No. 98261-9

SUPREME COURT
FOR THE STATE OF WASHINGTON

THE PHOENIX INSURANCE COMPANY,
a foreign corporation,

Petitioner,

v.

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

Respondents.

NORTHWEST WHOLESALE INCORPORATED'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Northwest Wholesale Incorporated ("NWI") requests that this Court deny review of the February 6, 2020, unpublished decision of Division III of the Court of Appeals, affirming the summary judgment dismissal of Petitioner Phoenix Insurance Company's ("Phoenix") subrogation claims against NWI and co-defendant Michelsen Packaging Company ("Michelsen").

The Court of Appeals held there was insufficient evidence that NWI breached any duty owed to Phoenix's insured, Blue Bird, Inc. (similarly, the trial court granted summary dismissal due to insufficient evidence on proximate causation).[1] On either basis the decision to dismiss Phoenix's claims should stand and the petition for review denied since:

- There is no competent evidence of any breach of duty. Petitioner provided only conclusory opinions on breach of duty without explanation or factual support.

- Likewise, there is no competent evidence that any breach of duty that may have been owed by NWI proximately caused Blue Bird's property damage. To the contrary, Petitioner conceded in open court that it did not know the origin of the burning material that landed on Blue Bird's warehouse which ostensibly caused the warehouse to catch fire. RP 23 at lines 12-17.

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[1] 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).

Further, it is important to point out early and often that Phoenix throughout this litigation, and throughout its efforts on appeal, continues to conflate the two Respondents when asserting "facts" and making its arguments on the negligence elements of breach and proximate cause. This is critical to the Court's analysis of the issues raised in the Petition since Michelsen and NWI are subject to separate facts, claims, arguments, and analysis. What may apply to Michelsen does not necessarily or automatically apply to NWI, despite Petitioner's best efforts to merge them into a single catch-all entity (i.e. Michelsen/Northwest). The long and the short of it is that Phoenix and its experts almost exclusively make arguments against Michelsen as the party liable for their damages and then try to bring NWI along with nothing more than a generous application of a forward slash, without presenting any new evidence or opinion specific to NWI. Even the Court of Appeals noted that "Blue Bird's claims against NW Wholesale are derivative of their claims against Michelsen… ."[2]

II. ISSUES PRESENTED FOR REVIEW

Petitioner appears to primarily assert that this case raises a substantial issue of public interest under RAP 13.4(b)(4). That assertion is

[2] Court of Appeals Opinion dated February 6, 2020 at p. A-3., attached as Appendix A to the Petition for Review.

unsupported. Like the trial court, the Court of Appeals put Phoenix's evidence to the test and found it sorely lacking regarding the breach of any duty that may have been owed. Division III's opinion does nothing to change or alter any rights or duties of parties as established by existing 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.[3]

Similarly, Petitioner contends the Court of Appeals decision is contrary to "numerous decisions of our courts on breach of duty as a question of fact for the jury" pursuant to RAP 13.4(b)(1)-(2). That assertion is equally unsupported. The Court of Appeals opinion did nothing more than follow precedent when it held that Phoenix failed to submit sufficient evidence to raise a genuine issue of material fact by relying solely on expert witnesses "who opined without explanation or support that Michelsen's storage practices created a foreseeable fire hazard." *Id.*[4]

Thus, the actual issue being presented for review is whether Phoenix's case was properly dismissed on summary judgment and upheld on appeal when Phoenix failed to present sufficient competent evidence to

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[3] *Id.* at p. A-5. The Court of Appeals, like Petitioner, referred to NWI and Michelsen collectively as "Michelsen" throughout the opinion. *Id* at p. A-3.

[4] Important distinction here in that while the Court of Appeals used "Michelsen" to refer to the Respondents jointly, the Petitioner's experts only opined that Michelsen's storage practices created a foreseeable fire hazard. They offered no such opinion with regards to NWI.

meet its burden under CR 56 on either proximate cause, as the trial court held, or breach, as the Court of Appeals ruled in affirming dismissal on summary judgment. These holdings are not subject to review by this Court under either RAP 13.4(b)(4) or RAP 13.4(b)(1)-(2) and the petition should be denied. Should the Court accept review, it should be of these evidentiary issues alone, including NWI's Motion to Strike Petitioner's experts' unsupported opinions from consideration. Further, the Court should uphold dismissal on review since the utter lack of evidence on either breach or proximate cause would result in justified dismissal of Petitioner's claims.[5]

III. STATEMENT OF THE CASE

A. ARSON SET FIRE JUMPED TO AND TORE THROUGH THE WAREHOUSE DISTRICT

On June 28, 2015, Jeremy J. Kendall set fire to the hillside outside of Wenatchee, Washington, for which he plead guilty to first-degree arson. CP 58. Wenatchee had been in a prolonged drought and temperatures that day reached 108 degrees Fahrenheit. CP 67-72. The Sleepy Hollow Fire (as it was later dubbed) burned through approximately 30 homes and 2,950 acres, raging through the Broadview residential neighborhood. *Id.* Winds at this point were very high, driving embers as far as East Wenatchee and

[5] *See also* CP 922-23 for trial court's dismissal of all claims due to the utter lack of evidence in support of proximate case.

Malaga. *Id.* Due to these extreme wind and weather conditions, windblown embers traveled from the Broadview neighborhood to the fruit packing warehouse district along the Columbia River, at least initially igniting a fire on the Michelsen property more than a mile away. CP 183-184, 229, 233.

Fire crews responded to reports of fires breaking out in the warehouse district at approximately 9:14 p.m., well after the businesses had closed for the day. Fire crews arrived to find multiple buildings blazing. CP 229. Pallets of compressed cardboard in the Michelsen yard were aggressively being consumed by the fire. *Id.*

At all relevant times, Michelsen leased and controlled property located at 1105 Hawley Street, Wenatchee, Washington, which was owned by NWI. CP 823. Under the lease terms, Michelsen had exclusive possession and control of the leased premises. *Id.* There was a chain link fence along the common property line that separated the Michelsen leased premises from NWI's operations. *Id.* East/Southeast of the Michelsen and NWI properties, across a wide expanse of railroad tracks, is the large Stemilt fruit packing facility. CP 560. Further East/Southeast of the Stemilt facility is the Blue Bird fruit packing warehouse approximately 1/2 of a mile from Michelsen's property. *Id* and CP 7.

Photographs taken on the night of June 28, 2015 and in the early morning hours of June 29, 2015, show the East/West chain-link fence

running between the Michelsen and NWI properties just behind a fertilizer tower which is on the NWI said of the property line and is an easy reference point. CP 823-824, 826-843. These photographs show the burning of materials on Michelsen's side of the fence line and the large amount of dead space on Northwest's side of the fence line. *Id.* They also show that the local fire department was on the scene and fighting the fire while it was still contained to the Michelsen property. *Id.* The burned metal cages along the south east edge of the NWI property are the remains of the heavy plastic drums and totes that were located on the NWI property. *Id.*

B. FIRE MARSHALL YAPLE COULD NOT DETERMINE CAUSE

The Wenatchee Fire Marshal, Mark Yaple, investigated the Sleepy Hollow Fire and prepared a report of his findings. CP 67-72, 183. Mr. Yaple examined the roofs and yards at Michelsen, NWI, Stemilt and Blue Bird, and interviewed witnesses. CP 183-185. He noted the aggressive progression of the fire as a result of being driven by high temperatures, flashy fuels, and high winds. *Id.* When he turned his attention to the warehouse district, he noted that he found very large embers on the Stemilt and Blue Bird properties and received reports of similar embers as far away as East Wenatchee. CP 70. He noted that these embers were found downwind from the Michelsen and NWI properties. CP 71. Critically, Mr. Yaple also specifically noted that he "*could not determine what or where*

these embers were remnants from." Id.

In his conclusion, Mr. Yaple summarized his opinion that the wind-blown embers from the Broadview neighborhood traveled East/Southeast and started the fire on the Michelsen property and possibly the storage buildings and yard at NWI as well. CP 72. Embers from this complex of fires was then believed to have been wind-driven further East/Southeast to the Stemilt warehouse across the railroad tracks and eventually further South to Blue Bird's facility. *Id.* He was unable to determine the source of the embers that ignited Blue Bird warehouse (Phoenix's insured). CP 203. Fire Marshall Yaple ultimately classified the cause of the Blue Bird fire as "Undetermined" under NFPA 921. CP 204.

Regarding Phoenix's claims that Respondents negligently stored combustible materials in their exterior yards creating an unreasonable fire hazard, Mr. Yaple declared that as Fire Marshall he conducted annual fire safety inspections from 2007 to 2015 of the warehouses at Michelsen and NWI. CP 180. Over the years, Mr. Yaple observed and noted the methods used by Michelsen and NWI to store fruit packing materials and cardboard recycling (limited to Michelsen) and found that they were in accordance with local fire safety standards and codes. CP 180, 824.

In addition, NWI had an independent safety auditor, USI Insurance Services, conduct safety inspections of the premises and NWI's safety

procedures and protocols. CP 824. These inspections have never revealed any fire safety concerns with NWI's inventory methods and procedures. *Id.*

C. RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT

Petitioner Phoenix reportedly paid more than $40 million to its insured, Blue Bird, for damages caused by the Sleepy Hollow Fire. Nearly three years after the fire, Phoenix as a subrogee of Blue Bird brought suit against Michelsen and NWI (but not Stemilt), alleging facts that Michelsen negligently caused the fire that damaged the Blue Bird fruit packing facility. CP 1-11. The Complaint was conspicuously devoid of specific allegations against NWI.

After conducting extensive written discovery in the case below, NWI filed for summary judgment dismissal of Phoenix's suit for failing to establish proximate cause. CP 32-49. Michelsen brought its motion on the negligence issues of duty and breach (CP 150-174), which NWI joined. CP 391-409. Phoenix disclosed for the first time, expert witnesses and their declarations in opposition to NWI's motion. CP 540-545, 546-556. NWI moved to strike the unfounded and unsupported expert opinions contained in these declarations which relied upon nothing more than speculation and conjecture to avoid dismissal on the issue of proximate cause. CP 607-635.

At oral argument, counsel for Phoenix admitted no one knew the origin of the burning material that flew onto the roof of the Blue Bird

warehouse allegedly starting the fire there:

> 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 denied Michelsen's motion for summary judgment on duty and breach, which Respondents believe was in error. CP 883-891. The trial court also denied NWI's motion to strike Phoenix's unfounded expert opinions based upon nothing more than pure speculation. *Id.* Nevertheless, the trial court correctly granted NWI's motion on the issue of proximate cause and dismissed Phoenix's claims against Respondents. *Id.*

In doing so, the trial court correctly held that "What is lacking in this matter is evidence establishing that any hazardous condition existing on the defendants' properties caused the fire at Blue Bird." CP 922. The trial court further found that "Only speculation has been offered to argue that the embers from Michelsen and NWI traveled and landed on the Blue Bird property." *Id.* "It is speculative that the embers from defendants' properties landed on the Blue Bird property and started the fire." CP 923. The trial court further recognized that even acting Fire Marshall Mark Yaple could

only speculate as to the origins of these embers at the conclusion of his investigation.[6]

In conclusion, the trial court held:

> 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. We believe both the trial court and Division III are correct and the petition for review should be denied.

IV. ARGUMENT AGAINST REVIEW

A. NO ISSUES OF SUBSTANTIAL PUBLIC INTEREST OR CONTRADICTION OF 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). However, the present case does not have that potential since the underlying courts based their

[6] CP 922, FN 4 (October 2, 2018 letter ruling of Judge Robert B. McSeveny quoting from Yaple Dec., Ex. 2, pg. 5) (emphasis added).

decisions on well-settled law on case specific facts, or the lack thereof, on the negligence elements of breach and proximate cause.

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

None of these grounds implicate policy decisions nor do they risk "confusing" legal practitioners or the citizenry. Rather, long-standing Washington law (and Civil Rule 56) make it clear that in order to survive summary judgment, the non-moving party must present specific facts as foundation of their expert's opinions in purported support of their claims. *Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Phoenix's failure to present competent evidence does not create an issue of substantial public interest or contradict established law.

B. TRIAL COURT DETERMINED DUTY OF CARE

The trial court noted that the rule in Washington is that a possessor of land is held to a standard of care to maintain the premises so that it does not become a hazard that "if fire should occur in it, it is reasonably probable that it would spread to the adjacent property." CP 920-921; *See also Prince v. Chehalis Sav. & Loan Ass'n,* 186 Wash. 372, 375, 58 P.2d 290 (1936).

In *Chicago, M., St. P. & P.R. v. Poarch*, 292 F.2d 449 (9th Cir. 1961), the Ninth Circuit applied Washington law on the basis of the rule pronounced in *Prince*. The railroad had allowed the vacant portion of an icehouse to become a fire hazard by permitting inflammable materials to accumulate and had not taken reasonable steps to prevent children and itinerants from gaining access. A fire broke out and spread to the plaintiff's buildings, resulting in a total loss. *Id.* at 450. The duty to maintain the property in such a manner as not to present a fire hazard was a question of fact properly submitted to the jury. *Id.* at 451. Here, Division III assumed without holding that Respondents Michelsen and NWI owed such a duty. *Court of Appeals Opinion at p. A-5.*

C. PHOENIX FAILED TO MEET ITS BURDEN OF PROOF ON BREACH.

The trial court went on to find there was an issue of fact sufficient to submit to a jury on the issue of whether Michelsen breached its duty of

care to maintain its property in such a manner as to not present a fire hazard to adjoining properties. CP 889.[7] In so finding, the trial court noted that Phoenix's expert, Albert Simeoni, stated that the "manner in which Michelsen stored its inventory stretching from the north end of the property down to the southern lot line, created the source for a high intensity fire. By not providing breaks in its inventory, a large fuel load resulted which resulted in a large fire plume lofting flaming debris into the sky." *Id.*

However, the trial court also noted that Phoenix did not cite any standards which were breached by Michelsen or NWI. In contrast, Michelsen provided Fire Marshal Yaple's declaration that Michelsen had never violated the fire code based upon the manner in which it stored materials in its yard. CP 182. Similarly, NWI provided the declaration of Kenneth Knappert that demonstrated it too had undergone many safety inspections with no violation for fire safety. CP 824.

Ultimately, the trial court found that it was the nature of Michelsen's recycling center that lent itself to an issue of fact on whether the Michelsen property posed a hazard. CP 889. The trial court further noted that the nature of the hazard, involving loose cardboard, was a significant risk because the large embers from such burned materials could be set adrift in the wind and

[7] The facts, findings and ruling on this issue were specific to Michelsen and not imputable to NWI.

pose a severe risk to the surrounding areas. *Id.* The trial court's ruling, like Phoenix's Complaint and answers to discovery, does not implicate NWI in the breach of duty holding. Nowhere does the trial court find an issue of fact as to whether NWI breached any duty owed to Blue Bird. The recycling center is Michelsen's and it does not appear to be in dispute that the fire in the warehouse district first originated on Michelsen's property. There are simply no facts or claims from which a genuine issue of material fact can be derived as to whether NWI breached any duty to Blue Bird.

Clearly, Division III of the Court of Appeals understood this and properly held that the Petitioner had submitted insufficient evidence that NWI breached any duty owed to Blue Bird. *Court of Appeals Opinion p. A-5.* Petitioner failed to cite to any fire safety standard or code violated by NWI and failed to explain what duty NWI owed or breached to Blue Bird located half a mile away during a high wind, wildfire event. The duty is to exercise reasonable care and there is no evidence that NWI failed to act reasonably under the circumstances.[8]

Lastly, Petitioner contends RCW 76.04.730 creates a duty NWI owed to Blue Bird. However, RCW 76.04.730 expressly applies only to

[8] 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).

"forestlands" and not fires within city limits. Therefore, NWI owed no statutory duty to Petitioner that was in turn breached.

D. NWI MET ITS LIMITED DUTY AS A LANDLORD

Phoenix has argued and still seems to suggest that since NWI owned the property that was leased to Michelsen at the time of the Sleepy Hollow Fire that it should have some liability for the loss. This is unsupported by Washington law. At the time of the fire, Michelsen had sole possession and use of the Michelsen property. Phoenix has the burden of establishing that as a mere landlord of the Michelsen property, NWI owed to Blue Bird a separate duty with regards to Michelsen's possession and use of its property. This, Phoenix has failed to do.

Phoenix erroneously relied upon the Washington Supreme Court case of *Hutchins v. 1001 Fourth Ave. Assocs.,* 116 Wn.2d 217, 802 P.2d 1360 (1991) for this proposition. However, the case supports NWI's arguments and Division III's dismissal of Phoenix's claims against NWI on in the issue of breach.

Nor has Phoenix established that NWI had any notice, actual or constructive, that any such conditions were hazardous or dangerous such that the fire at issue would have resulted. Absent such a showing, dismissal on summary judgment is appropriate as it was in *Charlton v. Toys R Us – Delaware Inc.*, 158 Wn. App. 906, 246 P.3d 199 (2010).

E. PHOENIX FAILED TO MEET ITS BURDEN ON CAUSATION

The trial court correctly ruled that Phoenix and its experts offered nothing more than speculation and conjecture on the issue of proximate cause and properly dismissed Phoenix's claims against Respondents. The trial court's decision should be affirmed by this Court if review is granted and the Court gets past the Court of Appeals ruling on the breach element.

1. To Survive Dismissal on Summary Judgment, Phoenix Needs More Than Speculation and Conjecture.

To justify submission of a negligence claim to a jury, Phoenix must offer evidence of the causal connection between their claimed damages and Northwest's alleged negligence. *See Kennett v. Yates*, 45 Wn.2d 35, 39, 272 P.2d 122 (1954). Phoenix must establish that the harm suffered would not have occurred but for an act or omission of NWI, and that the cause in fact of the plaintiff's harm should be deemed the legal cause of that harm. *Little v. Countrywood Homes*, *supra*, 132 Wn. App. at 778.

Phoenix's burden of proving proximate cause is not met unless the proof is sufficiently strong to remove that issue from the realm of speculation by establishing facts affording a logical basis for all inferences necessary to support it. *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947); *see also Martini v. Post,* 178 Wn. App. 153, 165, 313 P.3d 473 (2013). Causation is speculative when, after considering all the facts, the

injuries were just as likely to have occurred due to one cause as another. *Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010), *rev. denied,* 171 Wn.2d 1004 (2011).

Proximate cause may be determined as a matter of law where reasonable minds could not differ. *Briggs v. Pacificorp*, 120 Wn. App. 319, 323, 85 P.3d 369 (2003), *rev. den.*, 152 Wn.2d 1018 (2004). The question should be decided as a matter of law only if there is no genuine issue of fact as to the question of proximate cause. *LaPlante v. State*, 85 Wn.2d 154, 159–60, 531 P.2d 299 (1975).

Here, as the trial court pointed out, Phoenix failed in its burden on causation due to the speculative nature of its evidence, which is not sufficient to defeat dismissal on summary judgment under CR 56 or warrant review by this Court:

> ...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 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); *see also Browne v. McDonnell Douglas Corp.*, 698 F.2d 370, 371 (9th Cir. 1982).

> 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 a defendant would be liable and under the other of which 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) (emphasis added).

The mere fact that Blue Bird may have in fact suffered damages and property loss on June 28, 2015, does not alone entitle Phoenix to put the Respondent and the court through the expense and rigors of a trial. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999).

2. Phoenix's Experts Offer Speculation and Conjecture and Their Opinions Based Thereon Should Be Stricken

While it is the duty of the jury to decide what weight to give evidence in its deliberations, it is the function of the court to ensure that expert testimony has sufficient validity to warrant admission into evidence. *See Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The Court should act as a "gatekeeper" to ensure evidentiary reliability. *See generally Reese v. Stroh*, 74 Wn. App. 550, 559-60, 874 P.2d 200 (1994) ER 702 permits experts to testify on "scientific, technical, or other specialized knowledge" if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue."

Phoenix failed to recognize that inherent in ER 702 is a crucial requirement that expert testimony must be based on more than mere

speculation. *See Daubert*, 509 U.S. at 590 ("[T]he word 'knowledge' connotes more than subjective belief or unsupported speculation.").

In fact, courts must be especially careful when ruling on speculative expert testimony because of the "danger that the jury may be overly impressed with a witness possessing the aura of an expert." *Moore v. Hagge*, 158 Wn. App. 137, 154, 241 P.3d 787 (2010) (citing *Davidson v. Mun. of Metro. Seattle*, 43 Wn. App. 567 at 571-72). Speculative expert testimony must be excluded to ensure the jury does not consider such information, since a verdict cannot rest upon conjecture or speculation. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 214 (1940). As such, "it is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (citing *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 831 (1991), *rev. denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992)).

Mr. Albert Simeoni's expert declaration is rife with opinions given without any explanation of their underlying factual support. CP 540-545. Mr. Simeoni provides these statements without any references to facts in the record, let alone *specific* facts. Nor does Mr. Simeoni make any specific factual findings or allegations against NWI.

Likewise, Mr. Paul Way's declaration fails to adequately derive support from specific facts in the record as required for admissibility and should likewise not be considered. CP 546-556. These opinions declared by Mr. Way are offered as evidence without any factual support or explanation. They too are focused on Michelsen's potential liability and not NWI.

The trial court has wide discretion in ruling on admissibility of expert testimony. However, this Court has the authority to disturb the trial court's ruling if the reasons for admitting or excluding opinion evidence are not fairly debatable. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). This includes when the trial court's "discretionary decision is contrary to state law." *State v. Nation*, 110 Wn. App. 651, 661-62, 41 P.3d 1204 (2002).

V. 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 unpublished opinion should be affirmed on multiple grounds, primary being that Petitioner has been found by multiple judiciaries to have failed in their burden of proof on multiple elements, including breach of duty and proximate cause. This basic failure of essential evidence does not warrant review by this Court.

DATED this 24th day of April, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 24th day of April, 2020, I caused to be served a true and correct copy of the foregoing via Court of Appeals/Supreme Court E-Service, and courtesy copy via email addressed to the following:

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April 24, 2020 - 10:26 AM

Transmittal Information

Filed with Court:	Supreme Court
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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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