No. 98261-9

SUPREME COURT FOR THE
STATE OF WASHINGTON

THE PHOENIX INSURANCE COMPANY,
a foreign corporation,

Petitioner,

vs.

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

Respondents.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Respondent Michelsen Packaging Company ("Michelsen") asks this Court to deny review of the February 6, 2020, unpublished decision of Division III of the Court of Appeals affirming the summary judgment dismissal of Petitioner Phoenix Insurance Company's subrogation claims. The trial court granted summary judgment based on a lack of proof of proximate causation.

The Court of Appeals held there was insufficient evidence that Michelsen breached any duty owed to Petitioner's insured.[1] This decision should be upheld, and the request for review should be denied:

- There is no competent evidence of a breach of duty. Michelsen presented ample evidence that its storage practices complied with all applicable laws, customs and standards, and thus met the standard of care. Petitioner provided only conclusory opinions, without explanation or support, to refute this evidence.

- There is no competent evidence that any breach of duty by Michelsen caused the neighboring property to burn. Rather, petitioner conceded that it did not know the origin of the burning material that landed on its warehouse and caused the warehouse to burn.[2]

B. ISSUES PRESENTED FOR REVIEW

Petitioner contends the Court of Appeals' decision is in conflict with opinions of the Supreme Court or the Court of Appeals under RAP

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[1] The Court of Appeals may affirm on any ground supported by the record. *Otis Housing Ass'n v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009).

[2] RP 23 at lines 12-17.

13.4(b)(1) and RAP 13.4(b)(2). This is incorrect. The Court of Appeals opinion raises no conflict with prior decisions. Rather, the opinion simply holds that Petitioner failed to submit sufficient evidence to create a question of fact by relying solely on an expert "who opined without explanation or support that Michelsen's storage practices created a foreseeable fire hazard." *Court of Appeals Opinion at p. A-5*.[3]

Petitioner also contends this appeal raises a substantial issue of public interest under RAP 13.4(b)(4). This is again incorrect. The Court of Appeals' opinion contains nothing that interprets or revises the duties of the parties, and which might therefore be of "substantial public interest." Rather, the court restricted its analysis to questions of evidence. The language of the unpublished opinion makes clear that the Court of Appeals did not intend to issue any new guidance on the law:

> Assuming, without holding, that Michelsen had a duty to maintain its property to avoid creating a fire hazard, Phoenix has not raised a genuine issue of fact that Michelsen breached that duty.

Id. at p. A-5 (emphasis added) (internal footnote omitted).

The issue presented is thus whether a claim was properly dismissed on summary judgment when the plaintiff failed to produce sufficient evidence to sustain its obligations under CR 56?

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[3] The Court of Appeals Opinion dated February 6, 2020 is attached as Appendix A to the Petition for Review.

Michelsen also presents the question of whether the claims against it should be dismissed on the grounds that Petitioner failed to provide sufficient evidence of proximate cause. This utter lack of evidence on causation formed the basis of the trial court's ruling that dismissed all claims against Michelsen. CP 922-23.

C. STATEMENT OF THE CASE

This case arises out of a wildland fire that started outside of Wenatchee on June 28, 2015. The fire came to be known as the "Sleepy Hollow Fire." CP 199, 306-309. Arsonist Jeremy Kendall pled guilty to starting the fire with a Bic lighter on dry grass outside Wenatchee. CP 306-309. The fire swept toward, and then through Wenatchee, eventually consuming 2,950 acres and burning 30 homes. CP 229-231. The fire was particularly fast moving and dangerous because of high temperatures approaching 100 degrees, dry vegetation and gusty winds. CP 183, 226-227.

The fire was widespread and calamitous. CP 235. It required law enforcement officials to initiate Level III door-to-door evacuations of neighborhoods in and around Wenatchee. In order to conduct the evacuations necessary to protect the public, every single Chelan County Sheriff Office Deputy and every single off-duty Wenatchee Police Department Officer as well as two "strike teams" of the Washington State

Patrol and numerous Sheriff's office volunteers were mobilized. CP 225-31.

CP 235

As it became dark, large embers from the Sleepy Hollow Fire were observed floating through the air from the Broadview neighborhood and landing in the warehouse district in Wenatchee after travelling more than one mile in the air. CP 183-184, 229, 233.

CP 236

Exhausted fire crews responded to reports of fire at the warehouse district in Wenatchee at approximately 9:14 p.m. on June 28, 2015. They found multiple burning buildings. CP 229. Pallets of compressed cardboard in the Michelsen yard were also burning. CP 229. The fire eventually damaged or destroyed warehouses owned by Michelsen, NW Wholesale, Stemilt and Blue Bird. CP 184-185.

The day after the Sleepy Hollow fire, Wenatchee Fire Marshall Mark Yaple began his fire investigation in the warehouse district. CP 183. Mr. Yaple examined the roofs and yards at Michelsen, NW Wholesale, Stemilt and Blue Bird and interviewed witnesses to the fire. CP 183-185. He was unable to determine the source of the embers that ignited Blue Bird's (Petitioner's) warehouse. CP 203. Fire Marshall Yaple ultimately

classified the cause of the Blue Bird fire as "Undetermined" under NFPA 921. CP 204.

Petitioner Phoenix Insurance Company reportedly paid more than $40 million to its insured, Blue Bird, following the fire. Petitioner then sued Michelsen and NW Wholesale for negligence, as subrogee of Blue Bird. CP 1-11.

Michelsen filed a motion for summary judgment dismissal on grounds of lack of duty and lack of evidence of breach. CP 32-49, 150-174. Michelsen filed a Joinder in NW Wholesale's Motion for Summary Judgment regarding lack of proximate causation. CP 175-176.

In support of its Motion for Summary Judgment, Michelsen submitted the testimony of Fire Marshall Yaple. CP 178-219. Mr. Yaple opined Michelsen took exemplary safety measures to minimize fire exposure within its yard. CP 180-181. Michelsen obtained and updated all necessary permits for Flammable Liquids, Hi Piled Combustible Storage, Hazardous Materials Storage, and Combustible Material Storage. CP 182. At the time of the Sleepy Hollow Fire, Michelsen had all the necessary fire safety permits for storage of materials in its yard, and stored it materials in full compliance with the issued permits and all local and national fire codes. CP 180-182. Further, Michelsen had passed all annual fire safety inspections conducted by the Wenatchee Fire

Department. *Id.* It is undisputed that Michelsen strictly complied with all permits, fire safety codes and published standards.

After completing his investigation of the Sleepy Hollow Fire and its spread to the Wenatchee warehouse district, Fire Marshall Yaple could not determine what the embers at the Blue Bird facility were made of or where the embers originated. CP 185, 203.

At oral argument, counsel for Petitioner admitted no one knows the origin of the burning material that flew onto the roof of the Blue Bird warehouse and ignited the building. Counsel conceded:

> MR. BAUMAN: Do we know where the flying piece of what we believe was cardboard that caught Blue Bird on fire, do we know the origin at this point of this litigation? That's your question, Your Honor?
>
> THE COURT: Yes.
>
> MR. BAUMAN: At this point of litigation, **we do not**.

RP 23 at lines 12-17 (emphasis added).

The trial court granted summary judgment in favor of Michelsen and NW Wholesale, holding that Petitioner had not submitted sufficient evidence to establish proximate causation. The court ruled:

> The plaintiff's expert relies upon eyewitnesses who report seeing large embers alighting on the Blue Bird roof. However, there is no evidence to establish the origins of these large embers. Only speculation has been offered to argue that the embers from Michelsen and Northwest Wholesale traveled and landed on the Blue Bird property.4

4. Even Mark Yaple, when acting as Fire Marshall, could only speculate:

> These embers in the two fruit warehouses and other places were all downwind from the recycling center and NW Wholesale and are *possibly* product that burned from those areas. I could not determine what or where these embers were remnants from.

(Yaple Dec., Ex. 2, pg. 5) (emphasis added).

> Defendants argue that the yards of Stemilt and Blue Bird contained combustible materials similar to that found on their properties. It is just as likely that an ember from another yard landed on Blue Bird's roof as opposed to an ember from the defendants' premises. It is speculative that the embers from defendants' properties landed on the Blue Bird property and started the fire. Without the required evidence to establish causation, the plaintiff cannot show negligence. Phoenix Insurance's claims should be dismissed as a matter of law.

CP 922-23 (October 2, 2018 letter ruling of Judge Robert B. McSeveny).

D. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED

1. The Underlying Decision Does Not Present an Issue of "Substantial Public Interest" and Is Not Contrary to Existing Law.

A decision that has the potential to affect a number of proceedings in lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion. *See State v. Watson,* 155 Wn.2d 574, 577, 122 P.3d 903 (2005). This case does not present that potential. Rather, the underlying courts based their decisions on well-settled law regarding breach and proximate cause.

Division III of the Court of Appeals decided the appeal without oral argument. The Court of Appeals – in an unpublished opinion – affirmed the summary dismissal finding "insufficient evidence that defendants breached a duty to Blue Bird." *See Petition – A-1.* The Court of Appeals assumed – without holding – that Michelsen owed a duty to maintain its property to avoid creating a fire hazard. *Id., at A-5.* The Court of Appeals held that because the issue of breach was dispositive it did not need to reach other issues such as duty, proximate causation and whether the declarations of Petitioner's experts should be stricken on grounds of speculation and lack of foundation. *Id., A-4.* It could have affirmed on any of those grounds.

None of these grounds implicate policy decisions or would serve to "confuse" practitioners or the citizens of Washington. Rather, long-standing Washington law (and Civil Rule 56) makes clear that in order to survive summary judgment, the non-moving party must identify specific facts to support their claims. *Seven Gables Corp. v. MGM/UA Entm't Co*., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Petitioner's failure to present competent evidence does not create an issue of substantial public interest.

2. Petitioner Mistakes the Case Law It Cites in Favor of "Duty."

Michelsen cannot breach a duty it does not owe. It is far from clear that Michelsen owed any duty to other warehouses in the industrial

district to prevent the spread of fire other than to follow the requirements of its fire safety permits and local fire safety codes and regulations.

A threshold question is whether the defendant owed a duty of care to the plaintiff. *Pierce v. Yakima County*, 161 Wn. App. 791, 251 P.3d 270 (2011), *rev. denied*, 172 Wn.2d 1017 (2011). The question of whether a duty exists depends on mixed considerations of logic, common sense, justice, policy and precedent. *Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). The ultimate decision on the existence of duty is a question of law, not a question of fact. *Osborn v. Mason County,* 157 Wn.2d 18, 24, 134 P.3d 197 (2006). A question of law may be decided on summary judgment because a cause of action for negligence exists only if the defendant owes a duty of care to the plaintiff. *Id.* at 27.

Petitioner cannot point to any Washington case setting forth a duty requiring a landowner to stop the spread of an uncontrolled fire originating outside of its property from racing through its property toward neighboring landowners. Washington law imposes no duty on Michelsen to prevent a third party from starting a fire on property not owned by Michelsen.

The question then becomes, does Michelsen have a duty to serve as a "fire break" for the benefit of other landowners? There are sound

considerations of logic, common sense, justice, policy, and precedent why the trial court should not recognize such a duty.

Recognizing a duty here would lead to harsh and absurd results. There were 30 homes destroyed in the Sleepy Hollow Fire. Petitioner's argument suggests the owner of each home burned in the Sleepy Hollow fire could be liable to all downwind owners for spread of a fire started by an arsonist simply because the owners stored foreseeably "combustible" material on their property. This is an absurd result, and one not supported by sound public policy.

a. The Cases Cited by Petitioner Examine the Duty to Fight Existing Fires.

Petitioner contends Michelsen owed a "common law duty of care as a landowner to use due care in preventing the spread of a fire" *citing Oberg v. Dep't of Natural Resources,* 114 Wn.2d 278, 787 P.2d 918 (1990). Petitioner mistakes what is meant by "preventing the spread of fire," which entails the actions taken in response to a fire, and not acts of prevention. Plaintiff also misinterprets the holding of *Oberg*, a case that concerned Washington's "public duty doctrine." *Oberg* has nothing to do with the storage of materials on a property. Rather, *Oberg* and the cases *Oberg* cites discuss the obligation of landowners to take reasonable firefighting steps *once they have knowledge of an existing fire.*

In *Oberg*, firefighters fighting multiple fires failed to preclude *an existing* fire from traveling onto plaintiff's property. The negligence alleged in *Oberg* arose *after the fire ignited.* The mechanism of that negligence was the State of Washington's choices with regard to fighting the fire. In the present case there is no evidence of negligence occurring *after* Michelsen's facility began to burn. Nothing in *Oberg* sets forth any duty with regard to an obligation to *prevent* the initial fire.

The *Oberg* court cited *Sandberg v. Cavanaugh Timber Co.* 95 Wash. 556, 558, 164 P. 200 (1917) for the proposition that:

> ... there may be negligence [by the landowner] ... in his failure to use due diligence in preventing the spread of a fire originating upon his own land though it so originate[d] without any act or fault of his own.

Sandberg, 95 Wash. at 558. However, *Sandberg* considered only the landowner's efforts to extinguish an existing fire. In *Sandberg*, the Washington Supreme Court held:

> After he discovered the fire on his premises, he was bound to exercise reasonable care and diligence to prevent it from spreading so as to endanger his neighbor's property. His duty in this respect, after discovering the fire, would be the same as that resting upon a person who, without negligence, starts a fire on his own premises. He was bound to put forth such reasonable effort to prevent the fire endangering his neighbors as a man of ordinary prudence would put forth who was actuated by a proper regard for his neighbors' rights and safety.

Sandberg, 95 Wash. at 560 (emphasis added) (*quoting Baird v. Chambers,* 15 N.D. 618, 109 N.W. 61 (1906)).

Oberg also cites *Arnhold v. United States,* 284 F.2d 326, 328 (9th Cir.1960), *vacated* 166 F. Supp. 373 (W.D. WA 1958), *cert. denied,* 368 U.S. 876, 82 S.Ct. 122, 7 L.Ed.2d 76 (1961) (emphasis added). In *Arnhold* the court held that:

> an owner or occupant of forest land with knowledge of a fire burning on such land, even though started by strangers, must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others.

Arnhold v, 284 F.2d 330 (emphasis added).

What is remarkable about these citations in *Oberg* is that nowhere is there any suggestion a landowner has a duty to take precautionary measures prior to the ignition of the fire to protect third parties.

There is no evidence Michelsen was aware of the fire and failed to take reasonable steps to prevent its spread. A landowner who has notice of a fire has a duty to take reasonable steps to attempt to extinguish a fire before it spreads to neighboring properties. In *Walters v. Mason County Logging Co*., 139 Wash. 265, 246 P. 749 (1926), our Supreme Court held:

> The duty of respondent after notice of the fire burning upon its property was the same as if the fire had been set out by respondent itself. In other words, it is duty under the law announced in the *Jordan* case, *supra*, was to use all reasonable efforts to prevent the spread of fire to the property of others. That is also the statutory duty.

Walters, 139 Wash. at 271 (emphasis added).

Nothing suggests Michelsen had the means to effectively respond to the fire. Lacking evidence that Michelsen knew of the fire and refused to act, Petitioner's claim that "Michelsen should have prevented the Blue Bird fire" should be rejected.

b. Michelsen Did Not Owe a Statutory Duty to Blue Bird.

Petitioner contends RCW 76.04.730 creates a duty Michelsen owed to Blue Bird. However, RCW 76.04.730 expressly applies only to "forestlands" and not fires within city limits. The definitions make clear Title 76 does not apply to a warehouse in the industrial district of Wenatchee.

> (11) "Forestland" means any unimproved lands which have enough trees, standing or down, or flammable material, to constitute in the judgment of the department, a fire menace to life or property. Sagebrush and grass areas east of the summit of the Cascade mountains may be considered forestlands when such areas are adjacent to or intermingled with areas supporting tree growth. Forestland, for protection purposes, does not include structures. RCW 76.04.005.

Michelsen owed no statutory duty to Petitioner.

3. The Declarations of Petitioner's Experts Lack Foundation and Are Based on Speculation.

The trial court held it was pure speculation to conclude Michelsen proximately caused the Blue Bird fire. It could have also stricken the unfounded and speculative declarations from Mr. Way and Mr. Simeoni.

Mr. Simeoni resides in Massachusetts. He never visited the Michelsen property, and examined no photographs depicting Michelsen's storage practices on the date of the fire. CP 541. More importantly, Mr. Simeoni cited to no written standard, regulation or learned treatise in support of his position that the "hazard" was "foreseeable." He conducted no investigation of the fire. Mr. Simeoni offered no comments on published fire standards or Michelsen's permits. He undertook no testing to confirm his theories. In sum, he offered no basis for his opinion whatever. CP 540-56. Despite his lack of knowledge, Mr. Simeoni was happy to issue opinions regarding Michelsen's practices. This is improper. *See Riccobono v. Pierce County*, 92 Wn. App. 254, 966 P.2d 327 (1998) (expert not allowed to offer opinions where expert made certain assumptions with no basis in fact and on which his opinions were based). The Court of Appeals properly determined that Mr. Simeoni's lack of basic information rendered his opinions "conclusory" and "without explanation or support." *See Petition – A-5.*

Contrary to Petitioners' argument, the Court of Appeals' rejection of the testimony of Mr. Simeoni, is neither improper, nor unusual. Nor was it the "weighing" of evidence. Rather, a court reviewing the matter *de novo* certainly has the authority to reject expert opinion as lacking foundation. As stated by this Court:

> It is the proper function of the trial court to scrutinize the expert's underlying information and determine whether it is sufficient to form an opinion on the relevant issue.

Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 357, 333 P.3d 388 (2014). Put another way:

> Unreliable testimony does not assist the trier of fact. Neither does testimony lacking an adequate foundation.

L.M., by and through Dussault v. Hamilton, 193 Wn.2d 113, 137-38, 436 P.3d 803 (2019) (internal citations omitted).

Likewise, Mr. Way's cause and origin opinions also lack foundation and are speculative. CP 546-556. Mr. Way also misrepresents the evidence in his declaration when he takes one sentence from Mr. Yaple's report out of context, i.e., that "the fire at Michelsen Packaging and/or Northwest Wholesale, 'sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.'" CP 549. Mr. Yaple's report actually reads:

> These embers in the two Fruit warehouses (Stemilt and Blue Bird) and other places were all downwind from the recycling center and Northwest Wholesale and are possibly product that burned from those areas. I could not determine what or where these embers were remnants from.

CP 203 (emphasis added). Mr. Way's mischaracterization of Mr. Yaple's fire investigation does not create a question of fact.

4. Michelsen Did Not Breach a Duty Owed to Blue Bird.

As the Court of Appeals held, Petitioner submitted insufficient evidence that Michelsen breached a duty owed to Blue Bird. Phoenix fails

to cite any fire safety standard or code violated by Michelsen and fails to explain what duty it owed to a warehouse two blocks away other than to comply with local fire safety codes and standards.

As stated in his declaration, Fire Marshall Mark Yaple confirmed that Michelsen obtained all necessary fire safety permits for storage of materials in its yard and stored its materials in compliance with those permits, passed all fire safety inspections and complied with all local fire safety codes and standards. CP 180-181. It was not required to do more.

By complying with all applicable fire safety standards in the manner in which it stored combustible materials in its yard, Michelsen could not create an "unreasonable risk" of harm. If the manner in which Michelsen stored its combustible materials was actually hazardous, the Wenatchee Fire Department would have informed Michelsen, which would have been obligated to correct the situation. This did not happen. If the Fire Marshall charged with the safety of the warehouse district and well-versed in fire safety standards did not view Michelsen's yard as presenting a danger, then the danger was not "foreseeable" to a warehouse owner. The duty to use reasonable care extends only to such risks of harm as are foreseeable. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 933, 653 P.2d 280 (1982). Thus, "[t]he concept of foreseeability limits the

scope of the duty owed." *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

5. Michelsen Did Not Proximately Cause Blue Bird's Damages.

Not only was there a failure of proof of breach of duty, Petitioner's evidence of proximate causation is based solely on speculation and conjecture. At oral argument, Petitioner conceded that it did not know the source of the ember that landed on the Blue Bird property and started the warehouse fire. CP 890-891; RP 23 at lines 12-17. As noted by the trial court, it is just as likely that an ember from another yard landed on Blue Bird's roof as it is that ember originated from Michelsen' premises. *Id.*

Proximate cause may be determined on summary judgment when causation is based on speculation or conjecture. *Briggs v. Pacificorp,* 120 Wn. App. 319, 323, 85 P.3d 369 (2003), *rev. den.*, 152 Wn.2d 1018 (2004). The causal connection between the claimed damages and the defendant's negligence must be shown to justify its submission to the jury. *Kennett v. Yates,* 45 Wn.2d 35, 39, 272 P.2d 122 (1954). It is well settled in Washington that:

> … no legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, and without a further showing that it could not reasonably have happened in any other way.

Gardner v. Seymour, 27 Wn.2d 802, 810, 180 P.2d 564 (1947).

As the Washington Supreme Court has held, a jury will not be allowed to speculate on how an incident occurred:

> Where causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which the defendant would be liable and under the other there would be no liability, a jury is not permitted to speculate on how the accident occurred.

Sanchez v. Haddix, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981).

Simply because Blue Bird's warehouse was burned in the spread of the Sleepy Hollow fire and was downwind from the Michelsen facility is insufficient to take the issue of proximate causation to the jury. It requires the jury to speculate as to how the fire at Blue Bird started. It is undisputed that no one knows what the embers of the roof of Blue Bird that ignited were made or where they came from.

E. CONCLUSION

The Petition for Review should be denied. The existing opinion is not contrary to existing law and does not involve an important issue of substantial public interest. The Court of Appeal's opinion should be affirmed on multiple grounds: (1) lack of duty owed to Blue Bird; (2) lack of proof of breach of duty; (3) lack of proof of proximate causation.

DATED this 3rd day of April, 2020.

FORSBERG & UMLAUF, P.S.

By: *s/A. Grant Lingg*
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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ***ANSWER TO PETITION FOR REVIEW*** on the following individuals in the manner indicated:

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FORSBERG & UMLAUF, P.S.

April 03, 2020 - 1:27 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98261-9
Appellate Court Case Title:	Phoenix Insurance Co. v. Michelsen Packaging Co., et al.
Superior Court Case Number:	18-2-00109-3

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