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No. 64403-3-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

FARMERS INSURANCE COMPANY OF WASHINGTON, as
subrogee for PAUL MOLDON,

Plaintiff/Appellant,

v.

D-SQUARE ENERGY SYSTEMS, INC.,

Defendant/Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT D-SQUARE
ENERGY SYSTEMS

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I. SUMMARY OF THE CASE

This case involves a subrogation action by Farmers Insurance Company, which paid millions of dollars to Bainbridge Island homeowners, the Moldons, following a fire on December 25, 2005. The fire started when cedar scrap directly under the exhaust pipe of an emergency generator ignited. Farmers Insurance Company sued the manufacturer of the generator, along with several contractors and subcontractors who may have been involved in installing the generator three years earlier. Farmers also sued D-Square Energy Systems, Inc., a company that services generators.

D-Square's technician performed a basic annual maintenance on the generator at the Moldon property two months before the house fire involving the generator. The maintenance involved changing the oil, replacing filters and spark plugs, and making sure the inside of the unit was free of debris. Farmers is not asserting that the maintenance was performed incorrectly. Instead, Farmers claims that the D-Square service technician "serviced the generator while the combustibles were stacked next to it and had a duty to alert Moldon to the situation." CP39. The cedar was not located under the exhaust or next to the generator at the time of the service call.

D-Square moved for summary judgment in 2008 asserting that it had no duty to warn the homeowners of a situation that posed no threat at the time of the maintenance. CP 12-45. The trial court denied the motion, ruling that D-Square had a duty to warn of “obvious dangers/hazards.” The trial court denied D-Square’s Motion for Reconsideration as well, but noted that it was not commenting on the strength of the case against D-Square.

D-Square renewed its summary judgment motion a year later after extensive discovery and depositions of expert witnesses. D-Square presented evidence that there were no “obvious dangers/hazards” at the time of the D-Square service call. This time the trial court correctly ruled in D-Square’s favor that there were no obvious dangers or hazards existing at the time of the service call, thus no duty to warn.

D-Square contends that the court incorrectly denied its 2008 motion because there was never any evidence of obvious hazards. In 2009, the court correctly granted D-Square’s renewed motion for summary judgment that there were no obvious dangers/hazards at the time of the service call triggering a duty to warn.

Of interest is the fact that co-defendant Magnum Products, which filed opposing briefs in 2008 and 2009, did not join Farmers in its appeal.

II. ASSIGNMENT OF ERROR AS TO CROSS-APPEAL BY D-SQUARE

First Assignment of error: The trial court erred in denying D-Square's 2008 motion for CR 12(b)(6) relief or in the alternative, for summary judgment.

III. ISSUES ASSOCIATED WITH D-SQUARE'S ASSIGNMENT OF ERROR

Issue One: Whether D-Square had a duty to a homeowner to warn of materials near the generator when the service call was to service the generator motor?

Issue Two: Whether D-Square should have been dismissed when the evidence showed the stacked cedar was not a hazard and when Farmers presented no evidence to the contrary, only argument.

IV. LACK OF ERROR AS TO FARMERS APPEAL

1. The trial court correctly granted D-Square's 2009 motion for summary judgment and dismissed it from the lawsuit.

2. D-Square met its burden of putting Farmers to its proof to establish obvious dangers/hazards.

3. Farmers failed to come forward with evidence to support the elements of its case.

4. The trial court correctly denied Farmers' motion to strike paragraph 12 of the Richard Carman declaration.

V. ISSUES ASSOCIATED WITH LACK OF ERRORS IN THE TRIAL COURT'S 2009 DECISION

As to Lack of Assignments of Error 1-3:

1. Whether the cedar pile was far enough away from the generator that the service technician could walk between the generator and wood pile to perform the service call.

2. Whether the D-Square service technician needed to read the Magnum owners manual when he only serviced the Kohler engine and when the Magnum manual itself directs technicians to follow the Kohler engine manual for servicing.

3. Whether the service tech needed to read the Magnum installation manual when D-Square did not install generators, it relied upon installers to install the generators in accordance with the manual, and when it relied upon manufacturers to design generators in accordance with all safety standards.

4. Whether the location of the wood at the time of the service call was far enough away from the generator not to constitute a hazard.

5. Whether Farmers failed to establish the existence of any obvious danger/hazard at the time of the service call.

As to Lack of Assignment of Error 4:

Whether the trial court correctly allowed the D-Square expert to testify that only an expert with specialized knowledge could realize a stable cedar pile could collapse and end up under a generator exhaust where it would ignite.

VI. STATEMENT OF THE CASE

A. Background on the Generator and Cedar Wood Pile

The Moldons moved into their large custom home before Thanksgiving in 2002 - over three years before the house fire. CP 228. The Moldons acted as the general contractors for the project. CP 205. The Moldons knew that on Bainbridge Island homeowners needed emergency generators because of the frequent power outages. CP 206-207. Mr. Moldon picked out the Magnum generator and someone installed it for him, purportedly in conformance with the installation instructions. CP 206-207.

The generator came on automatically when the power went out. Sometimes it was on for a few hours, sometimes all day. Sometimes it ran for several days before power was restored. CP 155.

The house was sided in cedar. Mr. Moldon made sure the larger pieces of cedar were saved. CP 142. The siding was stacked by the garage

close to the generator. CP 149. Mr. Moldon's recollection is that the saved pieces were stacked up neatly. CP 153. Mr. and Mrs. Moldon both believed the cedar had been stacked neatly, not just thrown together.

A. I'm sure it was neatly stacked.

Q. Why are you sure of that?

A. Because all of our workers did everything neatly.

Q. Or else?

A. Or else, that's right.

Mrs. Moldon, CP 144. The way the wood looked in the photographs (*e.g.*, CP 137) taken after the fire was not the way it would have looked beforehand, according to Mrs. Moldon:

Q. ...is this the sort of wood pile that you would have at your home that is jumbled like this?

A. No, we would not have a jumbled disorderly pile of wood just hither thither.

CP 145. The wood was neatly stacked because that is the way Mrs.

Moldon required everything about the house to be arranged.

A. I know it would have been stacked nice, so I'll just assume that's how it was done. That's how everyone conveyed and understood her feelings. To have it helter skelter, impossible because everyone knew how she felt. If someone saw a mess, however it occurred, it was cleaned up because everyone understood that's how things were are our home.

Mr. Moldon, CP 153-54.

Mr. Moldon "can't imagine" anyone who worked for him putting wood underneath the exhaust side of the generator. He knows that

exhausts are hot. CP 156. He would never have directed his people to stack wood next to the generator, certainly not a mere foot from the generator. CP 156-157.

D-Square retained a fire cause and origin expert, Richard Carman. Mr. Carman is a Nationally Certified Fire Investigator specializing in the determination of the origin and cause of fires. CP 126-134. After the fire, Mr. Carman examined the scene. He was told by plaintiff expert John Shouman that the scene was unchanged from how it looked right after the fire suppression. CP 527. Mr. Carman specifically investigated the cedar pile to determine its original location. It was his conclusion that the pieces of cedar scrap had been bound up with blue tape into small bundles. The bundles were set two bundles high on a plastic pallet by the garage, partly under the house eaves. CP 123.¹ The pallet was located 18 inches from

¹ Mr. Carman did not testify that the cedar pile was stacked “too high,” as appellate counsel argues at p. 19 of her brief. He said it was stacked “two high,” but the court reporter erroneously typed “too.” The context of the deposition transcript makes this clear:

Q. Were you able to determine how tall the wood pile was before it collapsed?

A. I believe there's a photograph. I would have to go through—

Q. Well, let's see if you can find it there.

A. Well, I thought I had photographed that. I guess I don't. I can only estimate it was stacked too (sic) high, but the photographs show that.

Q. Your estimate is that it was stacked too high, or you can estimate how high it was stacked?

A. I can estimate that they were stacked two bundles high on edge vertically.

CP 633, p. 23, l. 25 to p. 24, l. 11.

the edge of the generator. CP 123. The stack was about 16 inches high. CP 123. Bags of fertilizer and potting soil were set against the end of the cedar stack on the side opposite the generator. CP 123. No expert contradicts this analysis or performed this level of investigation on the cedar pile. The D-Square technician also recalled that the cedar was bound in blue tape. CP 369.

Thus, before the October, 2005 D-Square Energy service call, all the evidence shows that the cedar was neatly stacked and bound in blue tape near the generator and under the house eaves along the side of the garage.

B. D-Square Technician Training and Service Call

D-Square's only contact with this generator was a single service call two months before the fire. The service call was for routine annual maintenance. That maintenance included changing the oil, filters, and spark plugs, cleaning the inside of the unit, and testing it. CP 23, CP 26-27, CP 356. The only evidence regarding what constituted basic maintenance came from D-Square. CP 354-56.

Don Dunavant owns D-Square Energy, Inc. He was deposed and also prepared a Declaration in this matter. According to Mr. Dunavant, there is no standard apprentice training program in his industry of

generator sales, service, and maintenance. CP 65. He designed a program to ensure that his employees were well-trained. First, new employees work in the shop on engines. They use the engine manufacturer's manuals to learn how to service and repair them. CP 359. Then they go out in the field accompanying experienced technicians. CP 29.

Service technicians are trained to follow the engine manufacturer's instructions to perform basic oil and spark plug changes. CP 355. The Moldon generator had a Kohler engine. The service tech, Tim Cislo, was trained in maintenance of Kohler engines. CP 355. He had been servicing field units by himself for a year before this incident. CP 23.

According to Mr. Dunavant, an annual maintenance check on a generator involves:

Basic service, change the oil, check and possibly replace—which we did—the spark plugs, check the unit out, clean the interior of the unit, make sure there wasn't any rats' nests many (sic) debris inside the unit.

CP 356. The service technician follows a checklist as he services the unit. CP 26-27. The checklist sets forth nine types of maintenance involved in the service call, such as Lube System Group, Cooling System Group, and Functional Test Group. Each group has several items that must be checked. None of the maintenance groups involved checking to see if the

generator was correctly installed, or examining the area around the outside of the generator. CP 27.

Mr. Cislo did not need to refer to the specific Magnum generator installation instructions because he performed basic maintenance only. According to Don Dunavant, if there is a problem with a generator, for instance not starting, a senior technician is sent out. That person would consult the specific manual for that generator. CP 356-357. Otherwise, the general maintenance protocol does not vary from unit to unit because generators only use two or three basic engine designs, regardless of the name on the unit. CP 355.

D-Square does not install generators, although owner Dunavant himself has experience in aspects of generator installation. CP 65, CP 458. D-Square has to rely upon manufacturers to design and build generators that conform to relevant codes. CP 29, CP 759. Likewise, because D-Square does not install generators, it must rely upon installers to have installed a particular generator according to the manufacturer's instructions. CP 29. In this case, the Magnum generator was installed three years earlier, by someone² at the direction of the homeowner who obtained whatever permits were required.

² It has never been established who installed the generator.

In addition to cleaning the interior of the unit of debris, service technicians are trained to spot obvious hazards. Mr. Dunavant described obvious hazards to include stacking lawn chairs on top of the generator, or the generator venting carbon monoxide into a bedroom window, or leaking propane or coolant. CP 66. Wood stacked nearby would not constitute an obvious hazard, as long as it was not stacked in contact with the generator. CP 29. Mr. Cislo stated he would have told the homeowner if there had been wood stacked against the generator or underneath where the exhaust was. CP 365-367. But there was no wood against the generator or under the exhaust flange. CP 22-24, CP 364, CP 369.

Tim Cislo followed his training as he serviced the Moldon generator. He took off the back and top of the unit and changed the oil and spark plugs and replaced the filters. He made sure the inside of the unit was free of debris that could clog it. He tested the unit to make sure it came on automatically. He wrote up a service report for the owner. Mr. Moldon reviewed the report and signed the form indicating that the work had been done. CP 23, 26-27.

C. The Cedar Was Not A Hazard at the Time of the Service Call

The only evidence as to where the cedar was stacked at the time of the service call comes from the service tech himself, Tim Cislo, because

Mr. Moldon was not there with him. Mr. Cislo was deposed three years after the service call. Understandably, he could not recall exactly where the cedar was stacked, but he did recall it was bundled with blue tape. CP 369. Both the Farmers expert Mr. Shouman and D-Square's expert Mr. Carmen agree there were bundles of cedar present after the fire that were still bound in blue tape. CP 169, CP 123.

Mr. Cislo said the bundles were far enough away from the generator that he could walk between the stack and the generator to get to the back of the generator to perform his maintenance. CP 23-24, CP 369. Mr. Dunavant also said that Mr. Cislo could not have opened up the generator if there had been wood piled against it. CP 460.

The Moldons did not know exactly where the cedar was stacked, just that it was along the side of the garage beyond the end of the dog run. CP 149. Even Mr. Moldon noted that D-Square's service technician could not have accessed the machine if wood had been stacked right against it. CP 156. As discussed earlier, the Moldons insist the wood was neatly stacked because everything around the house was neat.

Mr. Cislo has a clear memory there was no cedar under the exhaust because he would have removed it. CP 364. Mr. Cislo visited the property after the fire. He noted pieces of cedar right under the exhaust.

That was not the way the cedar looked when he serviced the unit. The cedar was not underneath the exhaust then. CP 24, CP 605. The Moldons agree that the tumbled over condition of the bundles after the fire was not the way the cedar was stacked before the fire. CP 145.

Therefore, there is no evidence at all to raise an inference that in October, 2005, the cedar was piled right up against the generator, or that the bundles had broken and lay directly underneath the recessed exhaust pipe when Tim Cislo changed the generator's oil.

D. The Cedar Was Stacked Almost Two Feet From the Exhaust Before Collapsing

D-Square's fire cause and origin expert Mr. Carman investigated the scene after the fire and took photographs. He noted that the wood appeared to have been originally bound in small bundles with blue tape and placed on a plastic pallet. CP 137 contains two photographs taken at the fire scene showing the bundles of cedar. See also CP 43 and 45. The pallet was about 18 inches from the edge of the generator (the exhaust was another several inches recessed from the side of the generator). The stacked cedar pile was lower than the generator. At some point, the stack had collapsed toward the generator. CP 123.

Mr. Carman testified that the wood pile was 18 inches from the generator, not 27 inches, as counsel states. CP 645. He testified that if

the cedar had remained stacked on the pallet, cedar would not have ended up under the exhaust and been subject to ignition. CP 645.

Farmers retained fire investigator experts Paul Way and John Shouman. They admitted in their depositions that the position of the cedar collapsed against the generator when they arrived on scene after the fire suppression was probably not where it had been at the time of the fire or before. CP 166, CP 169. Therefore, the presence of wood directly next to as well as under the exhaust pipe cannot be said to represent where the wood was originally stacked.

Q. Can you say before the fire suppression began where those bundles of wood had been?

A. I wasn't there during the fire suppression so I wouldn't even want to speculate.

John Shouman, CP 170.

Another fire investigator from Independent Forensics also provided a report for a party that is no longer in the case. CP 479-484. That investigator was not deposed nor did he provide any declaration in support of Farmers' position. That investigation merely concluded that the cedar was close enough to the generator to ignite, based upon the fire scene investigation. CP 484.

In support of D-Square's 2009 motion for summary judgment, Mr. Carman provided a Declaration stating that the wood was stacked almost

two feet from the exhaust pipe before some of the cedar broke loose from its tape and tumbled over. CP 121-125.

Farmers did not provide opposing Declarations from Way or Shouman or Independent Forensics in response to the Carman Declaration. Mr. Shouman did not offer a conflicting opinion about the location of the plastic pallet in relationship to the generator. He did not offer a different opinion as to how high the cedar was piled. He did not contradict Mr. Carman's analysis of the blue tape bundles or the height of the pile stacked two bundles high. At most he opined that the pile did not move "much" after the fire suppression. CP 170. The best that can be said of Mr. Shouman's opinion is that the wood had fallen next to the unit at some point before the fire, not that the wood was in that location at the time of the service call.

E. The Cedar Could Not Ignite Where it Had Been Stacked

Neither of Farmers' two experts could say how far from the generator the wood had to be stacked in order to ignite. The fire and origin experts (Carman and Shouman) agree that the origin of the fire was ignition of cedar directly under the hot exhaust. CP 194, CP 886.

The only person with an opinion as to why the pile collapsed toward the generator was Mr. Carmen, who stated the pile became

unstable when the blue tape succumbed to the elements. CP 124. That occurred some time after the service call by Tim Cislo in October, 2005 because there is no evidence the wood was not underneath or abutting the generator at the time of the service call.

In Mr. Carmen's opinion, the cedar ended up directly under the exhaust because the blue tape had come undone from some of the bundles due to the action of the elements. The heat from the generator exhaust was not hot enough to cause the blue tape to come undone. CP 124. The loose pieces fell toward and under the generator. CP 124. The sides of the generator were sloped inward at the bottom, forming wings beyond the base of the generator. This design permitted debris to collect directly under the hot exhaust pipe. CP 123, CP 172.

In Mr. Carman's opinion, the cedar would never have caught on fire had not some of the bundles come undone and wood slid directly under the hot exhaust. The exhaust would not have ignited the wood in its original location. The exhaust temperature would have dissipated to well below the ignition point of the wood before it reached the bundles as they had originally been stacked, about two feet from the actual exhaust pipe. CP 124.

Mr. Way, one of Farmer's experts, could not say where the fire started. CP 879. He could not offer an opinion about whether the cedar would have ignited at any particular distance from the down-facing exhaust.

A. My opinion on a more probable than not basis, I believe the exhaust at the point of discharge was high enough to ignite, but at six inches or any distance away I can't offer any opinion.

CP 165. He could not say how close to the exhaust the cedar had to be to ignite. CP 162. He would have to design a complicated test in order to determine how close the cedar was to the exhaust before it ignited. He did not design or conduct such a test. CP 888-891. Mr. Way believes that the cedar pile was "unstable to begin with" and "slumped downwards on either side." CP 680. He offers no evidence as to how the pile that remained in the same position for three years was unstable and collapsed, except to make the circular argument that because the pile fell over it was unstable. The photographs at CP 137 do not support this statement, either. The pile collapsed only toward the generator.

Farmers' expert John Shouman was asked if the cedar would have ignited if it had been a foot away from the exhaust. His response was "possibly." CP 171. "Possibly" does not meet the required standard of certainty required of an expert opinion in support a negligence cause of

action like this one. The testimony must be on a “more probable than not basis.” *Little v. King*, 160 Wn.2d 696, 705, 161 P.3d 345 (2007). Mr. Shouman recollected a case he had in the past where combustibles 18 inches from an ignition source caught on fire, but he could not say if the cedar in this case and under these conditions would combust from the exhaust:

A. So if your specific question is a foot away, I don’t know what the temperature would be, but I know that the exhaust temperature would be very hot where it discharged from the exhaust.

Q. How about if it were two feet away, the bundles were two feet away from the exhaust? Would you say on a more probable than not basis they would have ignited?

A. I can’t.

CP 172.

Therefore, Farmers’ experts did not and could not provide any opposing opinion to that of D-Square’s expert. Mr. Carman testified that the location of the cedar stack before it collapsed was too far away from the generator to catch on fire, or even to affect the blue tape holding the bundles together. In other words, the cedar bundles were not an obvious safety hazard.

F. The Magnum Manual Does Not Establish Safety Hazards

Installation. There is no basis for Farmers’ claim that the Magnum installation manual somehow creates another route for establishing safety

hazards, because there is no evidence D-Square's service technician would need to refer to it.

Mr. Dunavant testified that his company does not install generators. CP 356-357. It relies upon installers to do their job right. CP 29. Therefore, any argument that Tim Cislo needed to review installation directions to do his job is unsupported by any evidence. Likewise, there was no testimony that Tim Cislo had a duty to review the installation instructions and determine that the generator was mis-installed to perform basic maintenance.

Magnum's CR 30(b)(6) representative was deposed. Mr. McAllister stated that Magnum expected the generator to be installed by people who are trained installers. CP 829. D-Square does not install generators. Therefore, Mr. McAllister's testimony does not establish any duty on D-Square to know anything about installing the generator. There was no testimony from anyone stating that a service technician performing basic maintenance on a Kohler engine needed to review the installation instructions for this Magnum generator.

D-Square relies on the manufacturer to design a generator in conformance with applicable codes. CP 759-760, CP 772. Whether or not the generator was based on a faulty design, or Magnum failed to obtain the

proper UL certification is irrelevant as to the liability of D-Square for this fire loss.

Maintenance. D-Square's service techs would only need to refer to an owner's manual for a troubleshooting service call, not a basic oil change as was done at the Moldon home. CP 29, CP 463. Therefore any instructions in the manual regarding setbacks for combustibles would not be attributable to Tm Cislo.

Farmers' expert Paul Way admitted he cannot render an opinion regarding servicing or maintenance of the generator. CP 887. Farmers' other expert, John Shouman, does not offer any opinion regarding the duty governing generator maintenance.

The Magnum company representative, Mr. McAllister, states that it was Magnum's expectation that someone servicing the unit would consult the owner's manual. CP 839-840. But he does not distinguish between servicing the generator for a real problem and merely servicing the Kohler engine. The manual states that the engine in the unit is a Kohler engine. CP 372. The manual specifically states that servicing the engine is to be done in accordance with the Kohler Engine Manual. CP 376. That is exactly what Tim Cislo did.

Ultimately, whether or not the Magnum manual stated that materials should be kept three feet from the unit is irrelevant. The only evidence by an expert regarding this subject was provided by Mr. Carman, who stated categorically that the wood pile two feet from the generator exhaust would not have caught on fire.

Not only did Mr. Carman state that the bundles of cedar would never have ignited where they were originally stacked, he further opined that only an expert with “specific training in ignition sources, ignition temperatures, and combustibles generally found only in experts such as myself” would be able to foresee that the cedar siding might collapse and end up under the exhaust, where it could catch fire. CP 124-125. In his opinion, a service technician performing a basic maintenance oil change would not have this level of training. CP 125.

Co-defendant Magnum and Farmers moved to strike this statement. CP 694-701. Magnum argued that this was mere common sense, that even homeowner Paul Moldon knew the exhaust could be hot and that it was unwise to stack combustibles within two feet of the generator exhaust. Thus, it did not require an expert to make this statement. CP 697-698. D-Square opposed their motion, arguing that Mr. Moldon never professed to knowledge of generators and point out that no plaintiff expert challenged

Mr. Carman's assertions. CP 703-706. Neither Farmers nor Magnum produced the declaration of an expert countering what Mr. Carman asserted about combustibles not igniting two feet from the heat source. CP 694-701. The trial court correctly refused to strike the statement.

G. D-Square's 2009 Motion for Summary Judgment

In September, 2009, D-Square renewed its motion for summary judgment after the discovery depositions of the Moldons and experts Way, Shouman, and Carman. CP 110-181. The basis of the renewed motion was that—after the expert depositions—there was still no evidence of an obvious risk or hazard, as the court determined in 2008 was the duty of care. CP 107-110. Accompanying the motion was Mr. Carman's declaration stating that the cedar did not constitute a hazard before it collapsed. CP 121-125. D-Square also produced the testimony of Don Dunavant about lack of installation responsibilities CP 356-357, CP 759-760, CP 772. Mr. Dunavant described the situations where a service tech would need to refer to the Magnum operators manual, namely for troubleshooting a service call. CP 29, CP 463. D-Square produced relevant portions of the manual stating a basic engine service was to follow the Kohler engine manual. CP 376.

In response to D-Square's Motion, Farmers did not produce opposing declarations from its experts. Farmers' experts did not dispute the opinions of Richard Carman about the plastic pallet, how the wood was bundled, or the conditions required to ignite wood at any distance. They did not comment on the specific training needed to ascertain the potential for a wood pile to cause a fire under the conditions existing at the Moldon home. There was no Magnum declaration stating that a basic service tech should read either the installation or the owner's manual.

VI. ARGUMENT

Standard of Review and Relevant Case Law

The standard of review for an appeal of a motion granting summary judgment is de novo. *Hilse v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 852, 860, 93 P.3d 108 (2004).

This lawsuit involves a claim of negligence against D-Square. CP 9. The elements of a claim for negligence are duty, breach of the duty, injury or damages, and proximate cause between breach and injury. A plaintiff cannot prevail in a negligence action until and unless it can prove all of the elements of negligence. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant is entitled to summary

judgment when the plaintiff fails to come forward with evidence supporting each of the elements of the claim. *Young*, 112 Wn.2d at 225.

The burden of proof on a plaintiff in a negligence case is to establish “on a more probable than not basis” that a fact is true. *Little v. King*, 160 Wn.2d 696, 705, 161 P.3d 345 (2007). “Might have,” “could have,” or “possibly” do not establish more probable than not. *Id.*

Farmers is incorrect when it states that D-Square has the burden of proving there is no genuine issue of material fact that could support the plaintiff’s case. Appellant Brief at 24; *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). D-Square as a defendant need only meet its initial burden of proof by pointing out that the plaintiff lacks evidence to support its claim. *Indoor Billboard of WA, Inc., v. Integra Telecom of WA, Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007), citing *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 21-22, 851 P.2d 689, *review denied*, 122 Wn.2d 1010 (1993). The burden of proof then shifts to the plaintiff to set forth evidence of the sort admissible at trial to prove each and every element of the claim. Failure of proof on any one essential element is fatal to the plaintiff’s entire claim. *Young*, 112 Wn.2d at 225.

When it tries to respond to the defendant’s challenge of proof, a plaintiff cannot use speculation or conjecture to defeat defendant’s

summary judgment motion. *Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999). A plaintiff cannot substitute broad generalizations and vague conclusions for genuine issues of fact. *Ruff v. King County*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995). Instead, the plaintiff must produce competent testimony and other evidence setting forth specific facts, not general conclusions. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993).

A nonmoving party:

may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). A material fact is one upon which the outcome of the case relies in whole or in part. *Hope v. Larry's Markets*, 108 Wn. App. 185, 192, 29 P.3d 1268 (2001).

The mere occurrence of an accident and an injury do not necessarily lead to the inference that a defendant was negligent. *Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. at 377. "In matters of proof the existence of facts may not be inferred from mere possibilities." *Wilson v. Northern Pac. Ry.*, 44 Wn.2d 122, 128, 265 P.2d 815 (1954).

When reasonable minds can reach but one conclusion from the admissible facts, summary judgment should be granted. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). When reasonable minds cannot differ, an issue of fact can be determined as an issue of law. The court makes the initial determination as to whether reasonable minds could differ. *Hope v. Larry's Markets*, 108 Wn. App. at 196. The court must ask itself whether "reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson et al. v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Breach and proximate cause can be determined as a matter of law when reasonable minds could not differ on them. *Briggs v. Pacificorp.*, 120 Wn. App. 319, 323, 85 P.3d 369 (2003), *review denied*, 152 Wn.2d 1018 (2003).

In the present case, D-Square presented evidence in 2008 to support its contention that the cedar stacked near the generator was not an obvious danger or hazard. In response, Farmers failed to come forward with evidence "sufficient to establish specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp.*, 106 Wn.2d at 13. The trial court erroneously denied D-Square's motion.

D-Square renewed its motion a year later with even more evidence. Farmers once again failed to come forward with evidence to support each and every one of the elements of its case, as required by *Young*, 112 Wn.2d at 225. This time the trial court correctly granted D-Square's motion and dismissed it from the lawsuit. The Court is respectfully requested to affirm the trial court's dismissal.

CROSS-APPELLANT ISSUE NO. 1

D-Square did not owe the Moldons any duty to warn

In support of D-Square's motion for summary judgment in 2008, Mr. Dunavant provided a declaration stating that his service technicians were trained to perform a basic tune-up to include checking the interior of the generator only. CP 29-30. In the generator service business in general, a basic service tune up did not include examining the area surrounding the generator. CP 29.

The existence of a duty is a matter of law to be determined by the Court on summary judgment. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). The Restatement, Second, of Torts, section 299A, states that:

one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

Mr. Dunavant stated there was no legal duty in the generator maintenance business that requires a technician performing an oil change to warn homeowners of a wood pile that has sat in the same location for three years. D-Square's task was to perform basic maintenance on the generator.

Farmers did not present any evidence that the skills of this service technician were different from those normally possessed by members in that profession. Farmers did not allege that the service of the unit led to the fire, which was the task for which Tim Cislo was on site. Dismissal pursuant to CR 12(b)(6) or CR 56 was appropriate. The trial court erred in finding that a duty existed to warn of obvious dangers/hazards.

CROSS-APPELLANT ISSUE NO. 2

Farmers did not present evidence of any obvious safety issues, thus D-Square should have been dismissed

The uncontradicted testimony presented in 2008 was that the position of the wood piles as Tim Cislo found them would not be a hazard and would not create a situation calling for a warning to the homeowner. CP 23, CP 29.

The process used to perform a basic service on a generator did not include performing an exhaustive examination of the area surrounding the

generator to ensure it was properly installed or that it met UL standards for construction. Mr. Cislo confirmed he performed the basic service described by Mr. Dunavant.

Mr. Dunavant stated that service techs would notify a homeowner if the exhaust vented into a bedroom window, or if there were a gas or coolant leak. Those were the types of “obvious hazards” calling for a warning. CP 66. But Mr. Dunavant specifically stated that wood stacked near the generator was not an obvious hazard. CP 30.

According to Mr. Dunavant, modern generators are designed as self-contained units. Their exteriors do not become hot as they operate. Wood stacked near but not abutting the generator would not and could not catch on fire merely from the normal operation of the generator. CP 29.

The uncontradicted testimony in 2008 was that Mr. Cislo could walk between the unit and the cedar pile to take off the back cover. CP 369. There was no scrap wood under the exhaust pipe. CP 364. Therefore, the position of the wood piles as Tim Cislo found them would not be a hazard and would not create a situation calling for a warning to the homeowner.

Farmers Insurance asserted without evidence in its Response Brief that the wood stacked near this generator in October, 2005, was an obvious safety hazard. CP 49-50. The only basis for that assertion was a statement in the service agreement checklist: “(a) Check overall appearance of equipment and controls (leaks, loose wires, debris, etc.)” CP 57. It says nothing about checking the area surrounding the generator. Don Dunavant testified that the language referred to checking for debris inside the unit, not in the vicinity. CP 356.

Further, Farmers did not produce any evidence to show that the cedar was underneath the exhaust at the time of the service call. The one Declaration that Farmers did provide, of John Shouman, stated only that there was wood directly under the exhaust at the time of the fire. CP 68. Farmers failed to provide any evidence that the conditions present on October 25, 2005, constituted an "obvious safety hazard."

Co-Defendant Magnum also filed a response brief to D-Square's motion. It raised issues from Tim Cislo's deposition regarding the location of the wood piles but based its argument on a small portion of Mr. Cislo's deposition. CP 423. A fuller review of Mr. Cislo's testimony revealed that the wood was far enough away for him to walk between the generator and the wood. CP 369:

Q. Are you able to tell us that you were able to walk between the generator and the woodpile---

A. Yes.

Q.---to do your work?

A. Yes.

Q. And you didn't have to step on any wood to do you work while you were o the right side of the generator by the exhaust side?

A. No.

Although Magnum proffered the report of a fire investigator for a party that is no longer in the case, that investigator did not say where the wood was at the time of the service call. Therefore, even if the court concluded that D-Square had a duty to the homeowner to warn of obvious hazards, neither Farmers nor Magnum presented evidence that the wood pile was an obvious hazard. The only evidence presented to the trial court was by Tim Cislo and Don Dunavant. They testified the cedar was not a hazard where it was stored.

Magnum further pointed to the Magnum Operator's Manual as evidence that wood stacked three feet from the unit was a hazard. But there was no evidence that Mr. Cislo needed to read that manual before performing a basic service call. Don Dunavant testified that only a technician sent out to troubleshoot a problem with a generator would need to read the owner's manual, not someone like Tim Cislo doing an oil

change. CP 355-356. Tim Cislo only needed to refer to the Kohler engine manual. CP 355-356.

The inferences of Farmers and Magnum must not be given any weight because they are based on mere possibilities. *Wilson*, 44 Wn.2d at 128. They failed to produce evidence of the sort admissible at trial to support their position that the wood constituted an obvious hazard or that the Magnum manual created a duty. *Young*, 112 Wn.2d at 225.

D-Square's motion should have been granted and it should have been dismissed from the case because there was no evidence that D-Square should have known a danger existed, or that one did exist.

RESPONSE TO APPELLANT ISSUE 1

The trial court correctly granted D-Square's summary judgment in 2009 because Farmers failed to come forward with evidence to support the elements of its case.

The trial court ruled in 2008 that D-Square has a duty to warn of "obvious risks/dangers." CP 95. Thereafter D-Square participated in discovery and renewed its motion a year later. The trial court agreed with D-Square this time that Farmers failed to come forward with evidence of the sort admissible at trial to prove each and every one of the elements of its case. CP 380. The trial court's ruling should be affirmed.

A. D-Square Met its Burden of Putting Farmers to its Proof

D-Square put plaintiff to its proof of coming forward with evidence to support all of the elements of its case. *Indoor Billboard of WA, Inc.*, 162 Wn.2d at 70. D-Square produced the following evidence:

1. The cedar was not underneath the generator exhaust or even piled up against the generator when Tim Cislo was on site. The cedar was stacked neatly by the Moldons three years earlier. The Moldons testified the wood had been stacked along the garage since 2002. They are sure it stacked neatly because that's the way they insist everything be done around their home. The Moldons are sure the cedar was stacked in an orderly fashion, not "hither thither." CP 145.

Mr. Cislo testified he could not have serviced the unit if wood had been stacked next to it. He had room to walk between the generator and the wood pile. There was no wood underneath the cut-away fin where the exhaust was, otherwise he would have removed it. CP 22-24.

Homeowner Moldon agrees Cislo could not have serviced the unit with wood stacked next to it. CP 156. Don Dunavant agrees the wood could not have been piled next to the unit or service would not have been possible. CP 460.

2. Mr. Cislo performed a basic oil change that required him to know the Kohler engine instructions, but not the Magnum generator operational instructions. Don Dunavant testified that he trains his service technicians on the engines they will be servicing, including Kohler engines. A basic service call involves changing oil, spark plugs, and filters and cleaning the inside of the unit. CP 29.

The D-Square Generator Maintenance Service Record refers to checking the interior of the unit only. CP 27. The Magnum manual specifically tells service technicians working on the engine to refer to the Kohler manual for guidance. CP 376.

Don Dunavant testified that differently trained service technicians are sent out when the job calls for repair or troubleshooting of a generator. Those technicians would review the specific generator manual to help them figure out the problem. CP 356-357. However, a basic tune up involving a common Kohler engine would not require reference to the Magnum manual.

3. D-Square's service technician would not need to refer to installation instructions. Mr. Dunavant testified that D-Square does not install generators. CP 356-357. Thus, its service technicians would not need to refer to the installation portion of the Magnum manual. D-Square

relies upon the professionals installing a generator to know how to install it. D-Square relies upon the manufacturer of generators to conform to all applicable safety standards, such as UL.

4. Expert Richard Carman states the stacked cedar was almost 2 feet from the ignition source and in that position was not in danger of igniting. None of the fire investigators can say how long the cedar scrap was directly under the exhaust or fallen against the generator, or how long it took to ignite, only that it was found in that location after the fire was put out.

Fire cause and origin expert Richard Carman testified about his examination of the site after the fire, which was in the same condition it was in when Farmers expert Shouman examined it. CP 527. Mr. Carman determined that the cedar was originally sited on a pallet 18 inches from the generator. The bundles were wrapped in blue tape. The photographs support this opinion. CP 137.

At a distance of 18-24 inches from the exhaust, the tape would not have melted, nor would the cedar have ignited. Mr. Carman testified that the ignition temperature from the generator would have dropped too low before it reached the cedar to ignite either the tape or the cedar. No plaintiff expert disputes this. CP 124.

5. There was no evidence of any obvious danger/hazard at the time of the service call. Don Dunavant testified that the kinds of obvious dangers or hazards calling for a warning would be carbon monoxide pipes venting into bedroom windows, or leaking propane or coolant. Mr. Dunavant said that a pile of wood far enough away for Tim Cislo to maneuver around the generator was not a danger. Mr. Carman states that the cedar stacked two feet from the ignition source would not have caught on fire. Further, a mere service tech would not appreciate any potential for fire from a pile of cedar bundles stacked two feet from the ignition source.

A service tech would not need to read an installation manual to perform his work, thus he would not know whether a generator was mis-installed and could present safety issues. A basic oil change would not require reading the owner's manual, so the technician would not know that the manual suggests stacking combustibles three feet from an ignition source. A service tech would not examine a generator to determine if it was assembled in accordance with UL requirements.

By presenting the above, D-Square met its burden of coming forward with evidence to support its defense that it did not violate any duty to warn the Moldons of obvious dangers/hazards. *Indoor Billboard of WA, Inc.*, 162 Wn.2d at 70. D-Square shifted the burden to plaintiff Farmers to

come forward with evidence to support its case, which it failed to do.

Young, 112 Wn.2d at 225.

B. Farmers Failed to Meet Its Burden Of Coming Forward With Evidence

The non-moving party must come forward with evidence, not speculation or conjecture, to survive a summary judgment motion.

Marshall, 94 Wn. App. at 379. The nonmoving party cannot rely upon argument, but must produce “specific facts that sufficiently rebut the moving party’s contentions....” *Seven Gables*, 106 Wn.2d at 13. Facts “may not be inferred from mere possibilities.” *Wilson*, 44 Wn2d. at 128.

In response to D-Square’s evidence, Farmers produced few facts and mostly argument and speculation. In several key areas it could not and still cannot come forward with material facts to counter D-Square’s evidence.

1. Farmers has no evidence at all to establish that at the time of the service call cedar wood was stacked against the generator or under the exhaust. Opposing arguments based on actual evidence may create an issue of fact. But Farmers is not entitled to survive summary judgment when it failed to come forward with evidence at least comparable to that of

D-Square on this issue. Farmers cannot create an issue of fact by reliance on argument and impermissible inference rather than evidence.

The Moldons could not say where the cedar was stacked, only that it was next to the garage between the dog run and the generator. They testified that the wood had been in the same location since they moved in three years earlier. They also asserted consistently that the wood was stacked neatly, not scattered as seen in the photographs after the fire. There is no evidence to the contrary.

The only person who was present at the time of the service call was the service technician, Tim Cislo. Despite fierce questioning by counsel, he maintained the wood was not stacked against the generator. He had room to walk between it and the wood pile. CP 23-24, CP 369, CP 476. He is also adamant that there was no wood under the exhaust. CP 364. There is no evidence to the contrary to establish that the wood was stacked against the generator at the time of the service call, only argument. The trial court correctly noted there was no evidence of wood stacked against the generator in October, 2005. RP 23, ll. 22-24.

Farmers' experts Paul Way and John Shouman cannot say where the wood was stacked at any time before the fire. Mr. Shouman admitted he could not say where the wood was before the fire suppression. CP 170.

The report of Independent Forensics states only that the wood was close enough to the generator to ignite. CP 484. But again, that is based upon observation after the wood pile had collapsed.

By contrast, Mr. Carman was the only investigator who actually examined the cedar pile to determine where it was located before it collapsed. See photos at CP 137. He noted that the pile consisted of cedar bundles bound with blue tape, stacked two high about 16 inches high, on a plastic pallet 18 inches from the side of the generator. CP 123-124, CP 645. The Independent Forensics investigator took no measurements of the cedar pile and had no opinion about where the wood had been originally stacked, as did Mr. Carman.

Farmers came forward with vague conclusions as a substitute for genuine issues of fact. *Ruff*, 125 Wn.2d at 707. There is no evidence the cedar was stacked against and under the generator at the time of the service call, and thus no basis for the trial court to rule that Tim Cislo should have warned of an obvious hazard involving the location of the cedar bundles.

2. There is no evidence the service tech was required to read the Magnum owners manual. Farmers presents only argument in place of evidence to support its claim that Tim Cislo was charged with knowledge

of the contents of the Magnum owner's manual. That is not sufficient to defeat a summary judgment motion. *Seven Gables*, 106 Wn.2d at 13.

Contrary to appellant's assertion at p. 27 of its brief, no plaintiff expert testified that a service tech performing basic maintenance needed the knowledge contained in the owner's manual. Paul Way did note that if the owner's manual had been followed and combustibles kept three feet from the generator, the fire would not have occurred. CP 680. But Mr. Way also agreed he was not offering an opinion about servicing the generator. CP 887. He did not state that Mr. Cislo should have read the owners manual. Mr. Shouman offered no opinion at all on the subject.

Magnum's McAllister said Magnum expected someone servicing the unit would consult the manual. However, Mr. McAllister does not distinguish between service of the engine (governed by the Kohler manual) and service for a problem with the generator. Don Dunavant agrees that a technician dealing with a service problem would consult the Magnum manual. However, this was a basic tune up call, not a troubleshooting call.

Mr. Dunavant stated that a basic service technician like Mr. Cislo was trained to service the engine in the generator, not to troubleshoot service problems. The owner's manual itself directs people servicing the engine to follow the Kohler engine manual. That is what Mr. Cislo was

trained to do and did. The trial court also observed that D-Square was servicing a Kohler engine using a Kohler manual. RP 16, ll. 10-14.

Farmers offers only broad generalizations and vague conclusions to support its argument that Tim Cislo needed to read the owners manual.

That is insufficient to defeat summary judgment. *Ruff*, 125 Wn.2d at 707.

3. Farmers utterly fails to produce evidence that Mr. Cislo should have known about installation or generator construction. Magnum's McAllister said the generator needed to be installed by trained installers. CP 829. Paul Way noted that the fire was unlikely to occur if the generator had been installed per the manufacturer's instructions. CP 680.

D-Square did not install generators. CP 356-357. D-Square relied on installers to properly install a unit, just as it relied upon Magnum to design a generator in accordance with all applicable standards. CP 29, CP 759-760, CP 772. There is no inference that can be drawn to establish that D-Square should have known the generator may have been mis-installed, thus triggering a duty to warn the Moldons.

Farmers snidely implies that it was a "business decision" not to train its service techs properly. Appellant Brief at 12. Other than this bald argument, Farmers produces nothing to establish that someone changing oil in a Kohler engine need know about UL requirements or generator

installation when his company neither manufactured nor installed generators.

Farmers is required to establish its chain of failure to warn of misinstallation by competent evidence, not generalized conclusions. *Thompson*, 71 Wn. App. at 555. There is no evidence whatsoever to support this assertion.

4. Farmers cannot establish by competent evidence that the cedar bundles were an obvious danger at the time of the service call. No Farmers expert testified as to where the cedar was stacked in October 2005, only where it was after the fire. Tim Cislo testified there was enough room for him to walk between the generator and the cedar. Mr. Carman testified the plastic pallet upon which the wood originally sat was 18 inches from the generator. Therefore the only inference to be drawn from the evidence is that the cedar was stacked 18 inches from the edge of the generator at the time of the service call. The existence of facts must be inferred based upon on evidence, not “mere possibilities.” *Wilson*, 44 Wn.2d at 128.

Farmers then asserted that the wood was stacked in a dangerous way at the time of the service call and Tim Cislo should have known it and warned the Moldons. Farmers offered the testimony of Paul Way. Mr.

Way testified that the wood pile would not move by itself so it must have been piled in an unstable manner, then slumped downwards on either side. CP 679. Mr. Way offered no evidence to support this assertion, and he had no information on how it was stacked before the fire. It is merely a circular argument—the pile fell over, thus it had to have been unstable. The photographs at CP 137 belie an assertion that the cedar slumped in both directions.

Mr. Carman specifically located the cedar pile before it collapsed, and noted that it only collapsed toward the generator end only when the blue tape holding some of the bundles came undone due to the action of the elements. CP 121-125. The logical inference is that the cedar pile itself was stable until the tape failed. Certainly we know that the pile had remained stacked without falling for three years and was still stacked when Mr. Cislo was on site.

Whether the Magnum manual advises an owner to keep combustibles three feet away from the unit or not, the only evidence by any of the experts (Carman) is that cedar two feet from the unit would not have caught on fire.

Farmers fails to come forward with competent testimony of the sort admissible at trial to support its argument that the cedar stacked two feet

from the exhaust was an obvious danger. *Thompson*, 71 Wash. App. at 555. Its experts specifically admitted they could not say at what distance from the exhaust wood would ignite. Mr. Way could not say. CP 162, CP 165. Mr. Shouman said only that the wood “possibly” could ignite. CP 171-172. Farmers’ experts must offer opinions that are true on a “more probable than not basis.” *Little v. King*, 160 Wn.2d at 705. “Possibly” does not meet the required burden of coming forward with evidence of the sort admissible at trial to prove an element of the claim. *Young*, 112 Wn.2d at 225.

Even at two feet from the exhaust, fire expert Carman testified that the cedar pile would not have caught on fire. Therefore, the cedar was not an obvious hazard when Tim Cislo was on site, and he had no duty to warn.

Farmers offered general conclusions, not competent evidence of specific facts. *Thompson*, 71 Wash. App. at 555. Farmers is not entitled to have its argument taken at face value when it failed to counter D-Square’s evidence with specific facts to rebut those contentions. *Seven Gables Corp.*, 106 Wn.2d at 13.

5. Farmers fails to establish that any obvious danger/hazard existed at the time of the service call. Farmers had two expert witnesses in

this case. A third expert provided a report for a different defendant. A Magnum representative testified. Yet despite the testimony of these individuals and the other evidence in the case, Farmers cannot come forward with evidence to establish that an obvious danger existed in October, 2005, as the trial court required it to do. CP 95.

D-Square met its burden of coming forward with evidence to show lack of liability. It put Farmers to its proof of coming forward with evidence to prove each and every element of its claim. *Young*, 112 Wn.2d 225.

Farmers failed to come forward with evidence to establish that the location of the wood posed an obvious danger. There is no evidence that the wood was stacked next to and underneath the generator at the time of the service call. Farmers failed to come forward with evidence that Tim Cislo failed to warn about placing combustibles three feet from the generator. The evidence is that the combustibles two feet from the generator would not have ignited. There is no evidence to support the Farmers argument that Mr. Cislo needed to read the installation manual and thus failed to warn the Moldons it was misinstalled and lacked UL certification. The trial court noted at oral argument that installation was not the cause of the fire anyway. RP 25, ll. 10-18.

The trial court specifically noted in its order denying the first summary judgment motion and motion for reconsideration that it was not commenting on the relative strength of the plaintiff's case. CP 95, CP 97. A year later, the trial court reviewed all the evidence and did make a decision about the strength of the plaintiff's case. It determined that Farmers had not met its burden of adequately responding when D-Square put Farmers to its proof. *Indoor Billboard of WA, Inc.*, 162 Wn.2d at 70.

When reasonable minds can reach but one conclusion from the admissible facts, summary judgment should be granted. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). The trial court can determine breach and proximate cause as a matter of law. *Briggs v. Pacificorp.*, 120 Wn. App. 319, 232, 85 P.3d 369 (2003), *review denied*, 152 Wn.2d 1018 (2003).

In the present case, the trial court correctly determined that reasonable jurors could not find by a preponderance of the evidence that Farmers was entitled to a verdict against D-Square. *Anderson*, 477 U.S. at 252. Farmers failed to come forward with evidence to counter D-Square's evidence and to support its burden of proof at trial.

RESPONSE TO APPELLANT ISSUE 2

The trial court correctly denied Farmer's motion to strike paragraph 12 of the Carman Declaration.

Farmers asserts that Mr. Cislo had or should have had the specialized knowledge to realize that the cedar was an obvious hazard. Yet Farmers' experts did not provide any testimony to show that Mr. Cislo knew the exhaust temperature, or the combustion temperature of cedar, or that the tape would come undone, or that loose cedar could come close enough to the exhaust to ignite.

By contrast, Mr. Carman provided a declaration stating that only someone with training like his would be able to understand the elements of ignition sources, ignition temperatures, and combustibles necessary to foresee a situation where the cedar could catch on fire. Richard Carman is a Nationally Certified Fire Investigator who specializes in the determination of the origin and cause of fires. CP 126-134. He did not have to be a human factors expert or expert in generator technician training to determine that his specialized knowledge of fires and ignition sources gave him certain expertise that most people would not have. Mr. Carman stated that the specialized knowledge that might have provided Mr. Cislo with additional information about the seemingly innocent cedar stack would not be something a service tech would possess. Not only is that the sort of expert testimony he was qualified to make, his opinion was not contested by any Farmers expert.

Mr. Cislo lacked the expertise to determine that a stack of cedar bundles far enough away from the generator that he could maneuver between the wood and the generator might tumble close enough to the exhaust to ignite. Mr. Carman affirmed that the level of expertise to discern that possibility would only belong to a fire expert, not a service tech changing engine oil. The trial court correctly denied Farmers' motion to strike paragraph 12 of the Carman declaration.

VII. CONCLUSION

The trial court should have granted D-Square's first motion for summary judgment in 2008. D-Square provided a declaration stating that service technicians did not have a responsibility to assess the area surrounding a generator for dangers. D-Square produced declarations from the service technician and D-Square's owner stating that the cedar pile was not a hazard. Service techs doing basic maintenance are changing oil and filters. They do not need to consult any manufacturer's manual to perform this work, thus, D-Square cannot be charged with knowledge of any warning in the manual.

Farmers did not come forward with any evidence in 2008 to establish that a service tech should know that a wood pile far enough away

that he could walk between it and the generator was an obvious hazard.

Absent such evidence, D-Square was entitled to dismissal.

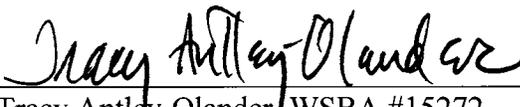
A year later and after substantial discovery and depositions of expert witnesses, D-Square again moved for summary judgment, again arguing that no obvious dangers/hazards existed at the time of the service call. This time the trial court correctly determined that Farmers failed to come forward with evidence sufficient to survive D-Square's summary judgment motion. Farmers failed to present evidence of the sort admissible at trial to establish that obvious dangers/hazards existed at the time of the service call. It proffered only argument that Tim Cislo had a duty to know the contents of the Magnum installation manual, the UL requirements of the generator, or the owner's manual. D-Square presented evidence that service techs performing basic maintenance only needed to know how to service the particular engine in the generator. D-Square's expert stated without contradiction that the wood pile two feet from the exhaust was not a danger.

Farmers presented considerable argument, speculation, and vague conclusions, none of which are legally sufficient to successfully refute a defense summary judgment motion. *Seven Gables Corp.*, 106 Wn.2d at 13. The trial court correctly determined that reasonable minds could not

differ. *White*, 131 Wn.2d at 9. D-Square should not be held liable for the fire.

RESPECTFULLY SUBMITTED this 7th day of June, 2010.

LAW OFFICE OF WILLIAM J. O'BRIEN

By 
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No. 64403-3-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

FARMERS INSURANCE COMPANY OF WASHINGTON, as subrogee for
PAUL MOLDON,

Appellant,

v.

D-SQUARE ENERGY SYSTEMS, INC.,

Respondent/Cross-Appellant.

CERTIFICATE OF SERVICE

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The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

On the 7th day of June, 2010, I caused to be delivered a true and correct copy of:

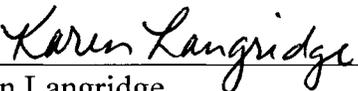
1. *Brief of Respondent/Cross-Appellant*; and
2. *Certificate of Service*.

to the following counsel of record:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
COUNSEL FOR PLAINTIFF	
Craig Evezich Evezich Law Offices, PLLC 600 University St., Suite 2701 Seattle, WA 98101	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Delivery
COUNSEL FOR APPELLANT	
Nancy McCoid Soha & Lang, P.S. 701 Fifth Avenue, Suite 2400 Seattle, WA 98104	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Delivery
COUNSEL FOR MAGNUM PRODUCTS	
Timothy Parker / Emilia Sweeney Carney Badley Spellman 701 Fifth Avenue, Suite 3600 Seattle, WA 98104	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Delivery
ORIGINAL TO:	
Clerk Court of Appeals of the State of Washington, Division I 600 University Street Seattle, WA 98101-1176	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Delivery

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

DATED this 7th day of June, 2010.



Karen Langridge