No. 36414-3-III

98261-9

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

THE PHOENIX INSURANCE COMPANY,
a foreign corporation,

Petitioner,

v.

MICHELSEN PACKAGING COMPANY,
a Washington Corporation;
NORTHWEST WHOLESALE INCORPORATED,
a Washington Corporation, and DOES 1-20,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Phoenix Insurance Company, the subrogee of Blue Bird, Inc. ("Blue Bird") asks this Court to grant review of the decision of the Court of Appeals terminating review set forth in part B.

B. COURT OF APPEALS DECISION

Division III filed its opinion on February 6, 2020. A copy is in the Appendix at pages A-1 through A-6.

C. INTRODUCTION/ISSUE PRESENTED FOR REVIEW

This case presents an important issue of statewide significance on the duty of property owners owed to their neighbors to prevent the spread of fire to those neighboring properties. RAP 13.4(b)(4). Division III's decision on breach of duty is contrary to numerous decisions of our courts on breach of duty as a question of fact for the jury. RAP 13.4(b)(1)-(2).

The issue for review is:

> Where neighboring property owners owed a duty of care to Blue Bird as to the spread of fire from combustible materials negligently maintained on their premises, did the Court of Appeals err in concluding that Blue Bird did not present sufficient evidence of those neighbors' breach of that duty where that issue is ordinarily a question of fact, and Blue Bird offered expert testimony clearly documenting a breach of that duty?

D. STATEMENT OF THE CASE

Division III's opinion offers only a skeletal description of the facts, op. at 2-3, necessitating a more detailed discussion of the facts here.

Blue Bird, Michelsen Packaging Company ("Michelsen") and Northwest Wholesale, Inc. ("Northwest") operate businesses in the fruit harvesting, packaging, and distribution industries in Wenatchee's commercial warehouse district. CP 572. Operating related businesses in close proximity to one another, they are intermittently both competitors and customers of one another. CP 560, 572. Founded in 1913, Blue Bird is the oldest cooperative of fruit growers, packers and shippers in Central Washington; its Wenatchee location is central to its cherry operations. CP 572.

Michelsen is a "leading produce packaging and equipment manufacturer and distributor" with a primary service area covering the entirety of North America. CP 564. Michelsen's business is primarily focused on manufacturing paper and plastic products that have been specially designed for shipping and packaging fresh produce. *Id.* At the time of the fire here, it stored its inventory in an outdoor yard. CP 8, 14-15. Michelsen also provided recycling services at its Wenatchee location, commonly referred to as Central Washington Recycling. CP 566. As part of its recycling operations, Michelsen allowed the public to drop off large quantities of loose cardboard, which were then baled, stacked, and stored on its premises. *Id.* The Michelsen recycling facility was open to the public twenty-four hours a day, seven days a week. CP 201. This lot was not

monitored or secured, and any person was permitted to enter and exit at any time, day or night, and for whatever purpose. CP 596.

Northwest provided a number of support services to the entire fruit industry, particularly packaging services. CP 573. It routinely stored materials in an outdoor yard. CP 8, 14, 15. At the time of the fire that gave rise to this action, Michelsen leased the northernmost portion of the property from Northwest, while Northwest operated its own facilities in the immediately adjacent areas, sharing a north-south lot line with Michelsen. Blue Bird's facility is located nearby to the southeast.

Michelsen/Northwest regularly stored large amounts of combustible material in their exterior yards. CP 541. Both Michelsen/Northwest stored their inventory in a compact line that ran along the eastern border of their properties and met at their shared north/south lot line. *Id.* Michelsen/Northwest did not leave a sufficient amount of space between their shared lot line and their respective inventory. CP 542. These stacks of combustible products stretched from the north side of the Michelsen property all the way down to the southern lot line. CP 568, 574. Michelsen also did not leave any space between their stacks, so that the stored inventory created a single large stack that collectively covered a massive amount of square footage. *Id.* Northwest, the property's owner, was in a position to observe the situation daily, but did not intervene or address the

dangerous state of the combustibles in any way and permitted this situation to persist.

Blue Bird's well-qualified expert, Albert Simeoni, opined that because Michelsen did not maintain any space between its stacks of inventory along the shared north/south line, it created a continuous fuel load between the two properties that would allow a fire to spread quickly and to be suppressed only with great difficulty. CP 541-43, 572. Further, Michelsen's expert, Mark Yaple, described the area of the Michelsen yard, where Michelsen allowed customers to dump truck loads of loose cardboard, as a "natural collection point" for embers or other burning materials. CP 201-02. The net effect of Michelsen's practices was that it created an unsecured fire hazard at its place of business. Instead, it actively invited the public to have access to that location without supervision. Michelsen created conditions that "amounted to a perfect catastrophe waiting to happen." CP 542. Despite these risks, Michelsen continued to allow its yard to remain in this condition.

At about 2:30 on June 28, 2015, a wildfire was reported near Sleepy Hollow Road in Chelan County. CP 199. That fire consumed approximately 2,950 acres in an area near Wenatchee. CP 596. That night, a fire also broke out on Michelsen's premises. CP 201. It was just one of

many fires that ignited within, and ultimately consumed, a significant portion of the Wenatchee warehouse district. *Id.*

Significantly, the parties' experts *agreed* that a fire started in the Michelsen yard, and that the Michelsen fire then ultimately spread to the south to the rest of the warehouse district, including Blue Bird's premises. On the night of June 28, 2015, the wind blew from north to south. CP 201. Michelsen's premises were the northernmost boundary of the area damaged by the Michelsen fire. All of the other damaged properties, including Blue Bird's, were "downwind from the recycling center [on Michelsen's premises] and NW Wholesale." CP 203. Blue Bird's expert, Paul Way, opined that the fire spread from the Michelsen/Northwest properties to Blue Bird's property. CP 548 ("Once ignited, the Michelsen fire caused large pieces of burning debris to be lifted into the air and carried by the wind toward other nearby commercial properties including but not limited to, Stemilt and Blue Bird, Inc."). Mark Yaple, Michelsen's expert, agreed that the fire at the Blue Bird warehouse emanated from the Michelsen/Northwest properties. CP 204 ("All the fires in the Broadview area are consistent with ignition by a wildland fire originating in the Sleepy Hollow area, or from homes burning from this exposure to the next home, spread through unseasonal hot, dry weather, and extreme wind conditions); *then embers from these fires igniting combustibles in the warehouse district, probably in*

Michelsen Packaging and/or Northwest Wholesale, which in turn sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.") (emphasis added).[1] These flaming pieces of debris ultimately landed on Blue Bird's warehouse and burned it to the ground, causing $48 million in damages. CP 586, 600-01, 879.

Phoenix paid claims submitted by Blue Bird under a valid insurance policy for its fire loss[2] and then filed the present action to recover against Michelsen/Northwest for their negligence in causing that loss. CP 1-11.

The trial court recognized that Michelsen/Northwest owed Blue Bird a duty of care, CP 898-900, and it rejected the Michelsen/Northwest motions to strike Blue Bird's experts' testimony, CP 607-35, 909, but, nevertheless, it granted the Michelsen/Northwest motions for summary judgment in an October 2, 2018 letter ruling. It concluded that Blue Bird

[1] The trial court acknowledged this agreement of the experts. CP 897 ("Way agrees with Mark Yaple's conclusion that the fire at Michelsen Packaging and/or NW Wholesale, sent embers to Stemilt warehouse and Blue Bird Fruit warehouse.").

[2] In the property insurance setting, under principles of subrogation, a doctrine rooted in equity, an insurer has the right by contract to recover what it pays to an insured under a policy by suing a tortfeasor responsible for the insured's loss. The insurer, in effect, steps into the shoes of the insured. *Touchet Valley Grain Growers, Inc. v. Opp. & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 341, 831 P.2d 724 (1992); *Mahler v. Szucs,* 135 Wn.2d 398, 411-18, 957 P.2d 632 (1998). Subrogation is favored in Washington and is liberally allowed in the interests of justice and equity. *Id.* at 412.

failed to establish that Michelsen/Northwest's negligence was the proximate cause of the fire damage it experienced. CP 883-91.[3]

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

(1) Michelsen/Northwest Owed a Duty of Care to Blue Bird

Division III did not overturn the trial court's correct formulation of the duty that Michelsen/Northwest owed Blue Bird for the maintenance of their premises and to prevent the spread of fire from those premises to neighboring properties. CP 889. It assumed, without holding, that a duty existed. Op. at 5.

Washington law provides both a statutory and common law duty on the part of property owners to prevent the spread of fire by their negligence to neighboring properties. The Legislature created a statutory cause of action for parties harmed by a premises owner's negligence in allowing a fire to spread from that owner's property. RCW 76.04.730 provides that "it is unlawful for any person to negligently allow fire originating on the person's own property to spread to the property of another." In *Oberg v. Dep't of Natural Resources,* 114 Wn.2d 278, 787 P.2d 918 (1990), this Court readily determined that DNR, as a landowner, had a statutory duty to

[3] In so ruling, the trial court appeared to labor under the misconception that Blue Bird had to prove that burning debris originated from the Michelsen/Northwest properties in order for Blue Bird to recover against them. CP 890 ("…there is no evidence to establish the origins of these large embers.").

provide adequate protection against the spread of fire from its land. Critically, the fire's specific origin did not determine the existence of the duty. Instead, the important point is that a landowner (whatever the fire's origin) allowed a fire to spread. The *Oberg* court noted that the origin of the fire on DNR's property was lightning, and that such an origin "is of no consequence." *Id*. at 282.[4] Division III's opinion does not mention the statutory duty.

In addition to a statutory duty of care, a common law duty exists, as the *Oberg* court noted. 114 Wn.2d at 283. Indeed, as early as 1917, this Court found a common law duty to be present even if the landowner had no fault in the fire's origin; the landowner is still liable for the fire's spread. *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 558, 164 Pac. 200 (1917). In *Sandberg*, the defendant was a logging company engaged in logging on its land. A fire started on its land close to a donkey engine that was being used in the logging operations. The fire spread to plaintiff's farm some two miles away, destroying the barn, outbuildings, hay and feed, and various farm implements. There was a dispute about the defendant's alleged negligence in starting the fire, but as the Court stated, that question

[4] *See also, Dep't of Natural Resources v. Public Utility Dist. No. 1 of Klickitat County*, 187 Wn. App. 490, 349 P.3d 916, *review denied*, 184 Wn.2d 1006 (2015) (DNR authorized by RCW 76.04.495(1) to recover fire suppression costs from any entity "whose negligence is responsible for the starting or existence of a fire which spreads on forest lands…").

"is of no moment in our present inquiry." *Id.* at 557. Rather, the Court stated the question for the establishment of common law liability to be:

> Was appellant, having knowledge of the starting of the fire upon its own premises, required by law to exercise due diligence looking to the prevention of the spreading of the fire to respondent's property; and would the failure on the part of appellant to exercise due diligence in that behalf render it liable to respondent as for negligence?

Id. at 558.

As the trial court here noted, CP 887-88, this principle has been reinforced in decisions like *Prince v. Chehalis Savings & Loan Ass'n*, 186 Wash. 372, 58 P.2d 290 (1936) and *Chicago, Milwaukee, St. Paul & Pac. Railroad Co. v. Poarch*, 292 F.2d 449 (9th Cir. 1961). The gravamen of the common law duty is whether a landowner has taken appropriate steps to prevent the spread of a fire from its premises. *Prince*, 186 Wash. at 375 ("The courts generally support the rule … that evidence as to the origin of the fire is not a necessary element to entitle a recovery where the property causing the fire has gotten into such a condition that it creates a fire hazard, and that, if fire should occur on it, it is reasonably probable that it would spread to the adjacent property.").

In *Chicago, M., St. P. & P.R.*, the Ninth Circuit affirmed a judgment for the plaintiff, stating:

> [O]nce it is established that the owner of a building has negligently allowed it to become a fire hazard and a fire does

> start the actual cause—whether deliberate, accidental, or act of God—is immaterial. The negligence is not in the ignition of the fire but rather it is in allowing a condition to exist which will be reasonably likely to cause injury to another if a fire does start.

292 F.2d at 451.[5] Whether a defendant breaches its duty by maintaining the property in such a manner as to create a fire hazard is for the jury. *Id.*

Further, the *Restatement (Second) of Torts* § 302 confirms that a premises owner owes a duty to anticipate the foreseeable negligent conduct of others or foreseeable risks of "forces of nature."[6] Specifically, a premises

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[5] This is in accord with the law of other jurisdictions as well. *See, e.g., Ford v. Jeffries,* 379 A.2d 111 (Pa. 1977) (discuss case). In *Ford*, the Pennsylvania Supreme Court held that a property owner owes a duty to a neighbor to maintain its property in a non-negligent fashion to prevent the spread of fire. It was a fact question for the jury to determine if the property owner breached that duty and whether such breach was a substantial factor in the plaintiff's fire loss. *See also*, *Steamfitters Local Union No. 602 v. Erie Ins. Exchange*, 209 A.3d 158 (Md. App. 2019), *cert. granted*, 216 A.3d 937 (Md. 2019) (landowner owes a duty of care to avoid the likely spread of fire from its property). The majority rule in the United States, as noted in *Liability of Property Owner for Damages from Spread of Accidental Fire Originating on its Premises*, 17 A.L.R. 5th 547 at § 2[a], is set forth in *Prince*:

> Liability for damages for the spread of fire may be based on an owner's negligence in maintaining his premises in such a condition that fire is likely to occur. Therefore, when an owner negligently stores combustible or inflammable material on property so that it is reasonably foreseeable that fires will start and spread to the premises of another, he may be liable for damage caused when this occurs, although the fire starts accidentally.

See also, 35A Am. Jur. 2d *Fires* § 27.

[6] The risk of fire in the Wenatchee area in the summer months is fully foreseeable. After the events in this case, the summer months in the Wenatchee area have seen extensive fire activity. For example, news reports in June 2017 reported more than 50,000 acres ablaze near Wenatchee. "Wenatchee area fire grows to 45,000 acres and sends smoke into Spokane," *Spokesman-Review*, June 29, 2017. http://www.spokesman.com/stories/2017/jun/28/fire-evacuation-orders-issued-in-parts-of-grant-co/. A similar number of acres in the same vicinity were burning a little more than

owner must not create conditions on its premises that will cause a fire to start or to spread. In fact, the *Restatement* has two illustrations of these principles:

> 1. A sets a fire on his own land, with a strong wind blowing toward B's house. Without any other negligence on the part of A, the fire escapes from A's land and burns down B's house. A may be found to be negligent toward B in setting the fire.
>
> 2. A discovers on his land a fire originating from some unknown source. Although there is a strong wind blowing toward B's house, A makes no effort to control the fire. It spreads to B's land and destroys B's house. A may be found to be negligent toward B in failing to control the fire.

In sum, the trial court correctly determined that Michelsen/Northwest owed Blue Bird a duty of care to avoid allowing fire to negligently spread from their premises to Blue Bird's. Notwithstanding Division III's bare treatment of the duty issue, a landowner's duty to prevent the spread of fire to neighboring properties is currently a significant issue in this era of fires in our state. This Court has not revisited that duty, a significant public importance in our state, since *Oberg* was decided in 1990. Review is merited. RAP 13.4(b)(4).

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a year later. "Wildfires blazing across Washington, fire risk high on Monday," *Seattle Post Intellingencer*, August 20, 2018. https:// www.seattlepi.com/washington-wildfires/article/Wildfires-across-Washington-blazing-fire-risk-13168894.php. As for 2019, *see* https://en.wikipedia.org/wiki/2019_Washington_wildfires.

(2) Breach of Duty Should Not Have Been Addressed as a Matter of Law as It Is a Question of Fact for the Jury

The trial court determined that Michelsen/Northwest owed Blue Bird a duty of care, but that any breach of that duty did not proximately cause Blue Bird's harm as a matter of law. CP 883-91. Division III did not even address that issue, op. at 4, in light of Blue Bird's extensive arguments that proximate cause was for the jury. Br. of Appellant at 21-32; reply br. at 28-31.[7] The trial court did not address breach of duty anywhere in its decision. CP 883-91.

[7] Nor could the trial court's decision be sustained in light of the unambiguous opinion of Blue Bird's expert, Paul Way, on the spread of the fire from the Michelsen/Northwest properties to Blue Bird's:

> 9. Once ignited, the Michelsen Fire caused large pieces of burning debris to be lifted into the air and carried by the wind towards other nearby commercial properties, including but not limited to Stemilt and Blue Bird, Inc. *See* photograph taken by Rob Spradlin and attached hereto as Exhibit B.
>
> 10. During my investigation, I spoke with Blue Bird employees, including Larry Blakely and Roger Sommers, who were on Blue Bird's premises during the Michelson Fire. Mr. Blakely witnessed a large piece of burning debris, which he believed to be cardboard, land on Blue Bird's exposed roof. Mr. Blakely and Mr. Sommers, [sic] attempted to extinguish the burning debris with a garden hose, but were unable to reach the flames. Both Mr. Blakely and Mr. Sommers witnessed the ignition of the Blue Bird facility due to this large piece of burning debris. Mr. Blakely stated that the debris had dimensions approximating 16 inches by 24 inches.
>
> 11. I did not find any evidence that the Blue Bird property was ignited by a wildfire brand. The burning debris witnessed by Mr. Blakely and Mr. Sommers is not material that would originate from a wildland fire. Rather, the large piece of burning debris was consistent in size and shape to cardboard and is consistent with what one would expect to see originating from the Michelsen yard. The Blue Bird property was

Both Blue Bird experts were qualified and their testimony met the test for admission. *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). Division III did not address Blue Bird's well-documented contention that its experts' testimony was properly before the trial court, op.

> a victim of the fire that was burning in the commercial district. The fire burning in the commercial district originated on the Michelsen property.
>
> 12. I reviewed the report authored by Mark Yaple. I agree with his conclusion that the fire at Michelsen Packaging and/or Northwest Wholesale, [sic] "sent embers to Stemilt warehouse and Blue Bird Fruit warehouses."
>
> 13. *It is more likely than not,* [sic] *that the Blue Bird property was ignited by flaming debris that originated from and/or was caused directly by the fire at the Michelsen yard.*

CP 548-49 (emphasis added). Thus, Way unambiguously opined that the fire, however, it originated, emanated from the Michelsen/Northwest properties and damaged the Blue Bird property.

Way's analysis mirrors the conclusions originally drawn by Yaple in his role as the Wenatchee Fire Marshall in 2015. CP 204. His report stated that he interviewed an unnamed Blue Bird employee who was on the roof at the time of the Michelsen fire because he was attempting to put out fires on the roof with a garden hose. CP 203. Yaple took photographs of the burn holes on an adjacent roof in an area near Blue bird's loading dock that had been timely extinguished. *Id.* After examining these burn marks, Yaple opined that "these holes would require large embers to ignite this roof membrane, similar to those found on the Millers side of the complex." *Id.* Those "similar" pieces of debris were separately described in Yaple's report as being "15-16 inches across." CP 202. Thus, Michelsen's own expert identified secondary burn marks on the Blue Bird warehouse roof that were consistent with the eyewitness testimony of Blue Bird's employees that large pieces of flaming cardboard were the cause of Blue Bird's damages.

Yaple's report noted that the debris observed at and around Blue Bird's warehouse was of a different kind and quality than the Sleepy Hollow fire embers that were found farther to the north. CP 202. The "embers" from the Sleepy Hollow fire primarily consisted of "shakes and pine needle debris," consistent with the type of small and light material that could travel some distance from a wildland fire. *Id.* By contrast, the debris found in the vicinity of Blue Bird appeared to be "from a synthetic product or material." *Id.* Michelsen's collection of combustible materials in its recycling business was a natural collection point for embers, according to Yaple. *Id.*

at 4; br. of appellant at 33-42; reply br. at 20-26.[8] Instead, it summarily ruled as a matter of law that Blue Bird failed to prove breach. Like the trial court on causation, it *weighed* the parties' evidence, giving less credence to Blue Bird's expert on breach. It was error for Division III to step in and rule that breach could be resolved here *as a matter of law*.

Numerous appellate decisions make clear that breach is generally a question of fact. *E.g.*, *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *McCarthy v. County of Clark*, 193 Wn. App. 314, 330, 376 P.3d 1127, *review denied*, 186 Wn.2d 1018 (2016) ("Whether an officer has fulfilled the duty to investigate is a question of fact."); *Butler v. Thomsen*, 7 Wn. App. 2d 1001, 2018 WL 6918832 (2018), *review denied*, 193 Wn.2d 1026 (2019) (Division I reverses summary judgment where expert testimony raised question of fact as to breach). Ample evidence supported Blue Bird's position that Michelsen/Northwest breached their duty to it.

[8] Michelsen/Northwest carped below about the alleged "speculative" nature of the Simeoni and Way expert testimony, even though the basis for their opinions on the fire's origin on the Northwest/Michelsen properties was largely no different than employed by their expert, Mark Yaple. Michelsen Br. at 35-42; Northwest Br. at 37-53. Eschewing consistency, they never explained how Yaple's opinion was "valid," but the corresponding views of Simeoni or Way were "incompetent" or "speculative," other than they wish it to be true. Yaple's opinions, as evidenced in his report and declaration, were based on precisely the *same facts* as those relied upon by Way and Simeoni. In effect, they played the "hometown boy" theme as to Yaple's testimony as the rationale for trusting his view over "someone from Massachusetts." Reply br. at 3.

Division III never articulated why the Simeoni/Way opinions should, in effect, be deemed less "worthy." Instead, it weighed the expert opinions and preferred Yaple's testimony. Op. at 5-6. In effect, Division III made a credibility decision it was not allowed to make on *de novo* review of a summary judgment.

The better analysis is that the expert opinions of Simeoni and Way created a question of fact on breach. In addressing whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to the non-moving party, here, Blue Bird. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Where there are significant witness credibility issues present in a case, it has long been the rule in Washington that summary judgment is inappropriate. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986) ("Credibility issues involving more than collateral matters may preclude summary judgment.").

When expert opinions come to differing conclusions on a key issue, that creates a plain issue of fact for the jury. *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019) (this Court reaffirms that conflicting expert opinions create triable issue of fact and that weighing of conflicting evidence by the trial court on summary judgment is improper).

See also, *Chen v. City of Seattle,* 153 Wn. App. 890, 900, 223 P.3d 1230 (2009), *review denied,* 169 Wn.2d 1003 (2010). *Bowers v. Marzano*, 170 Wn. App 498, 290 P.3d 134 (2012) (experts in disagreement on cause of auto crash); *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 295 P.3d 816 (2013) (differing opinions in medical negligence action as to cause of patient's injury); *C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 200, 402 P.3d 346 (2017), *review denied*, 192 Wn.2d 1023 (2019) ("In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate."); *Leahy v. State Farm Mut. Auto. Ins. Co.*, 3 Wn. App. 2d 613, 633, 418 P.3d 175 (2018); *Meyers v. Ferndale Sch. Dist.*, __ Wn. App. 2d __, __ P.3d __, 2020 WL 614329 (2020) at ¶ 23.

Simeoni could not have been clearer in opining that Northwest/Michelsen breached their duty to Blue Bird by creating "a perfect catastrophe waiting to happen:"

> 6. Michelsen and Northwest stored large amounts of inventory in their exterior yards. The Michelsen yard and the Northwest yard shared a common border. Both Michelsen and Northwest stored inventory in a contiguous line, directly adjacent to the lot line (north/south) between their occupancies.
>
> 7. Michelsen stored stacks of fruit packaging material along the eastern edge of its property. The stacked inventory stretched from the north side of the property all the way down to its southern lot line. Michelsen did not leave any space between the stacks of inventory, so that the inventory created one, large, stack.

> 8. By not permitting space between its stacks, Michelsen created a single condensed fuel load that created a high and foreseeable risk of fire too intense to control. With no breaks in the stack, control of the subject fire's spread became impossible.
>
> 9. By creating such a large fuel load with no natural breaks, Michelsen contributed to the creation of a large and intense fire in its yard. As a direct result of Michelsen's storage practices, the fire very quickly became uncontrollable. Despite the best efforts of the firefighters, the high intensity of the fire resulted in a large fire plume that entrained flaming debris to be lofted high in the air and carried away from the Michelsen property and toward other commercial properties located downwind of the fire. As a result, firefighters could not contain the flaming debris from leaving the site of the fire.
>
> 10. Had Michelsen appropriately maintained and organized its inventory with necessary breaks, it would have given firefighters the opportunity to contain this fire before the Blue Bird facility ignited.
>
> 11. The contiguous line of inventory between the Michelsen yard and the Northwest yard, created conditions that amounted to a perfect catastrophe waiting to happen.
>
> 12. Both the Michelsen and the Northwest yards created an unsafe fire hazard because a fire, once started, would be very difficult if not impossible to be stopped from spreading and distributing flaming debris onto surrounding properties.

CP 541-43. Simeoni's testimony on breach in the summary judgment setting was enough to take the case to the jury. Review is merited. RAP 13.41(b)(1)-(2).

F. CONCLUSION

This case presents an important issue both of duty and breach in the context of fire loss. Review is merited. RAP 13.4(b)(1), (2), (4). Division III's opinion glosses over the duty issue and decides breach as a matter of law when there were genuine issues of material fact on that issue. Michelsen/Northwest breached their duty to Blue Bird, as noted in expert testimony, by maintaining combustible materials on their premises that could readily explode into flame, thereby improperly facilitating the spread of such flames to Blue Bird's premises, causing it millions of dollars in damages.

This Court should reverse the trial court's decision and remand the case for trial on the merits. Costs on appeal should be awarded to Blue Bird.

DATED this 5th day of March, 2020.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

THE PHOENIX INSURANCE COMPANY, a foreign Corporation, Appellant, v. MICHELSEN PACKAGING COMPANY, a Washington corporation; NORTHWEST WHOLESALE INCORPORATED, a Washington corporation, and DOES 1-20, Respondents.	)	No. 36414-3-III UNPUBLISHED OPINION

KORSMO, J. — A wildfire broke out near Wenatchee, causing extensive damage to homes and businesses, including Blue Bird, Inc. Phoenix Insurance Company (Phoenix), Blue Bird's insurer, brought suit against neighboring businesses Northwest Wholesale Incorporated (NW Wholesale) and Michelsen Packaging Company (Michelsen), alleging that defendants negligently caused the fire to spread to Blue Bird's property. The superior court granted summary judgment in favor of defendants. Finding insufficient evidence that defendants breached a duty to Blue Bird, we affirm.

FACTS AND PROCEDURAL HISTORY

We state the facts in the light most favorable to Phoenix. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011).

Blue Bird and Michelsen operated fruit packaging businesses on nearby parcels of real property in Wenatchee. Michelsen leased its property from NW Wholesale. Michelsen stored shrink-wrapped stacks of recycled cardboard and paper packing materials on its property.

On the afternoon of June 28, 2015, an arsonist started a wildfire in Chelan County northwest of Wenatchee. The fire quickly spread and ultimately burned 2,950 acres, destroying 30 homes and 4 businesses. The Blue Bird and Michelsen properties were located approximately one mile east and downwind of the outer edge of the main conflagration.

Shortly after 9:14 p.m. on June 28, Wenatchee Police observed that several pallets of compressed cardboard on the Michelsen property were on fire, and that the fire was spreading toward neighboring properties. Later that night, the Blue Bird property caught fire and sustained substantial damage.

Phoenix, as subrogee for Blue Bird, brought an action in the Chelan County Superior Court against Michelsen and NW Wholesale for negligence and private nuisance, alleging that Michelsen's storage practices caused the fire to spread to Blue Bird's

premises.[1] Michelsen moved for summary judgment. In support, Michelsen submitted a declaration from Fire Marshal Mark Yaple. Yaple had previously conducted fire safety inspections of Michelsen's property and had determined that Michelsen's combustible material storage practices complied with the International Fire Code and Wenatchee City Code, and that Michelsen had received and complied with required storage permits.

In opposition, Phoenix submitted a declaration from Albert Simeoni, an expert in fire science. Simeoni opined that by storing stacks of flammable material close together, Michelsen created a foreseeable fire hazard. Michelsen moved the court to strike the declaration, arguing it was based on speculation and lacked personal knowledge. The court denied the motion.

The court granted summary judgment for Michelsen on causation grounds. The court held that Michelsen owed a duty to prevent its property from becoming a fire hazard, but that Phoenix presented insufficient evidence of causation. All parties appealed. A panel considered the case without oral argument.

ANALYSIS

The parties present the issues of whether Simeoni's declaration is admissible, and whether Phoenix's claims should survive summary judgment on duty, breach, and causation grounds. We hold that Phoenix has failed to raise a genuine issue of material

[1] Because Blue Bird's claims against NW Wholesale are derivative of their claims against Michelsen, we hereinafter refer to respondents collectively as "Michelsen."

fact as to whether Michelsen breached a duty. The issue of breach being dispositive, we do not address the other issues.

We review de novo an order granting summary judgment. *Mohr*, 172 Wn.2d at 859. Summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). In order to survive summary judgment, the nonmoving party must identify specific facts that rebut the moving party's contentions. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The nonmoving party may not rely on an expert's conclusory assertions unsupported by specific facts. *Id*. We may affirm the trial court on any ground supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-201, 770 P.2d 1027 (1989).

A negligence plaintiff must prove 1) defendant owed a duty, 2) defendant breached that duty, 3) plaintiff suffered an injury, and 4) defendant's breach caused the injury. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-128, 875 P.2d 621 (1994). Generally, persons have a duty to use reasonable care to avoid causing physical harm to others. *See Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608, 257 P.3d 532 (2011) (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010)). Breach, therefore, is the failure to exercise reasonable care. However, a defendant's duty of care extends only to foreseeable risks of harm. *J.N. by & Through Hager v. Bellingham Sch. Dist. No. 501*, 74

Wn. App. 49, 57, 871 P.2d 1106 (1994). Defendant's compliance with industry custom is not determinative, but is evidence that defendant exercised reasonable care. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 553-554, 192 P.3d 886 (2008). Whether a party has breached its duty is ordinarily a question for the finder of fact, but may be determined as a matter of law when reasonable minds could not differ. *See Charlton v. Toys "R" Us—Delaware, Inc.*, 158 Wn. App. 906, 912-915, 246 P.3d 199 (2010).

Assuming, without holding, that Michelsen had a duty to maintain its property to avoid creating a fire hazard,[2] Phoenix has not raised a genuine issue of fact that Michelsen breached that duty. Michelsen presented evidence that it exercised reasonable care by following industry custom—its storage practices complied with local regulations and permit requirements, and had been approved by the fire marshall. The only evidence Phoenix presented in opposition was the declaration of Albert Simeoni, who opined without explanation or support that Michelsen's storage practices created a foreseeable fire hazard. This conclusory statement fails to rebut Michelsen's evidence that it exercised reasonable care, and thus fails to create a question of fact. From the evidence

[2] *See Prince v. Chehalis Sav. & Loan Ass'n*, 186 Wn. 372, 375-377, 58 P.2d 290 (1936), *adhered to on reh'g en banc*, 186 Wn. 372, 61 P.2d 1374 (1936) (property owner was liable in negligence when he allowed his building to become a fire hazard, and the building caught fire and spread to neighboring property).

presented, a reasonable fact finder could not have concluded that Michelsen failed to exercise reasonable care.[3]

CONCLUSION

Even if the fire on the Michelsen property caused Blue Bird's damages, Michelsen was not negligent. The judgment of the trial court is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, C.J.

[3] Because Phoenix's nuisance claim is based on the same theory of negligence, it shares the same fate. *See Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 527, 799 P.2d 250 (1990).

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division III Cause No. 36414-3-III to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 5, 2020, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

March 05, 2020 - 4:13 PM

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