COURT OF APPEALS No. 47778-5 - II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CEDAR COURT APARTMENTS, LLC,
a Washington Limited Liability Company

Respondent/Plaintiff

v.

GUSTAVO & MARIA COLORADO,
husband & wife, and the marital community composed thereof,

Appellant/Defendant

APPELLANTS' OPENING BRIEF

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Regulations and Rules

I. INTRODUCTION

On February 26, 2015, a Pierce County jury unanimously found in favor of Appellants Gustavo and Maria Colorado. Three months later, Pierce County Judge Bryan E. Chushcoff overturned the jury's verdict and granted Respondent's motion for JNOV. Judge Chushcoff ruled that there was insufficient evidence to sustain the verdict. The Colorados file this appeal to reverse the trial court's order granting JNOV.

This case stems from a fire that occurred at the Cedar Court Apartment complex in Tacoma, Washington on February 21, 2013. Both parties accused the other of starting the fire. The only question the jury was asked to determine was whether either party negligently caused the fire.

The Colorados were renting their two bedroom apartment from Cedar Court Apartments, LLC. On the morning of the fire, it is undisputed that Mr. Colorado filled out two work orders that authorized Cedar Court to enter the Colorados' apartment. These work orders requested that Cedar Court repair the stove and the bathroom sink that were malfunctioning, and also clean their carpets. The Colorados vacated the apartment on the day of the fire to allow the requested repairs and carpet cleaning to ensue.

It is undisputed the fire originated on top of the Colorados' stove. It is undisputed that Cedar Court possessed master keys to enter the Colorados' apartment at any time. It is also undisputed that Cedar Court hired carpet cleaners to clean the Colorados' carpet and were on site at the

time the fire started. During trial testimony, both Gustavo and Maria Colorado denied using the stove on the day of the fire or leaving anything flammable on top of the stove.

Ultimately, this trial came down to a credibility contest. Simply put, the jury weighed the competing evidence and rejected Cedar Court's explanation of the fire. Conversely, the jury accepted the Colorados' story as to how the fire must have started. As the trial court correctly instructed the jury: "The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other." See Washington Pattern Instruction § 1.03. Further, it is black letter law that the trial court must "defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." Faust v. Albertson, 167 Wn.2d 531, 537-38 538, 222 P.3d 1208 (2009).

II. ASSIGNMENTS OF ERROR

A. Assignment of Error

The trial court erred when it granted Cedar Court's motion for JNOV.

B. Issue Pertaining to Assignment of Error

Whether the trial court erred when it granted Cedar Court's motion for JNOV even though the Colorados marshalled substantial

circumstantial evidence that was more than sufficient to support the jury's determination that Cedar Court negligently caused the fire?

III. STATEMENT OF THE CASE

A. Factual Background

Appellants Gustavo and Maria Colorado, and their three daughters, began residing at Unit 94 of the Cedar Court Apartments on September 29, 2008. (RP 172, 180-81). Cedar Court consists of 136 apartments. (RP 226). Throughout the years, the Colorados chose to extend their lease with Cedar Court several times. (Id.).

On November 18, 2011, the Colorados complained to Cedar Court that the stove in their apartment was malfunctioning. (RP 172, 183). Cedar Court asked the Colorados to fill out a maintenance request form before fixing the stove, and the Colorados complied. Cedar Court responded to the maintenance request on the same day. Id.

On February 13, 2013, the Colorados signed a new 12 month lease to renew their tenancy. (RP 337). In conjunction with the lease renewal, Cedar Court promised and agreed to clean the Colorados' carpets as a lease renewal bonus and incentive. (RP 338).

The Colorados made a second complaint about the defective nature of the stove on February 21, 2013. (RP 207). On this day, Mr. Colorado, once again, went to the Cedar Court management office at around 10:00 A.M. (Id.). This time Mr. Colorado filled out two separate written

maintenance request forms to have Cedar Court fix the Colorados' stove and bathroom sink, and to grant Cedar Court permission to access the apartment to clean the carpets. (RP 173, 182-83, RP 207).

On the maintenance request form, Mr. Colorado stated that the large burners were not working properly and the bathroom sink was clogged. (Id.; Ex 7). On the second maintenance request form, Mr. Colorado formally requested that Cedar Court perform the agreed upon lease renewal carpet cleaning. (Ex 6). By signing the maintenance request forms, Mr. Colorado gave Cedar Court express written permission to enter the apartment. Id.

During trial, Maria Colorado testified that she did not use the stove on the day of the fire and that she did 99% of the cooking for her family. (RP 183). Mrs. Colorado testified that no cooking occurred on the day of the fire "because it was not working." (RP 184). In fact, no one within the Colorado household did any cooking on the day of the fire.[1] (RP 184). Further, Mr. and Mrs. Colorado both denied that they placed anything on top of the stove before they left their apartment to allow the carpet cleaning to occur. (RP 190-91, RP 212)

Mr. and Mrs. Colorado testified that, in anticipation of carpet cleaning, they had packed and stacked their personal effects in the morning

[1] Only one of the Colorados' daughters was living with Gustavo and Maria at the time of the fire. The other two daughters were living in Yakima and Everett, Washington.

before exiting their apartment. (RP 174-75, RP 206). Mr. Colorado specifically denied that anything was left on the stove. (RP 212). Mr. Colorado testified that he did place items in boxes but was careful to place them on the floor away from the stove. (RP 219).

Mr. Colorado was asked in response to a jury question whether he placed any items in boxes and he replied: "I put some stuff in boxes, but I put them in such a way that I kept it on the floor away from the stove." Mr. Colorado also denied leaning any mattresses against the stove in direct response to another jury question. (RP 219). Mr. Colorado further denied placing anything on top of the stove in response to another jury question. (Id.).

At approximately 11:00 A.M, the Colorados left their apartment to give Cedar Court time to perform the maintenance requested. RP 208. At approximately 1:30 P.M., the Colorados went back to the apartment to see if the carpet cleaning had been completed. (Id.). Mr. Colorado specifically testified that he was checking to see if the maintenance had been completed because "[m]y daughter has some homework to do" and because he works the graveyard shift and "need[ed] to rest." (RP 209). Mr. Colorado testified that he simply went upstairs to check, opened the door, and left immediately thereafter once he realized the carpets had not been cleaned. (RP 209).

Next, the Colorados travelled to Subway Sandwiches to eat. (RP

188, 210). Mr. Colorado testified that he would not normally eat at Subway, but did so because the stove was not working. (RP 188).

At approximately 4:00 p.m., Mr. Colorado drove his wife and daughter back to Cedar Court to see if the carpet cleaning had been completed. (RP 188-89, 210). Mr. Colorado's wife and daughter stayed in the car. Mr. Colorado explained that he simply opened the door, determined that the carpets had not been cleaned, and then immediately left his apartment. (RP 210). Mr. Colorado did not touch or move any objects in his apartment at this time, including the stove. (RP 211). Mr. Colorado also did not smell any smoke. (RP 219).

On his way back to his vehicle, Mr. Colorado encountered a carpet cleaning worker. (RP 212-13). Given that Mr. Colorado had returned to his apartment for a second time and the carpets still had not yet been cleaned, Mr. Colorado testified as follows: "I asked him if he can hurry to clean up our carpet so we can get in our apartment." (RP 203, 213; RP 189). On cross-examination, Mr. Colorado was asked why he told the carpet cleaning worker to hurry:

> "Because, well, first of all, I'm tired. I was tired at the moment. My daughter has something to do with her school, and I need to rearrange all of the furniture and back in its place."

(RP 213-14).

After returning to his vehicle where his wife and daughter waited,

Mr. Colorado drove his vehicle to the Tacoma library because his daughter had homework she needed to complete. (RP 189). Approximately 30 minutes later, the Colorados received notification that their apartment was on fire. (Id.).

At approximately 4:30 PM on February 21, 2013, a fire was reported within Unit 94 at the Cedar Court Apartments. This apartment was the residence of the Colorado family. Fortunately, no one was injured as a result of the fire as the Tacoma Fire Department was able to contain the fire relatively quickly after arriving upon the scene. Damage to the building and the Colorados' personal property resulted from the fire and smoke damage.[2]

Shortly after the fire was extinguished, a fire investigation was conducted by Tacoma Fire Department Investigator Lieutenant Ken Hansen. As a result of his investigation, Lt. Hansen determined that the fire was ignited by the same stove that the Colorados previously made two complaints about and requested Cedar Court to fix.

Lieutenant Hansen of the Tacoma Fire Department testified that he inspected the scene of the fire after it had been put out by responding fire crews. (RP 117). Lt. Hansen testified that, in his opinion, the fire originated on top of the apartment's stove and had ignited some object with sufficient

[2] The parties stipulated to the amount of damages during the trial. Consequently, the jury did not hear about the parties' property damages at trial and only heard evidence relating to the parties' competing liability theories.

fuel to sustain fire long enough to ignite the nearby cabinetry and spread throughout the kitchen area of the unit. (RP 137, 147-48). Lt. Hansen testified that the fire must have ignited within a relatively short time prior to it being reported. (RP 148).

At trial, Lt. Hansen testified: "It was my conclusion that something was left on top of the stove, the stove accidently turned on, and a fire had started in such a manner." (RP 137). Mr. Hansen further stated: "I went with the paper product on top of the stove." (Id.). Mr. Hansen further testified as follows:

> Q. You were asked about – the question about whether or not something could have been smoldering since 11:00. If you understand that somebody was in the apartment at 4:00 and did not smell smoke, is then your conclusion that something happened – something to cause that ignition happened between 4:00 and 4:30?
>
> A. Correct.

(RP 162).

B. Additional Background Facts.

Shortly after the fire was reported, Cedar Court began investigating. At trial, Cedar Court called Tammy Wheat to testify. (RP 295). Ms. Wheat was the property manager in charge of the Cedar Court complex on the day of the fire. (RP 316). Ms. Wheat testified that after the fire was extinguished there was a meeting in the Cedar Court office. Attending this meeting were the following persons: Lieutenant Hansen, Deanna Hanshew, Maria Colorado, Gustavo Colorado, Maria Colorado's sister,

and Ms. Wheat. At trial, Ms. Wheat testified as follows in regards to this meeting:

Q. You described there were things going on.

A. A lot of things, correct.

Q. Did the fire investigator – did Lieutenant Hansen ever indicate where he believed the fire originated?

A. Yes.

Q. Where did he believe it originated?

A. Top of the stove, back burner.

Q. Did either of the Colorados say anything in response?

A. Yes.

Q. What did –

A. I believe they asked the question of Lieutenant Hansen.

Q. Did you hear – did they say anything following his answer?

A. Yes.

Q. What did you hear?

A. "I put something down."

Q. Who said that?

A. Maria.

(RP 332-33).

On cross-examination, Ms. Wheat was asked to clarify her testimony regarding Mrs. Colorado's purported admission. (RP 362).

Specifically, Ms. Wheat was asked who Mrs. Colorado directed this statement towards and what language she used. In response, Ms. Wheat testified that these statements were made to Mr. Colorado in English. (RP 363). Further, Ms. Wheat acknowledged that she failed to note Mrs. Colorado's purported admission in any documents that Cedar Court used to memorialize its investigation, including its own Serious Incident Report, now known as Exhibit 49. On cross-examination, Ms. Wheat admitted that she does not speak or understand the Spanish language. (RP 378).

After Ms. Wheat testified regarding Mrs. Colorado's purported admission, Mrs. Colorado was re-called to rebut Ms. Wheat's testimony. (RP 397). During her testimony, Mrs. Colorado testified only through a certified Spanish speaking court interpreter, which was consistent with the manner in which she previously testified at trial and deposition. (RP 396). In contrast, Mr. Colorado testified without assistance of an interpreter.

Substantively, Mrs. Colorado testified that she normally only talks to her husband in Spanish. (RP 397). Specifically, Mrs. Colorado was asked whether she spoke English to anyone after the fire. Mrs. Colorado responded: "No. I only wait for the translation because I don't understand." (RP 397). And further, Mrs. Colorado once again denied placing any items on top of the stove on the day of the fire. (RP 398).

After Mrs. Colorado testified in rebuttal, Mr. Colorado was re-called as a witness to testify on the same subject. (RP 405). Mr. Colorado

specifically denied that he spoke with his wife in English on the night of the fire. (Id.). During the meeting with the fire investigator, Mr. Colorado testified that his wife was speaking Spanish "[a]ll of the time." (RP 405).

C. Background Facts Regarding Cedar Court's Disposal of the Stove that Caused the Fire.

During trial, Ms. Wheat acknowledged that the Colorados made two complaints about their stove malfunctioning. Further, it was conceded at trial that Ms. Wheat failed to tell her boss, Deanna Hanshew, about the Colorados' most recent complaint about the malfunctioning stove until weeks after the fire. (RP 266).

Ms. Wheat also acknowledged that Cedar Court deliberately disposed of the Colorados' stove the next day after the fire. (RP 363-65). Ms. Wheat testified that her boss, Deanna Hanshew, was aware of the disposal of the stove. (RP 365). Ms. Wheat admitted that no one was able to inspect the stove for defects before it was hauled away, other than Lieutenant Hansen. (RP 365-66).

Lieutenant Hansen testified at trial that he did not analyze or assess the internal electrical wiring system within the stove because he was not qualified and was not an "electrical engineer." (RP 145). Lt. Hansen explained that he did not want to "monkey around" with the stove and was concerned about "spoliation of evidence." (Id.).

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D. Cedar Court's Response to the Colorados' Two Work Orders that were Submitted on the Morning of the Fire.

Ms. Wheat acknowledged that the Colorados had submitted a work order on the morning of the fire due to their malfunctioning stove and also for a clogged bathroom sink. (RP 343). Ms. Wheat admitted that a clogged sink would interfere with a person washing their hands and that there was only one bathroom in the apartment. (RP 344). Ms. Wheat testified that Cedar Court's maintenance technician, Alex, would come into the office throughout the day to check with her about ongoing maintenance needs. (Id.). Further, Ms. Wheat expressly acknowledged that Alex had been given the Colorados' work request forms earlier in the day before the fire started. (RP 357). Ms. Wheat testified that she considered the Colorados' maintenance requests to require resolution within 72 hours. (RP 308). Further, Ms. Wheat admitted that she gave the keys to the Colorados' apartment to the carpet cleaners in the afternoon before the fire started. (RP 347-48).

E. Cedar Court had Full Access to the Colorado's Apartment at All Times.

At trial (and deposition), Cedar Court Apartments, LLC, designated Deanna Hanshew as its official corporate representative. Ms. Hanshew supervised all Cedar Court employees, including Tammy Wheat. (RP 226). Ms. Hanshew testified that it was her understanding that the Landlord Tennant Act requires malfunctioning appliances to be fixed

within 72 hours and serious plumbing problems to be fixed within 24 hours. (RP 231-32). Consequently, Cedar Court had legal incentive to attend to these maintenance problems immediately.

It is undisputed that Cedar Court and all of its employees had keys available at their disposal to access the Colorado's apartment at any time. (RP 232). This was verified by both Deanna Hanshew and Tammy Wheat. (RP 345).

Both Tammy Wheat and Deanna Hanshew testified that "Alex" was the maintenance technician who was employed by Cedar Court on the day of the fire. (RP 263). Ms. Hanshew testified: "Alex is responsible for all of the normal maintenance for the property outside of what would be considered above his, you know, skill level, so it is usually general maintenance." RP 264.

Ms. Wheat testified that she possessed the key to the room where the master keys were kept but that her assistant, Tiara, also had access to the keys whenever Ms. Wheat left. (RP 345). Ms. Wheat's assistant, Tiara, never testified at trial. (RP 345).

Cedar Court hired the carpet cleaning service known as New Life Carpet Cleaning. (RP 303). Ms. Wheat testified that she hired and worked with New Life approximately 8 days per month on average. (Id.).

Cedar Court did not call "Alex," the Cedar Court maintenance employee, as a witness at trial. Similarly, Cedar Court did not call any

employees or agents of New Life Carpet Cleaning to testify at trial.

During cross-examination, Ms. Hanshew was questioned about her deposition testimony in this case, which occurred on August 24, 2014. Ms. Hanshew could not recall her prior testimony where she testified: "On behalf of Cedar Court there was clearly someone in the apartment [prior to the fire]." (RP 273). At trial, Ms. Hanshew confirmed that the following deposition testimony that she previously gave was truthful and accurate:

Q. So someone had completed some repairs in this apartment on February 21.

A. That's what it appears.

Q. The same day of the fire.

A. That's what it appears.

Q. Who was that?

A. That would have been the maintenance technician but that wouldn't have been Jose at that time. I'm going to apologize because I don't recall his name.

Q. Kind of important that we identify who was in this apartment on the date of the fire.

A. Sure.

Q. So I'm not trying to put words in your mouth. I just want clarification. Does this entry indicate that someone on behalf of Dobler or Cedar Court was in the apartment doing repairs that were done by 11:00 on the morning of February 21, 2013?

A. On behalf of Cedar Court there was clearly someone in the apartment.

(CP 271-273; Hanshew Deposition at p. 53; Ex. 49).

At the end of Ms. Hanshew's trial testimony, there were several questions from the jury asking who had access to the keys to the Colorados' apartment. For example, the jury asked:

Q. "Who has access to the room that has the keys, the locked room?

A. "Employees of Cedar Court Apartments can access that room." (RP 293).

Q. "Does the apartment manager open the door for the carpet cleaner or maintenance technician or does she give them the keys to enter the apartment?"

A. "The maintenance technician would be responsible for checking the keys out, and the manager would check them out on behalf of the carpet cleaner." (RP 294).

Similarly, at the end of Ms. Wheat's trial testimony, there were several questions from the jury in regards to which employees of Cedar Court had access to the keys to the Colorados' apartment. For example, the jury asked:

Q. "Why would you give the keys to the cleaners at 2:00 p.m. If you thought the Colorados were home?

A. They put in an order to have their carpet renewal clean. I wanted to be sure that that happened for them that day. I wanted the carpets to be cleaned for that day. (CP 389).

The jury posed the most questions in the entire case to Tammy Wheat. Most of these questions were at least implicitly directed towards

Ms. Wheat's credibility. (RP 389-393). Further, these questions asked very direct and somewhat argumentative questions about Ms. Wheat's memory and her willingness to allow access to the apartments of various tenants without their consent. (Id.). The following is a concise example of Ms. Wheat's testimony on this subject:

> Q. Is it your policy to allow licensed and bonded contractors into tenants' units typically without consent?
>
> A. Yes. (RP 394).

As a result of the fire, many of the Colorados' personal belongings were destroyed. The Colorados have never been fully compensated for these losses. The parties stipulated to damages in this case and the testimony was confined to each parties' liability theories of the case. (RP 240-242).

At the conclusion of trial, counsel for Plaintiff and counsel for Defendants expressly agreed that the only issue for the jury to determine was who negligently caused the fire. Plaintiff and Defendants expressly agreed that neither party was required to prove causation. (RP 14). On February 26, 2015, the jury returned a verdict in favor of the Colorados on liability.

F. Procedural Background

On October 9, 2014, Cedar Court filed a motion for partial summary judgment seeking to dismiss all of the Colorados' counterclaims and seeking affirmative relieve on their own claims. On December 5,

2015, the Honorable Jerry T. Costello dismissed all of the Colorados' counterclaims but specifically refused to dismiss their negligence claim. At oral argument, Judge Costello decided that questions of fact precluded the trial court from granting summary judgment on the Colorados' negligence counterclaims.

IV. ARGUMENT

A. The Trial Court Erred by Granting JNOV Despite Substantial Circumstantial Evidence that Supported the Jury's Verdict.

"In reviewing a JNOV, this court applies the same standard as the trial court." Goodman v. Goodman, 128 Wn.2d 366, 371, 907 P.2d 290, 293 (1995). A JNOV is proper only when the court can find, "as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict." Brashear v. Puget Sound Power & Light Co., 100 Wn.2d 204, 208-09, 667 P.2d 78 (1983) (quoting Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)). "A motion for a JNOV admits the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the moving party and in the light most favorable to the opponent." Goodman, 128 Wn.2d at 371. "No element of discretion is involved." Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 529, 998 P.2d 856, 865 (2000). "A court should only grant a motion for a judgment n.o.v. under CR 50 when the court can say that, 'as a matter

of law, there is neither evidence nor reasonable inferences therefrom sufficient to sustain the verdict.'" Browne v. Cassidy, 46 Wn. App. 267, 269, 728 P.2d 1388, 1389 (1986) (quoting in part Brashear v. Puget Sound Power & Light Co., 100 Wn.2d 204, 208-09, 667 P.2d 78 (1983)).

It is well settled law that the credibility of witnesses and the weight to be given to the evidence are "matters which rest within the province of the jury." Burke v. Pepsi-Cola Bottling Co., 64 Wn.2d 244, 246, 391 P.2d 194 (1964). "A jury is free to believe or disbelieve a witness, since credibility determinations are solely for the trier of fact." Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125, 126 (2003). "Credibility determinations cannot be reviewed on appeal." Id. (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In this case, the trial court abused its discretion in setting aside the jury verdict in favor of Gustavo and Maria Colorado. In this case, the trial court erred because it inappropriately weighed the testimony and substituted its own credibility determinations of the witnesses.

In this case, there is abundant, ample and substantial evidence to support the jury's verdict that Cedar Court negligently caused the fire. First, it is undisputed that Gustavo Colorado filled out two maintenance request forms on the day of the fire. Second, it is undisputed that Cedar Court employees had keys to access the Colorados' apartment. Third, it is undisputed that Cedar Court gave the keys to the Colorados' apartment to

employees of New Life Carpet Cleaning before the fire. It is also undisputed that Gustavo Colorado requested that New Life Carpet "hurry up" and complete the carpet cleaning prior to the fire. This is just a brief summary of the list of facts in support of the Colorados' liability case. At the same time, the Colorados fully acknowledge that its case is supported only by circumstantial evidence.

However, in Washington, it is well settled that "[c]ircumstantial evidence and direct evidence are equally reliable." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); see also Washington Pattern Jury Instruction § 1.03. Further, "[a] claim of insufficiency admits the truth of the [non-moving party's] evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); see also State v. Turner, 103 Wn. App. 515, 520, 13 P.3d 234, 237 (2000).

In this case, Cedar Court and its agents had the motive, means and opportunity to enter the Colorados' apartment before the fire started. In fact, Cedar Court's own corporate representative, Deanna Hanshew, testified under oath that she believed that a Cedar Court employee entered the Colorado's apartment before the fire occurred on February 21, 2013. Further, Cedar Court and its agents had the motive, means and opportunity to turn on the stove shortly before the fire. And Cedar Court and its agents

had the motive, means and opportunity to put flammable items on the stove shortly before the fire.

It is also important to note that the individuals most likely to have entered the Colorados' apartment on behalf of Cedar Court were not called as witnesses. Cedar Court employees Alex and Tiara were known to have relevant information but Cedar Court strategically and deliberately chose not to call these employees as witnesses. (RP 263, 345). As Ms. Hanshew testified at trial: "Alex is responsible for all of the normal maintenance for the property outside of what would be considered above his, you know, skill level, so it is usually general maintenance." (RP 264). Similarly, Ms. Wheat testified that Tiara would have full access to keys to the Colorados' apartment. (RP 345). The jury is permitted to draw a negative inference that Cedar Court failed to call either of these employees to testify at trial. Wright v. Safeway Stores, 7 Wn.2d 341, 347, 109 P.2d 542, 544 (1941); Cook v. Tarbert Logging, Inc., 190 Wn. App. 448, 472-73, 360 P.3d 855, 868 (2015).

In addition, Cedar Court also elected not to call any witnesses who were employed with New Life Carpet Cleaning. At trial, Ms. Wheat testified that Cedar Court has had a long standing business relationship with New Life. On average, New Life conducts carpet cleaning at Cedar Court approximately 8 days per months. (RP 303). Once again, the jury is permitted to draw a negative inference in regards to Cedar Court failure

to call any New Life employees to testify at trial. Wright v. Safeway Stores, 7 Wn.2d 341, 347, 109 P.2d 542, 544 (1941); Cook v. Tarbert Logging, Inc., 190 Wn. App. 448, 472-73, 360 P.3d 855, 868 (2015).

Ultimately, this entire trial was about circumstantial evidence in regards to both parties' theories of the case. There is an abundant amount of circumstantial evidence to indicate that Cedar Court entered the apartment before the fire and placed boxes on top of the Colorados' stove. Lieutenant Hanson explained that the fire started in this rudimentary manner.

Thus, the question really boiled down to whether the jury believed the Colorados' testimony that they did not place any items on the stove before the fire started. Assuming that the jury obviously believed the Colorados, the jury then had to determine whether anyone from Cedar Court or New Life went into the apartment immediately prior to the fire. There was abundant, substantial, and compelling evidence that someone entered the Colorado's apartment before the fire other than the Colorados.

And finally, Tammy Wheat's testimony was extremely erratic, dumfounding and not credible. In many regards, the jury could have reasonably based their findings on Tammy Wheat's incredible testimony alone. Coupling Tammy Wheat's dubious testimony with all of the other circumstantial evidence, the trial court erred by weighing the testimony rather than assessing its sufficiency. As a result, the trial court's Order

granting Cedar Court's motion for JNOV must be reversed and the jury's verdict reinstated.

B. Counsel for Maria and Gustavo Colorado are Entitled to Attorney's and Costs as Prevailing Parties under the Lease.

In order to preserve this issue on appeal and remand, counsel for Maria Gustavo Colorado request reasonable attorneys' fees and litigation costs as prevailing parties under the terms of the Lease executed by and between Cedar Court Apartments, LLC, and the Colorados on November 13, 2013. It is undisputed that the attorney's fees clause is valid and enforceable. The parties stipulated as such during trial.

Following the jury's verdict in favor of the Colorados, counsel for the appellants, Raymond J. Dearie and Thomas Crowell, each submitted their attorney's fees application to the trial court. The trial court denied these attorneys' fees petitions because it granted Cedar Court's motion for JNOV. The trial court reasoned that neither of the parties should be considered "prevailing parties" under the law.

Counsel for the Colorados respectfully move this Court for attorneys' fees and costs associated with this appeal pursuant to the Lease signed between the parties. Counsel for the Colorados respectfully assert that this issue can be adjudicated by the trial court upon remand.

V. CONCLUSIONS

The sole focus of the jury trial in this case was as follows: Who negligently caused the fire? After hearing testimony, the jury determined

that Cedar Court more likely than not caused the fire on February 21, 2013. This jury trial was almost exclusively a contest of credibility.

Gustavo and Maria Colorado vehemently and steadfastly denied that they placed anything on the stove that could have caught fire. Conversely, Cedar Court's assertion that it had nothing to do with causing this fire was contradicted, rebutted and impeached by abundant circumstantial evidence throughout the course of the trial. In short, the jury simply did not believe Cedar Court's story. The trial court erred by superimposing its own judgment against the judgment of a 12 person Pierce County jury. In short, JNOV must be reversed and this case remanded back to the trial court for an appropriate determination of reasonable attorneys' fees and costs.

Respectfully submitted this 12th day of February 2016.

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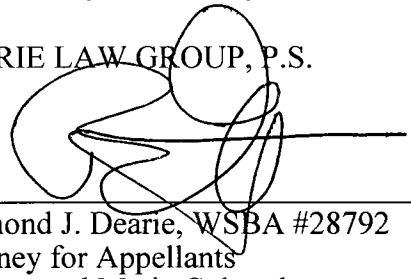

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 12th day of February 2016 a true and correct copy of the foregoing *Appellants' Opening Brief*, was served upon the following parties and their counsel of record in the manner indicated below:

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