominantly liable for her injuries due to her *level* of intoxication.” (Op. ¶¶ 12, 13) (emphasis added) The Court further held that the trial court erred in instructing the jury that Cove could be liable to Gerlach for a violation of duties under the RLTA, because “Gerlach was not a tenant.” (Op. ¶ 45)

IV. SUPPLEMENTAL ARGUMENT

A. The trial court allowed Cove to vigorously argue their intoxication defense, and did not abuse its discretion in its ER 403 balancing of the probative value of a hospital blood draw against its potential for misuse.

The trial court did not abuse its substantial discretion in the admission of evidence by allowing Cove to establish the fact of Gerlach’s intoxication, while excluding the results of an unverified hospital blood serum test. While the admitted, undisputed *fact* of Gerlach’s intoxication was relevant to Cove’s intoxication defense, the numerical *level* of Gerlach’s blood alcohol, as measured after a hospital blood serum test that did not meet State toxicology standards, was far less so, not only because of the potential of its misuse to impugn Gerlach’s character, but because it had minimal (if any)

probative value to Cove's sole theory of comparative fault - that Gerlach got drunk and fell while climbing on the balcony railing. The trial court's discretionary decision ultimately did not prejudicially affect the verdict, as the jury accepted Cove's theory of Gerlach's comparative fault while nonetheless finding, based on undisputed physical evidence, that the landlord maintained an unsafe condition.

- 1. RCW 5.60.040 does not require a trial court to admit into evidence a blood alcohol result derived from a hospital blood draw.**

The trial court properly allowed Cove to prove Gerlach's voluntary intoxication for purposes of its RCW 5.40.060 defense. Cove had no additional right under that statute to have the jury consider the numerical level of the amount of alcohol in her blood based on an unverified Harborview blood serum test.

RCW 5.40.060(1) incorporates "[t]he standard for determining whether a person was under the influence of intoxicating liquor . . . established for criminal convictions under RCW 46.61.502." RCW 46.61.502, in 2012 and now, provides two ways to prove that a plaintiff was "under the influence" of alcohol. First, "an alcohol concentration of .08 or higher as shown by an analysis of the person's breath or blood made under RCW 46.61.506" based on a blood alcohol concentration (BAC) test meeting the State toxicologist's standards, is admissible

“per se” to establish the person was intoxicated. RCW 46.61.502(1)(a); RCW 46.61.506(3). *See, e.g., State v. Donahue*, 105 Wn. App. 67, 74, 18 P.3d 608, *rev. denied*, 144 Wn.2d 1010 (2001). Second, a person also may be proved to be “under the influence of or affected by intoxicating liquor,” with competent evidence *other than* a BAC test that meets State toxicologist standards. RCW 46.61.502(2)(c). *See* former RCW 46.61.502(1)(b) and Laws 2013, ch. 3, § 33; *see also Donahue*, 105 Wn. App. at 77.

While BAC tests complying with State toxicologist standards are admissible “per se” in criminal cases, trial courts retain substantial discretion to admit or exclude “non-per se” tests performed for medical treatment:

Unlike the “per se” section and its implementing regulations, the “other evidence” section of RCW 46.61.502 does not specifically refer to any type of blood or breath testing. We conclude the legislature was drawing a distinction between tests performed by the State and its agents, pursuant to statute, and other tests, such as tests done at the instigation of the defendant or for medical treatment. Such tests would be subject to the same usual evidentiary checks.

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).

Nonconforming tests are “subject to the same usual evidentiary checks” as any other evidence. *Clark-Munoz*, 152 Wn.2d at 49. *See, e.g., State v. Charley*, 136 Wn. App. 58, 67, ¶ 18, 147 P.3d 634 (2006) (affirming exclusion of nonconforming medical blood sample seized and tested by State), *rev. denied*, 161 Wn.2d 1019 (2007). RCW 5.40.060 does not diminish the trial court’s discretionary authority to apply the rules of evidence in ruling on the admissibility of the results of the Harborview blood draw.

2. The trial court did not abuse its discretion in balancing the probative value of a hospital blood draw and related expert evidence with the potential for juror prejudice and confusion.

Under ER 403, the trial court had broad discretion in balancing the relevance of the numerical level of Gerlach’s blood alcohol based on a hospital medical draw against the danger of unfair prejudice. *See Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 462, 746 P.2d 285 (1987) (“The weighing of probative value against unfair prejudice under [ER 403] rests within the sound discretion of the trial court.”). This discretion necessarily means that courts “can reasonably reach different conclusions” about the admissibility of evidence without abusing their discretion. *Gilmore v. Jefferson Cty. Pub. Transportation Benefit Area*, 190 Wn.2d 483, 495, ¶ 21, 415

P.3d 212 (2018) (reinstating jury verdict overturned by Court of Appeals because trial court had excluded expert testimony) (internal quotation and citation omitted).

Division One erroneously overruled the trial court's discretion, deciding *de novo* that the probative value of a hospital blood draw result that "could be evidence of intoxication" under RCW 5.40.060 outweighed its potential for unfair prejudice under ER 403. (Op. ¶¶ 18, 11) It was undisputed and the jury, after hearing from every eye witness that Gerlach and her companions had spent the night drinking, was instructed that "Gerlach was under the influence of intoxicating liquor at the time of the accident." (RP 2799-2800) The trial court had ample discretion to determine whether Gerlach's admission to intoxication was sufficient "to render [Cove's] evidence wholly needless under the circumstances." 9 Wigmore, *Evidence in Trials at Common Law* § 2592 (rev. ed. 1981.)

The trial court reasonably decided that the result of a non-conforming hospital blood draw had minimal probative value here; Gerlach's admission established that she was "under the influence of intoxicating liquor" for purposes of RCW 5.40.060. *See Peralta v. State*, 187 Wn.2d 888, 903-04, ¶ 27, 389 P.3d 596 (2017) ("trial court did not abuse its discretion when it ruled that [plaintiff's] admission

[that she was intoxicated] satisfied” RCW 5.40.060). Contrary to the Court of Appeals’ analysis, “the *extent* of Gerlach’s intoxication” (Op. ¶ 16) and whether it rose to the level of “extreme intoxication” (Ans. 8) had little bearing on the one and only theory of comparative fault Cove espoused – that Gerlach was trying to climb on to the balcony when its rotten railing failed. (Exs. 60-63; RP 2993-94, 3126-35)

As the trial court recognized, “[i]f [Gerlach] made a bad decision to climb over the railing, the fact that she was intoxicated may explain the bad decision” (RP 50-51), but the numerical level of her blood alcohol and Cove’s experts’ speculation from that number how she was acting before she fell, is not otherwise probative of causation. (RP 1562) Cove’s expert conceded the railing was rotten (RP 3121-25), and Cove did not contest that a safe railing must withstand far more than the weight of a 125 lb. person, whether drunk or sober. (RP 2067-68, 2108, 2246; Ex. 138) The question here was not the extent to which the level of Gerlach’s intoxication compromised her judgment, but whether the fact of her intoxication led her to a “bad decision” to climb over the railing in the first instance. *Compare State v. Brayman*, 110 Wn.2d 183, 194, 751 P.2d 294 (1988) (recognizing a relevant “correlation between the amount of alcohol in a driver’s breath and his ability to drive”). The jury was entitled to find (as it

did) that intoxication was a factor in establishing Gerlach's comparative fault (Inst. 20; CP 1880); Cove's attempt to quantify the "precise level" of her intoxication would have told the jury nothing.²

Similarly, as the physical effects of intoxication are well known, the trial court properly rejected Cove's attempt to get the non-conforming blood serum test result before the jury through its expert's opinion "equating what Ms. Gerlach did based on the amount of alcohol she consumed." (RP 1333, 1562) *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (affirming exclusion of expert testimony on effects of alcohol as within common understanding of jurors), *rev. denied*, 104 Wn.2d 1026 (1985).³ The trial court did not abuse its discretion in considering under ER 403 the substantial likelihood that the jury would give undue weight to a

² The trial court was also entitled to take into account the time and expense that would have been occasioned by a diversion during a 15-day trial into the reliability of the hospital blood draw number – a mini-trial into the science of blood alcohol testing that was unnecessary once Gerlach stipulated that she was intoxicated. (RP 1527-40: voir dire of expert on science of blood testing and alcohol metabolism); see *State v. Donald*, 178 Wn. App. 250, 271, ¶ 42, 316 P.3d 1081 (2013) ("reasonable concern about the confusion of issues and possible delay" is a valid basis for trial court's discretion to exclude expert testimony under ER 403), *rev. denied*, 180 Wn.2d 1010 (2014).

³ See also *Edgar v. Brandvold*, 9 Wn. App. 899, 904, 515 P.2d 991 (1973) (affirming exclusion of firearms expert testimony on hunting safety), *rev. denied*, 83 Wn.2d 1007 (1974); *Kenna v. Griffin*, 4 Wn. App. 363, 365, 481 P.2d 450 (1971) (affirming exclusion of expert psychiatric testimony as to the effect of alcohol on intent to commit battery).

number that would not tell the jury whether or how Gerlach's admitted intoxication caused the rotten railing to fail. The trial court's exclusion of the hospital blood draw and related expert testimony under these facts was not an abuse of its broad discretion.

3. Any evidentiary error was harmless because the jury credited Cove's theory that Gerlach's intoxication caused her to climb on the balcony.

The jury's verdict establishes that if any evidentiary error occurred, it did not affect the outcome of the case or prejudice Cove in any way. In finding Gerlach partially responsible for her injuries, the jury necessarily found that an intoxicated Gerlach made the "bad decision" to climb on the balcony – the only theory of comparative fault Cove offered. (See CP 1896 jury question during deliberation) Because a properly instructed jury⁴ accepted Cove's voluntary intoxication theory (CP 1890), putting a number to Gerlach's undisputed intoxication could be of no consequence.

Cove's comparative fault defense hinged on its contention that its balcony railing, while "deteriorated" (RP 3124), could withstand the normal forces of expected use, but not those created when Gerlach

⁴ As discussed *infra* at 23, the Court of Appeals correctly held that the instructions accurately stated the law and allowed Cove to fully argue its intoxication defense under RCW 5.40.060. (Op. ¶ 41)

attempted to climb it. Emphasizing the trial court's instructions and Gerlach's "admission to being intoxicated," Cove told the jury that she "climbed over in a state when she was . . . compromised," and "put herself at risk as a consequence of being intoxicated that night . . . Ms. Gerlach was negligent. She was voluntarily intoxicated." (RP 3639-43)

After being instructed to consider Gerlach's voluntary intoxication "at the time of the occurrence . . . in determining fault," (Inst. 20, CP 1880), the jury agreed with Cove's defense, assigning 7% of the fault to Gerlach. (CP 1890) The jury's verdict establishes that Cove failed to maintain premises that were reasonably safe for any invitee, whether leaning, standing, or climbing on the rotten railing, and whether drunk or sober. It also establishes that Gerlach failed to exercise reasonable care for her own safety by engaging in the one and only action Cove alleged to support its theory of comparative fault – that Gerlach climbed on the railing while intoxicated. (RP 3639)

Granting a new jury trial due to an evidentiary ruling is an extreme remedy, required only when the error prejudicially affected the verdict. *Brown v. Spokane Cty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The trial court's exclusion of evidence is not grounds for a new trial if the evidence is cumulative of other evidence or has speculative probative value. *Miller v. Arctic Alaska*

Fisheries, Corp., 133 Wn.2d 250, 261, 944 P.2d 1005 (1997), citing *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994) (both reinstating jury verdicts). What would have been different had the jury been told of the result of a hospital blood serum test, or heard an expert's opinion that Gerlach's intoxication would have impaired her judgment and her inhibition against risk-taking behavior? Cove emphasized these very points repeatedly in closing argument (RP 3639-43 (Appendix C)), and convinced the jury that Gerlach was indeed partially at fault for her injury.

Cove's speculation that the jury might increase the amount of Gerlach's comparative fault had it heard evidence of Gerlach's "extreme intoxication" based on the non-conforming Harborview blood draw only highlights Cove's real reason for seeking admission of this and other evidence of intoxication: to tarnish Gerlach with prejudicial character evidence that had little if any probative value to its theory of comparative fault. Given that Gerlach's intoxication was undisputed, that she was held to the standard of a sober person, and that the effects of alcohol on judgment and risk-taking are matters within the common understanding of jurors, the trial court's discretionary evidentiary ruling could not have affected the jury's verdict.

B. A landlord’s warranty of habitability to maintain premises in a safe condition extends to an apartment resident who has not signed the lease.

The Court of Appeals also erred in holding that the statutory and implied warranty of habitability runs only to the signator of a lease, and not to a guest or one sharing the premises with the named tenant. The trial court did not err in allowing Gerlach to enforce the landlord’s duty. (CP 677, 1874-76; *see* WPI 130.06)

Restatement (Second) of Property: Landlord & Tenant § 17.6 (1977) allows 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 Court of Appeals recognized that Washington has adopted *Restatement* § 17.6, but held liability can attach only “in cases where a landlord’s negligence is alleged by a tenant,” prohibiting claims based on breach of the warranty of habitability by an injured party who is a “non-tenant.” (Op. ¶ 43, citing *Phillips v. Greco*, 7 Wn. App.2d 1, 6-7, ¶ 15, 433 P.3d 509 (2018)).⁵

⁵ Compare *Lian v. Stalick*, 106 Wn. App. 811, 822, 25 P.3d 467 (2001); *Martini v. Post*, 178 Wn. App. 153, 170-72, ¶¶ 42-43, 313 P.3d 473 (2013) (both adopting *Restatement* § 17.6 in action by tenant) with *Pruitt v. Savage*, 128 Wn. App. 327, 332, ¶ 18, 115 P.3d 1000 (2005) (declining to adopt *Restatement* § 17.6 in action by non-tenant when neither party adequately briefed issue); *Sjogren v. Props. of the Pac. NW., LLC*, 118 Wn. App. 144, 151, 75 P.3d 592 (2003) (declining to adopt *Restatement* § 17.6 in action by non-tenant when non-tenant could pursue claim under premises liability theory for dangerous condition in a common area).

A statutory duty of care may be the basis for a cause of action where “plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; . . . legislative intent, explicitly or implicitly, supports creating or denying a remedy; and . . . implying a remedy is consistent with the underlying purpose of the legislation.” *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 675, ¶ 21, 398 P.3d 1108 (2017), quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). The duty to “maintain the structural components . . . in reasonably good repair” under RCW 59.18.060(2) should protect not just the lease’s signator, but *all* persons from dangerous conditions on the premises, including those less likely to know of a hazardous condition, such as family members and guests.

Tort liability for injuries caused by a landlord’s breach “tends to increase the likelihood that the will of the legislature as expressed in the statute or regulation will be effectuated.” Comment a, *Restatement (Second) of Property* § 17.6.⁶ Recognizing a remedy in

⁶ Guests and other third parties may enforce in tort breach of the landlord’s statutory duty to maintain the premises in a habitable and safe condition in many other states. *Scott v. Garfield*, 454 Mass. 790, 912 N.E.2d 1000, 1005-06 (2009); *Merrill v. Jansma*, 86 P.3d 270, 289, ¶ 46 (Wyo. 2004); *Shump v. First Cont’l-Robinwood Assoc.*, 71 Ohio St. 3d 414, 644 N.E.2d 291, 296 (1994); *Thompson v. Rock Springs Mobile Home Park*, 413 So. 2d 1213, 1215 (Fla. Dist. Ct. App. 1982); *Ford v. Ja-Sin*, 420 A.2d 184, 187 (Del. Super. 1980); *Mermelstein v. 417 Riverside Drive*, 25 A.D.2d 522, 267 N.Y.S.2d 330, 331 (1966).

tort but then limiting it (as the Court of Appeals would) to those in privity of contract undermines the purpose of the statutory warranty of habitability to impose an extra-contractual duty upon the landlord to “keep the premises fit for human habitation.” RCW 59.18.060(1).

That Gerlach, rather than her fiancé who signed the lease, fell victim to the Cove’s rotted balcony railing is a mere fortuity. Implying a cause of action solely for the tenant but not for others who may foreseeably be harmed by the failure to keep rental property in a minimally habitable condition is both illogical and undermines the fundamental public policy “to provide a livable dwelling.” *Foissy v. Wyman*, 83 Wn.2d 22, 27, 515 P.2d 160 (1973) (adopting implied warranty of habitability). This Court should hold that invitees are equally within the class of persons entitled to claim damages in tort for a landlord’s negligence in maintaining hazardous premises.

C. Cove has failed to preserve its challenge to the trial court’s other discretionary rulings on cross review.

Cove complains of a host of other discretionary rulings, but in the absence of assignments of error or argument in its Brief of Appellant, these issues are waived. *Kardoronian v. Bellingham Police*

Dept., 119 Wn.2d 178, 191, 829 P.2d 1061 (1992).⁷ Cove has not preserved other issues by asserting its “right to raise” or “present this issue only if the Court grants review” in desultory footnotes to its answer. (Ans. 7, n.6; Ans. 20, n.21) A respondent seeking cross-review must do more than identify, without arguing, an issue decided by the Court of Appeals. RAP 13.4(d); see *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 725, 845 P.2d 987 (1993) (“incomplete briefing” does not preserve issue for cross-review). Gerlach nevertheless briefly addresses the footnotes in Cove’s answer purporting to challenge the trial court’s wording in its instructions on Cove’s voluntary intoxication defense (CP 1878-80), the exclusion of expert testimony regarding the reasonableness of Gerlach’s medical expenses, and the scope of trial on remand here:

- 1. The trial court’s instructions properly stated the law and allowed Cove to argue its voluntary intoxication defense.**

The trial court did not abuse its discretion in its wording of its instructions. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732-33, 927 P.2d 240 (1996) (wording of instructions reviewed for abuse of

⁷ *E.g.*, Cove purports to challenge the trial court’s decisions to exclude Miller’s “excited utterance” (Ans. 3, n.2), Gerlach’s deposition testimony and “testimony from Miller on Gerlach’s intoxication.” (Ans. 6, n.5)

discretion). Instructions 19-21 accurately identified each element of RCW 5.40.060 and allowed Cove to argue that the jury should consider Gerlach's undisputed intoxication in deciding whether she was contributorily negligent and in allocating fault to her. (CP 1878-80) (Op. ¶ 41)

Cove argued in obtaining an order in limine on this very issue that the jury should not be told of RCW 5.40.060's "50% bar to recovery" because it is the jury's job to find the facts and the trial court's duty to give legal effect to the jury's verdict. (CP 1116) *See Coulter v. Asten Grp., Inc.*, 135 Wn. App. 613, 626, ¶ 30, 146 P.3d 444, 450 (2006), *rev. denied*, 161 Wn.2d 1011 (2007). The trial court did not abuse its discretion by giving instructions that allowed Cove to argue its theory of the case. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558 (2001).

2. The trial court did not abuse its discretion in excluding an expert's opinion that Gerlach's medical expenses were unreasonable based on the amounts paid by collateral sources.

The trial court also properly exercised its discretion in excluding opinion evidence on the reasonableness of Gerlach's medical expenses. (CP 1547; RP 169-70) That "Gerlach's physicians accept a lesser payment for services from Medicare is not helpful to

the jury in determining whether her medical expenses were reasonable.” (Op. ¶ 34); see *Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001); *Hernandez v. Stender*, 182 Wn. App. 52, 60, ¶ 18, 358 P.3d 1169 (2014) (“the amount billed or paid is not itself determinative.”).

The trial court correctly noted that a mini-trial would be required “to let the jury decide” if or how “Harborview inflates bills,” and did not want to hear argument about “how much each insurance company gets a break on each and every bill,” particularly Gerlach’s third party payors who had subrogation rights. (RP 169-70); *Det. of West*, 171 Wn.2d 383, 401, ¶ 25, 256 P.3d 302 (2011) (trial court’s discretion to limit unduly complicated testimony). It properly reasoned that such testimony would open the door to inadmissible collateral source evidence. (CP 1547, ¶ 5.6) See *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (“payments, the origin of which is independent of the tort-feasor, received by a plaintiff because of injuries will not be considered”) (quoted source omitted).

Further, where, as here, an appellant makes no substantial challenge to the jury’s assessment of damages the appellate court properly exercises its discretion to limit the scope of a remand to issues of liability, as the Court of Appeals did on Gerlach’s unopposed

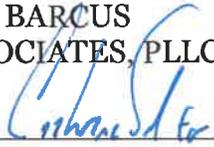
motion for reconsideration. *See Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). Should there be a new trial, it should be limited to the issue of Cove's liability and Gerlach's comparative fault under RCW 5.40.060.

V. CONCLUSION

A properly instructed jury, accepting Cove's theory that Gerlach allowed her admitted intoxication to impair her judgment and climb on Cove's rotted railing, fairly allocated fault after considering Gerlach's intoxication. This Court should reinstate the trial court's judgment on the jury's verdict.

Dated this 17th day of December, 2019.

BEN F. BARCUS
& ASSOCIATES, PLLC

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Attorneys for Petitioner

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 December 17, 2019, I arranged for service of the foregoing Revised Supplemental Brief of Petitioner, to the court and to the parties to this action as follows:

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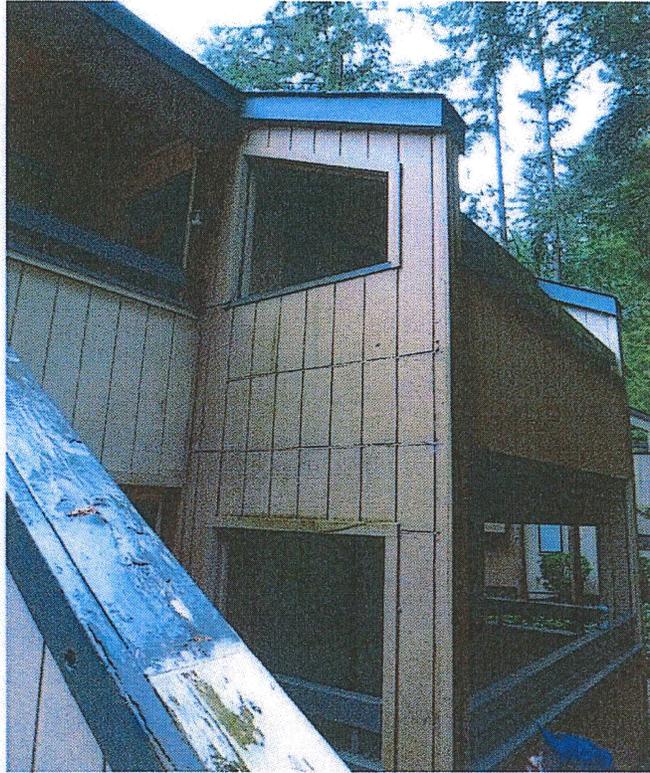
<p>Pauline V Smetka Helsell Fetterman LLP 1001 4th Ave Ste 4200 Seattle WA 98154-1154 <u>psmetka@helsell.com</u> <u>AMuul@helsell.com</u></p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Stewart A. Estes Keating, Bucklin, & McCormack, Inc., P.S. 801 Second Avenue, Suite 1210 Seattle, WA 98104-1518 <u>sestes@kbmlawyers.com</u></p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>

DATED at Seattle, Washington this 17th day of December, 2019.



Sarah N. Eaton

#1202 Miller, Nathan



View From staircase landing

where the fall occurred

CA LLC 0252

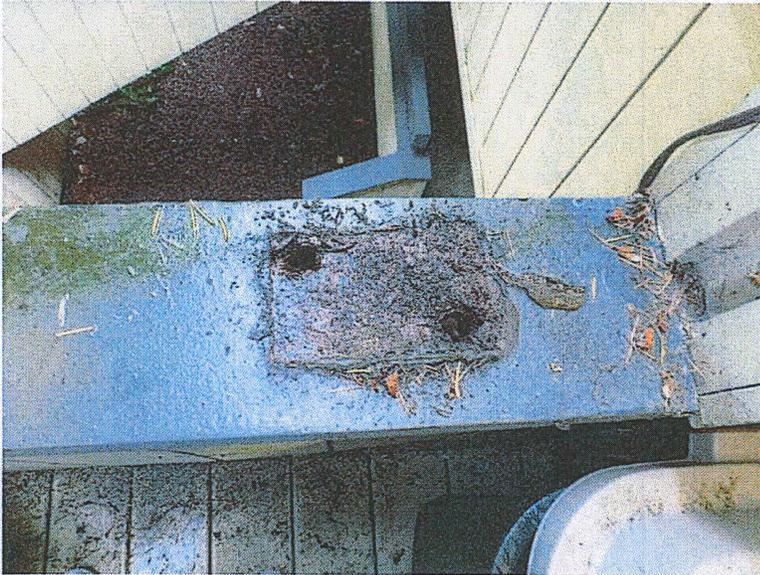
App. A



The Beam that was detached from fall



Where she fell from



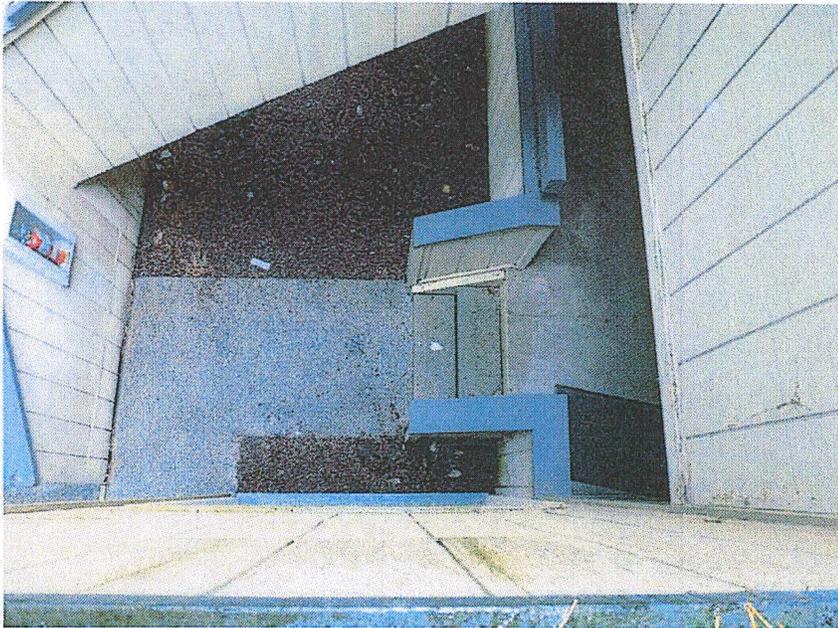
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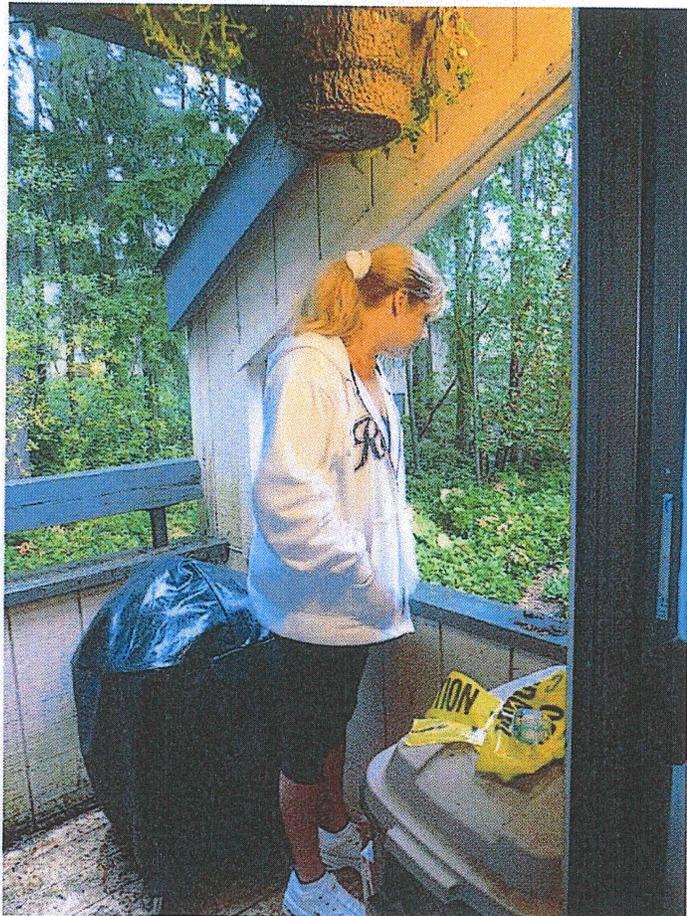
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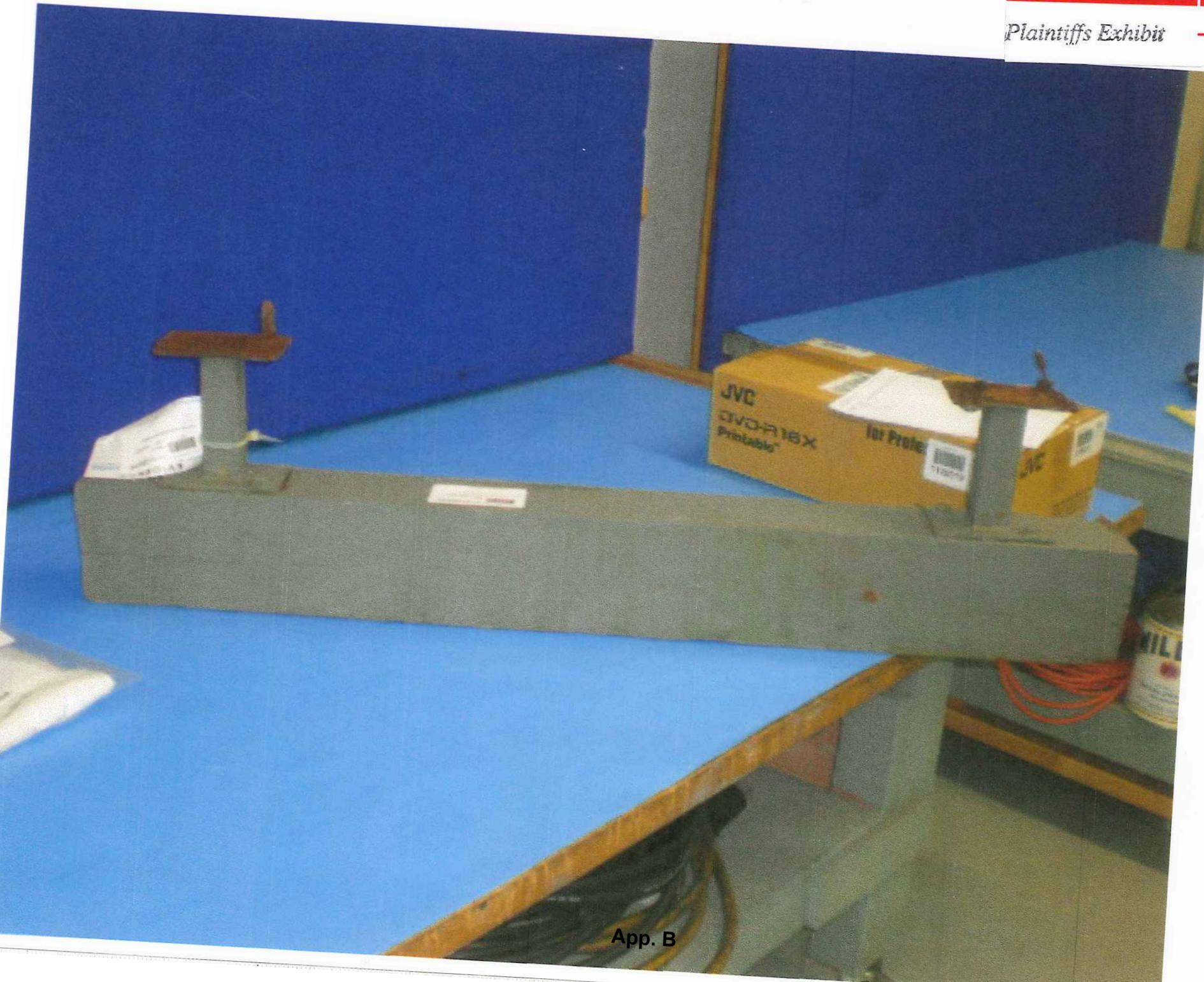


she feel to-Face down on the two stairs

Where



Where she was standing





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EVIDENCE

CASE FORENSICS

File # **1120019**

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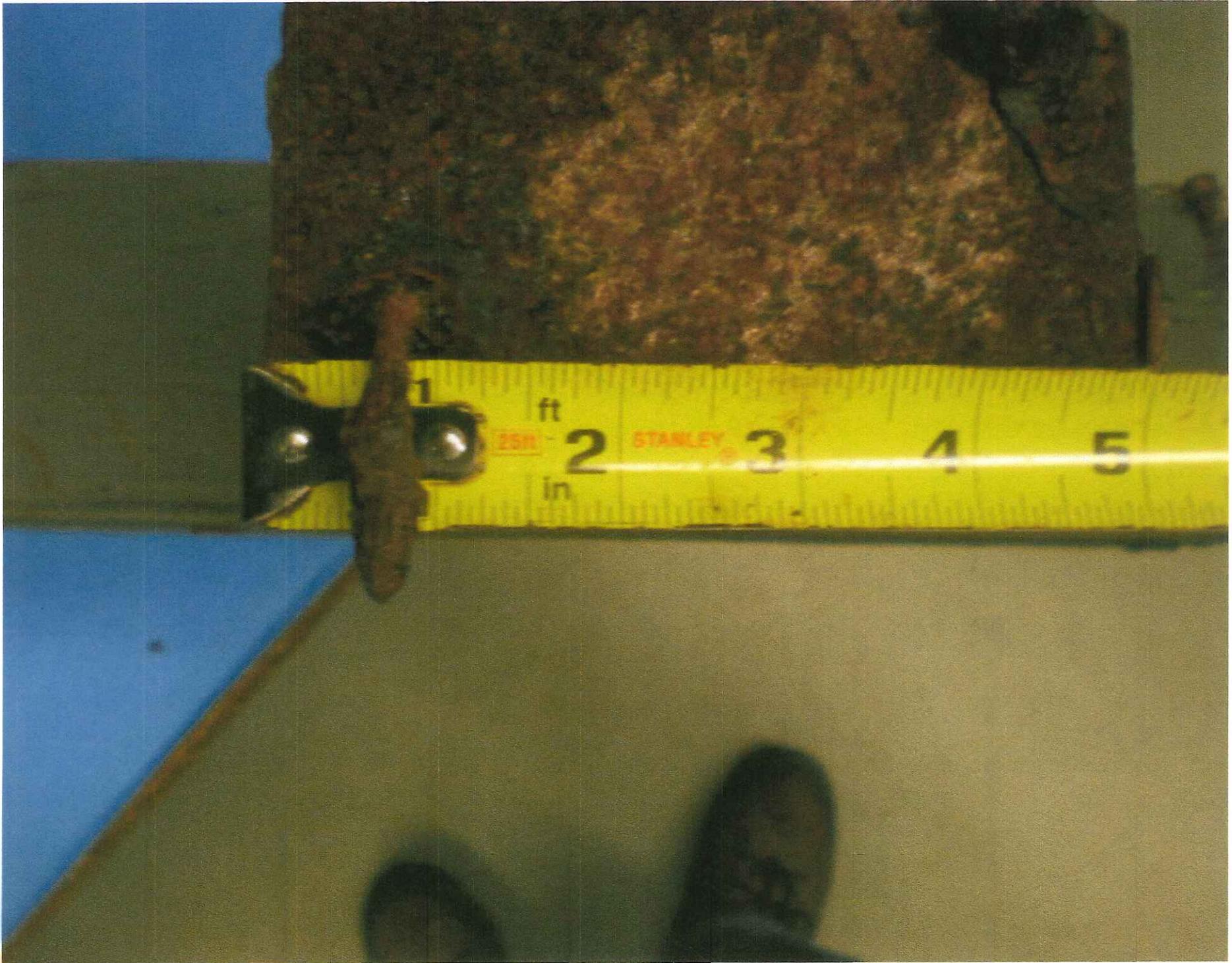
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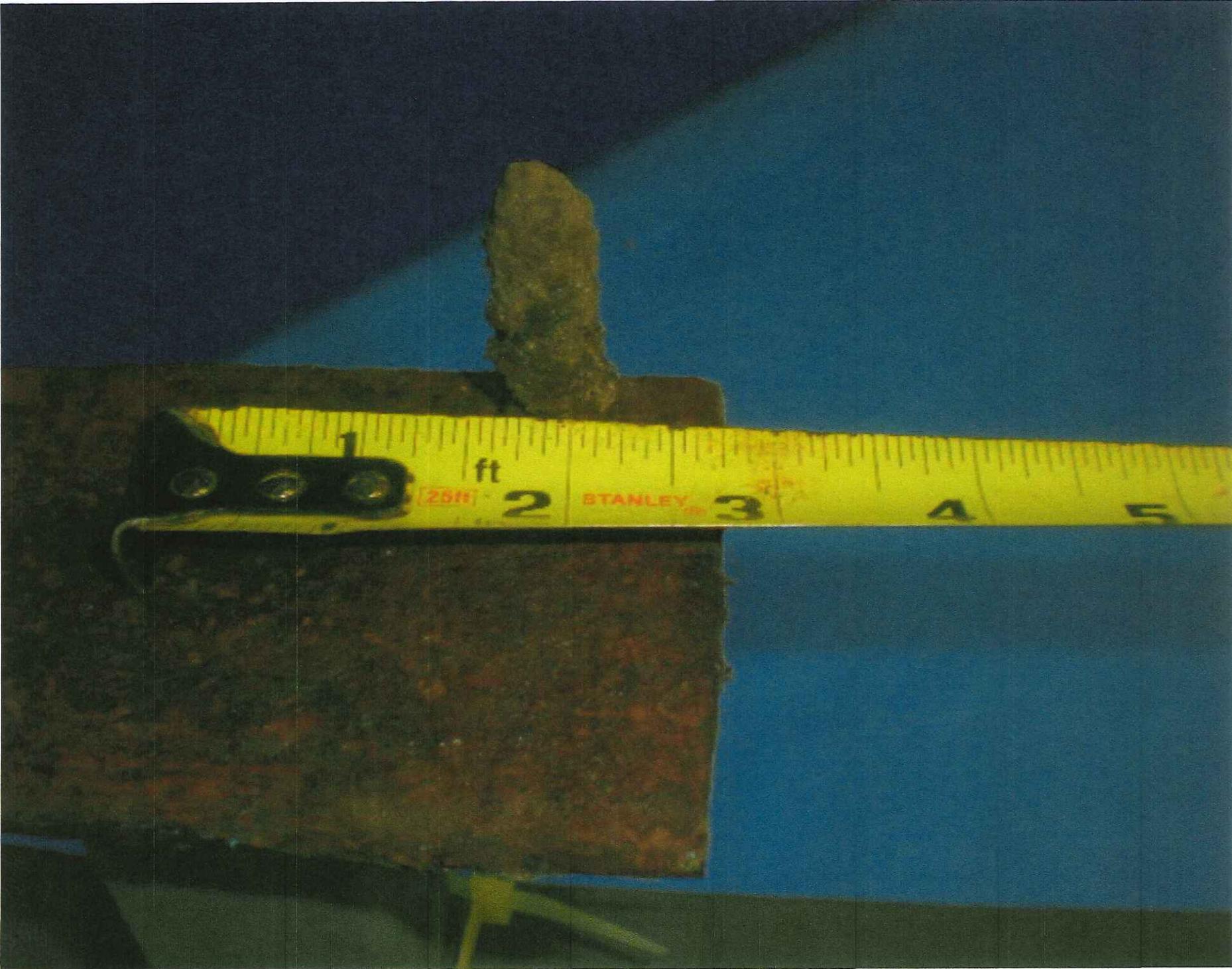


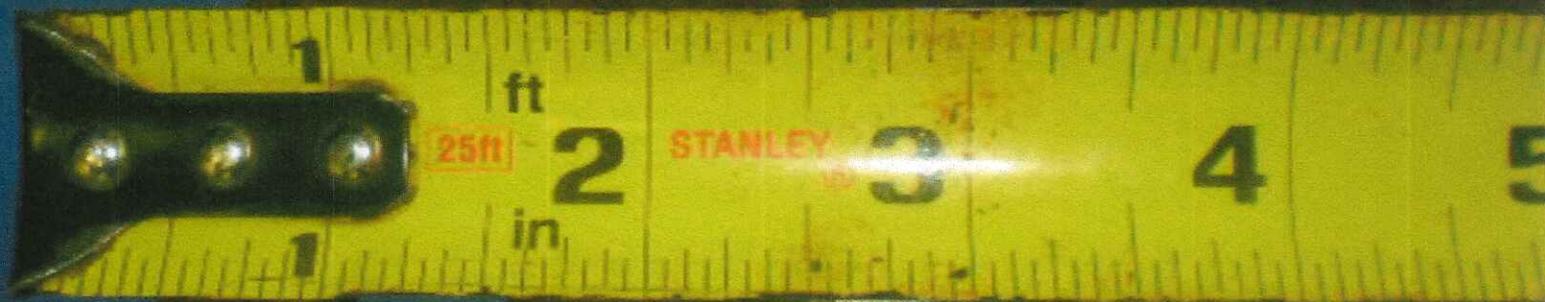
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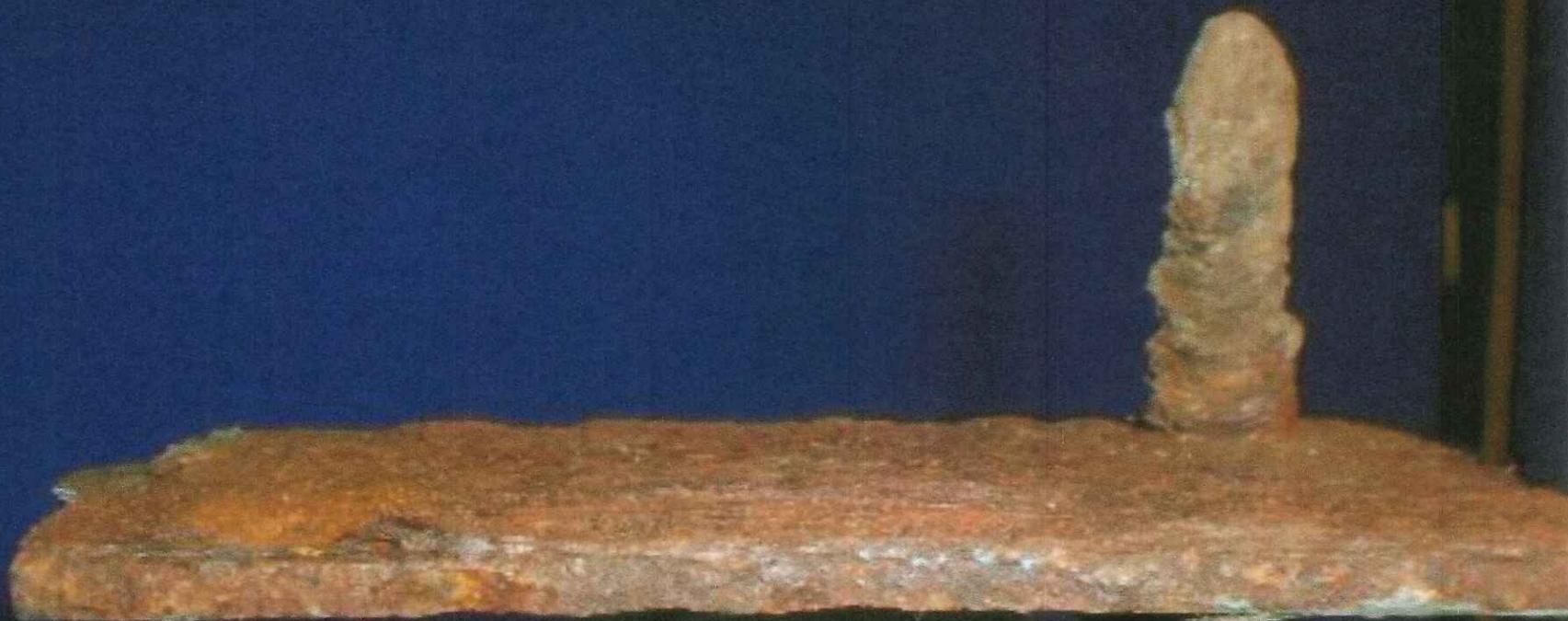












FBI LABORATORY
CASE NO. 1120019
DATE: 10/27/2012
FBI LABORATORY

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Part 2
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The New York State Thruway Authority

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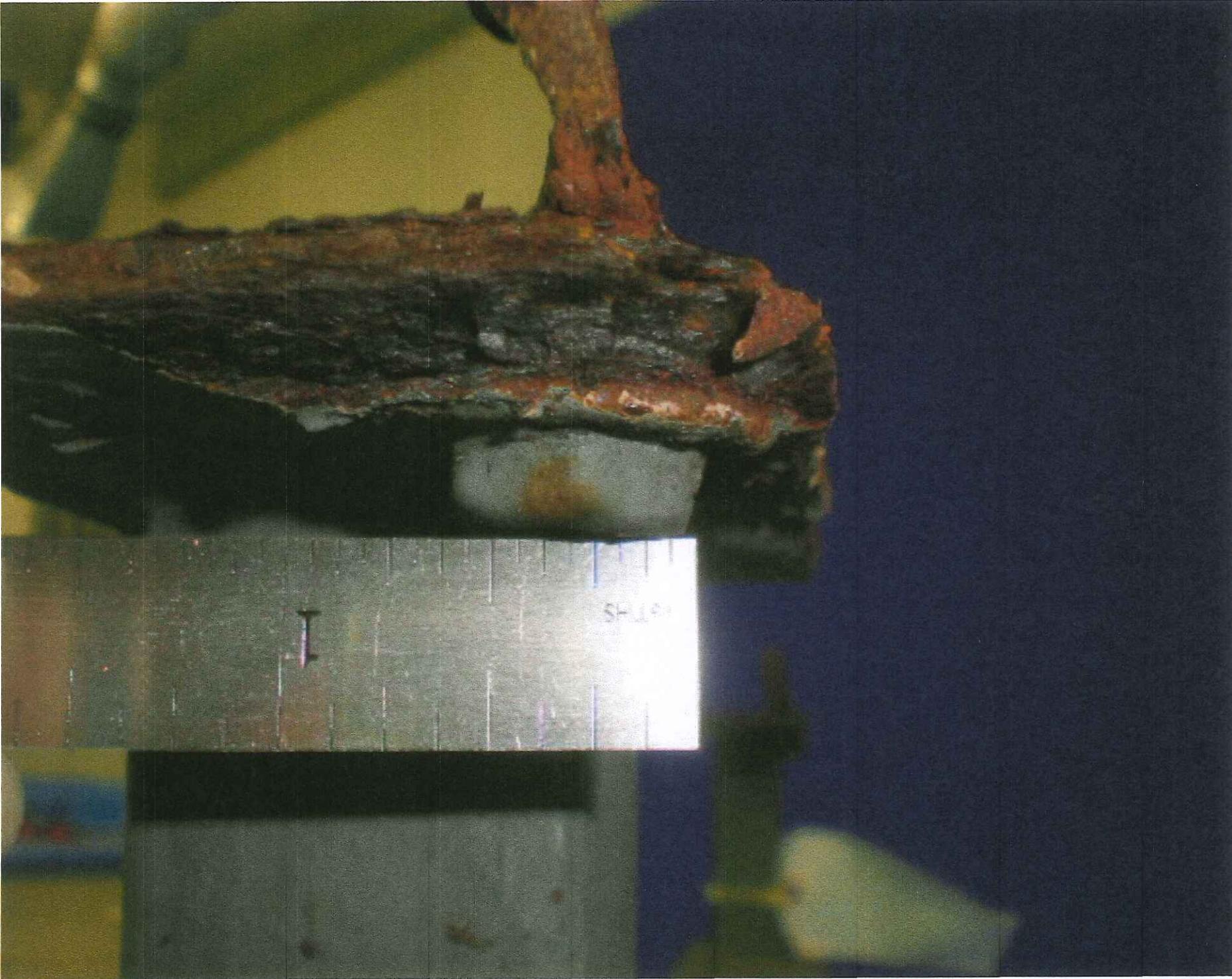












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15-2-25974-1KNT

Gerlach vs. The Cove Apartments

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
77179-5-I

KIMBERLY J. GERLACH,)
 individually,)
 Respondent,) King County Cause
 vs.) No. 15-2-25974-1 KNT
 THE COVE APARTMENTS, LLC, a)
 Washington corporation; and)
 WEIDNER PROPERTY MANAGEMENT,)
 LLC, a Washington corporation,)
 Appellants.)



VERBATIM REPORT OF PROCEEDINGS
 BEFORE THE HONORABLE
 RICHARD McDERMOTT
 Trial Day 15
 (Volume 1)

JULY 10, 2017

TRANSCRIBED FROM RECORDING BY:
 CHERYL J. HAMMER, RPR, CCR 2512

1 enough that they could walk to it.

2 Which both Brodie Liddell and Nate
3 Miller said that was one of the things they did, is
4 wanted to be close enough so they could walk, so they
5 could take cars out of the equation, that was Brodie
6 Miller's[sic] testimony, so they wouldn't have to
7 drive. And she drank and they all drank and she was
8 intoxicated. You have been instructed that she was
9 intoxicated that night.

10 Now, what are the things that
11 intoxication does? It affects your judgment. People
12 make mistakes when they are intoxicated because they
13 think they're better than they are. It affects your
14 judgment. It affects risk taking. It affects the way
15 you do things. People who are intoxicated and pulled
16 over by the police, they can't walk a straight line.

17 I submit to you that they can't also
18 climb from a walkway over to a balcony, particularly
19 when that is not the expected way of doing it. That's
20 not the safe way of doing it, it's not the proper way
21 to do it, and that is the condition in which Ms.
22 Gerlach attempted that maneuver that evening.

23 Now, South King Fire and Rescue were
24 called to the scene, and they noted 28-year-old female
25 had been drinking, fell through a second floor rail,



1 then patient face down, I think is what it says. But
2 this here, HBD, had been drinking.

3 MedicOne also came. MedicOne noted
4 28-year-old female fell. Patient was said to have
5 been extremely AOB, alcohol on breath. She was quite
6 affect by her drinking that night, and in doing so
7 contributed to what happened, was a proximate cause of
8 what happened, if not the proximate of what happened.

9 Now, let's look at these jury
10 instructions, instruction number six and seven.
11 Instruction number six tells you, negligence. It
12 defines negligence. Negligence is the failure to
13 exercise ordinary care. It is the doing of some act
14 that a reasonably careful person would not do under
15 the same or similar circumstances, or the failure to
16 do some act that a reasonably careful person would
17 have done under the same or similar circumstances. So
18 that's negligence.

19 Instruction seven tells you what is
20 ordinary care. Ordinary care means the care a
21 reasonably careful person would exercise under the
22 same or similar circumstances; and finally, take a
23 look at number eight. Every person has the right to
24 assume that others will exercise ordinary care, and a
25 person has a right to proceed on such assumption until



1 he or she knows, or in the exercise of ordinary care
2 should know, to the contrary.

3 You put these instructions together
4 along with plaintiff's admission to being intoxicated,
5 and this means she is admitting she was negligent that
6 night. If she climbed over -- and I think the
7 evidence shows that's the only way she got there --
8 she was negligent. A reasonably careful person under
9 the circumstances would not do that, but at 2:00 a.m.
10 after a night of drinking, you are no longer a
11 reasonably careful person and you do things that a
12 reasonably careful person wouldn't do.

13 She did not exercise ordinary care for
14 her own safety, because at that level, a second floor,
15 if anything goes wrong, including you make a mistake
16 yourself, the consequences can be severe. She put
17 herself at risk as a consequence of being intoxicated
18 that night.

19 Two more instructions I'd like you to
20 look at, and they are 19 and 21. Instruction 19 says,
21 contributory negligence is negligence on the part of a
22 person claiming injury or damage that is a proximate
23 cause of the injury or damage claimed. So
24 contributory negligence is negligence on the part of a
25 person, such as Ms. Gerlach, who's claiming injury or



1 damage. That is a proximate cause.

2 Now, there's another instruction on
3 what constitutes proximate cause, and proximate cause
4 is a cause that contributes to what occurred. There
5 can be more than one, but I submit to you that being
6 intoxicated and doing what she did was a proximate
7 cause of her injuries, and it was negligence, and she
8 has basically admitted being negligent.

9 Now, if you look at instruction 20, it
10 says, a person who becomes voluntarily intoxicated is
11 held to the same standard of care as one who is not so
12 affected. The intoxication of the plaintiff, see, you
13 are being instructed, she's intoxicated at the time of
14 the occurrence, may be considered by the jury,
15 together with all other facts and circumstances, in
16 determining whether the person was negligent.

17 I submit to you, the evidence shows
18 that Ms. Gerlach was negligent. She was voluntarily
19 intoxicated. That is not an excuse. She is held to
20 the same standard.

21 Instruction 21 then is, if you find
22 contributory negligence, if you find defendants were
23 negligent, if you find plaintiff was negligent, you
24 must determine the degree of negligence expressed as a
25 percentage attributable to each, and there is a



1 special verdict form for you to follow in doing so.

2 I submit to you that Ms. Gerlach was
3 in the best position, having lived there for
4 approximately three years by that time, having been on
5 that balcony, been on that railing, had her hands on
6 it, not detecting any problem with it, she was in the
7 best position to control her conduct under that
8 circumstance and she didn't do so. She took a risk
9 and it was a bad choice to climb there in that
10 condition at that time.

11 Instruction nine is the instruction on
12 proximate cause. A cause, which in a direct sequence,
13 produces the injury complained of and without which
14 such injury would not have happened. There may be
15 more than one proximate cause of an injury.

16 It clearly was a proximate cause when
17 she climbed over -- when she climbed over in a state
18 when she was not really able to do so safely. It can
19 be done safely if you're really careful and you're
20 sober, but not when you are compromised.

21 Now let me talk to you about the
22 damages being claimed. No issue on the medical bills,
23 by 205,000 and some odd dollars. It's in the
24 instruction there.

25 There is a real issue on lost



SMITH GOODFRIEND, PS

December 17, 2019 - 4:28 PM

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