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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By .....

Court of Appeal Cause No. 327043

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

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WESLEY B. AMES and STANLEY R. AMES, Appellants

v.

DARLEEN AMES and ARLETA J. PARR, Respondents

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APPELLANT'S SUPPLEMENTAL BRIEF

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Wesley B. Ames  
Pro Se Appellant  
4154Q Deer Creek Road  
Valley, WA 99181  
(760) 815-4845

Stanley R. Ames  
Pro Se Appellant  
2180 SW Pheasant Dr.  
Beaverton, OR 92003  
(503) 348-1487

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### **III. INTRODUCTION**

Appellants submit this Supplemental Brief in response to the Court's letter dated March 17, 2016 requesting supplemental briefing, apparently under RAP 12.1(b), on the issue of whether the issue of causation was ripe for review and, if so, whether Appellants had produced sufficient evidence to overcome Respondents' motion for summary judgment, and is further responsive to Respondents' Supplementary Brief ("RespSB").

Appellants respectfully submit the issue of causation is not ripe for appellate review, and is not ripe for consideration of summary judgment on causation. Even though the issue of causation is not ripe for consideration on summary judgment, based on the evidence in the record, it would be incorrect and unjust if this Court were to grant summary judgment against Appellants based on a purported lack of evidence of causation.

The court below improperly truncated the process before most of the evidence had been presented. For example, the court below did not hear testimony from either Appellant, from either Respondent, or from the insurance agent. Thus, the court below did not perform any determination of the credibility of each of the individuals or of the respective pieces of evidence. RP; CP at 120-127. Further, because the court below

improperly truncated the process, the court did not even substantively consider the documentary evidence. CP at 120-127.

As described below, the record shows evidence Respondents were aware of the property insurance held by Appellants, were aware of the identity of the insurance agent, Fran Jenne, and were aware the insurance agent was engaging in her professional functions at the time Respondents trapped the insurance agent and would not allow her to leave the property. Therefore, the very reasonable interpretation is the insurance agent, after being trapped on the property, would not be willing to continue to subject herself or her associates to similar future risks, and therefore would not be willing to continue the insurance relationship with Appellants.

With the evidence in the record of events as described, Appellants have provided evidence sufficiently establishing proximate cause, i.e., showing both causation in fact and legal causation, to, at a minimum, demonstrate substantial questions of material fact remain.

#### **IV. LAW AND ARGUMENT**

##### **A. The Court should not have Raised the New Issue of Causation.**

The discretion possessed by this Court under RAP 12.1(b) should not have extended so far as to include the Court raising the new issue of causation in this case. The Washington Supreme Court has provided guidance on the scope of issues which may properly be raised by an

appellate court in a case. That is, the Washington State Supreme Court stated “this court has frequently recognized it is not constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent.” *City of Seattle v. McCready*, 123 Wn.2d 260, 269, 868 P.2d 134 (1994) (citations omitted). In this case, because the Court has raised the new issue of causation, it erroneously expanded RAP 12.1(b) beyond appropriate bounds into a fundamentally factual inquiry.

**B. False and Misleading Representations and Unsupported Assertions by Mr. Montgomery, Counsel for Respondents**

**1. Mr. Montgomery’s/Respondents’ failure to cite to the record before the Court.**

RAP 10.3(a)(6) requires citation to the record to factually support a party’s argument. Mr. Montgomery’s presentation of Respondents’ Supplemental Brief is quite notably deficient in references to the record, with many important assertions of purported fact unsupported by any references to the record. Mr. Montgomery’s unsupported factual assertions improperly leave this Court and Appellants to speculate about or search the record for support for the purported facts. The lack of support provided by citations to the record means the corresponding alleged facts and arguments in Respondents’ Supplemental Brief should be completely disregarded by this Court.

## **2. Mr. Montgomery's False Representation of the Nature of Proceeding in Superior Court.**

As a second preliminary note, unfortunately, Mr. Montgomery once again exhibits a shocking predilection for deception. In this case, Mr. Montgomery tries to transmogrify a motion to dismiss based on res judicata and estoppel ground and a judgment issued on those procedural bases into a motion for summary judgment based on the substantive facts and a summary judgment order. See, e.g., RespSB at 1, 2. Cf. CP at 18-32; CP at 120-127. Mr. Montgomery appears to use this tactic to try to convince this Court a substantive judgment was made below, something which perusal of the record establishes as clearly false.

## **3. Mr. Montgomery's Misrepresentation of Controlling Law and Precedent Concerning "Ripeness."**

The primary case cited (with the case name incorrect) by Mr. Montgomery for Respondents is *Rosemere Neighborhood Ass'n v. Clark Cnty.*, 170 Wn.App. 859, 290 P.3d 142 (2012). Mr. Montgomery misused this case by representing standards for establishing 'justiciability' or 'case or controversy' ripeness apply to appellate 'ripeness'. The Rosemere case was a direct appeal to the Court of Appeals from decisions of an administrative board, i.e., the Pollution Control Hearings Board, and therefore was not an appellate review of a lower court decision. It should be noted the statement in the opinion about 'ripeness' is pure dicta because

the corresponding issue was not properly before the court at all. The consequence is that any other statements are meaningless dicta.

Nonetheless, the statements concerning ripeness arise from a long series of cited cases extending back to at least 1938. The ripeness issues in that entire line of cases uniformly concern the question of whether an issue is justiciable. In most of the cases, the question was whether the matter was justiciable under the Declaratory Judgment Act. Thus, the courts' concern is to avoid "advisory opinions."

Specifically, the *Rosemere* court stated

these issues are not properly before us in the appeal of the Agreed Order. Moreover, the issues of constitutional takings and improper fees are not ripe for review. A controversy is ripe when, (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that are direct and substantial rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. As discussed above, nothing in the Board's decision requires the County to abandon its concept of sharing the mitigation burden with developers. Until the County adopts new ordinances, we would be speculating about possible unconstitutional takings or violations of RCW 82.02.020. Thus, there is no "actual or present" controversy before us. We decline to address these issues.

*Rosemere Neighborhood Ass'n.*, 170 Wn.App. at 888 (citing *Bellewood No. 1, LLC v. LOMA*, 124 Wash.App. 45, 49–50, 97 P.3d 747 (2004)).

The end of the quotation above makes the context exceedingly clear, i.e., the lack of ““actual or present”” controversy, and the four criteria are directed toward determining whether there is an “actual or present” controversy, that is, whether the matter is presently justiciable (or justiciable). Plainly, the case and the stated four criteria are not directed to ripeness on appeal or ripeness for summary judgment, but rather ripeness for initial adjudication.

The line of cases preceding *Rosemere* make even more obvious the four criteria are directed to justiciability (or justiciability) (i.e., to whether there is an actual or present case or controversy). Thus, *Rosemere* cited *Bellewood No. 1, LLC v. LOMA*, 124 Wn.App. 45, 49–50, 97 P.3d 747 (2004), which expressed the matter even more clearly, stating

A justiciable or "ripe" controversy must exist before a court may rule by declaratory judgment.. A justiciable controversy is (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that are direct and substantial rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. [ ] Another way of stating the requirement is that "a claim is ripe for judicial determination if the issues raised are

primarily legal and do not require further factual development, and the challenged action is final."

*Id.* (citations omitted).

The clarity and consistency of the line of cases expressing requirements for justiciability continues much further back. Thus, *Bellwood No. 1, LLC* cited support for the criteria for justiciability from *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn.App. 361, 382, 940 P.2d 286 (1997), which listed the same four criteria for justiciability. In turn, *Viretta Park* cited *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994), which cited *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990), which cited *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) ("These elements must coalesce, otherwise the court steps into the prohibited area of advisory opinions."), which cited *Kahin v. Lewis*, 42 Wn.2d 897, 901, 259 P.2d 420 (1953), which cited *Washington Beauty College, Inc., v. Huse*, 195 Wash. 160, 80 P.2d 403; *State v. Fruitland Irrigation District*, 196 Wash. 11, 81 P.2d 844; *Adams v. City of Walla Walla*, 196 Wash. 268, 82 P.2d 584; *Brehm v. Retail Food & Drug Clerks Union*, 4 Wash.2d 98, 102 P.2d 685; and *Conaway v. Time Oil Co.*, 34 Wash.2d 884, 210 P.2d 1012.

The extended line of cases noted above conclusively establish the four criteria recited by Mr. Montgomery in Respondents' Supplemental Brief

specifically apply to basic justiciability, and, as pointed out in *Bellewood*, the four criteria can be paraphrased as the “claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, and the challenged action is final.”

*Bellewood No. 1, LLC v. LOMA*, 124 Wn.App. at 50 (emphasis added).

These cases thus lead directly to the only possible conclusion, that is, the only thing Mr. Montgomery has shown on behalf of Respondents concerning ‘ripeness’ is the case was properly before the Spokane County Superior Court because it was justiciable as there existed an actual and present controversy. Nothing more.

It is most unfortunate Mr. Montgomery chooses to proceed deceptively, and even more unfortunate he is permitted to do so and get away with it, because Mr. Montgomery’s unsavory practices undermine the fairness of this Court and every court before which he appears. Respectfully, Appellants are aware Mr. Montgomery has appeared before this Court on multiple previous occasions, and this Court should already be aware of Mr. Montgomery’s practices, including his estrangement from truthfulness in preparing briefs.

**C. Causation is Generally a Factual Inquiry and can be Inferred from a Chain of Circumstances.**

Proximate cause is a central tort element, and in Washington law is commonly stated as having two elements, cause in fact and legal causation. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013) (citation omitted). Proximate cause is generally a question of fact. *Conrad Ex Rel. Conrad v. Alderwood Manor*, 78 P.3d 177, 119 Wn.App. 275, 119 Wn. App. 275 (2003) (citation omitted). A proximate cause is one that produces the injury in natural and continuous sequence, unbroken by an independent cause and without which the ultimate injury would not have occurred. *Id.* (citation omitted). Notably, proximate cause does not need to be established by direct and positive evidence, but instead can be shown by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable. *Id.* (citing *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn.App. 326, 331, 966 P.2d 351 (1998)).

**D. Issue of Causation is not Ripe for Appellate Review.**

Relevant Washington State Appellate opinions addressing ripeness of issues for appellate adjudication in cases with analogous facts and with the proceedings posture similar to the present case are rather limited, as most ripeness opinions arise in the context of whether a penalty has been applied prior to the time of appeal. Opinions from other jurisdictions are largely similar.

However, a few cases do indicate how a court should proceed. For example, the Washington State Supreme Court stated “in determining whether a claim is ripe for review, we consider if the issues raised are primarily legal, and do not require further factual development, and if the challenged action is final. We also consider the hardship to the parties of withholding court consideration.” *Jafar v. Webb*, 177 Wn.2d 520, 525, 303 P.3d 1042 (2013) (citing *First Covenant Church v. City of Seattle*, 114 Wash.2d 392, 399–400, 787 P.2d 1352 (1990), *adhered to on remand*, 120 Wash.2d 203, 840 P.2d 174 (1992)). See also cases and discussion in Section IV.E.2. Remand, not Premature Consideration of Motion for Summary Judgment is Correct Approach for bases and discussion of circumstances demanding remand for further factual development.

In this case, the issue of causation is not primarily legal. Also, both the issue of causation and the question of suitability for summary judgment based on an alleged lack of causation are intrinsically factual inquiries, and the court below truncated the fact finding process prematurely.

That is, if the case had gone to trial, evidence relating to causation would have been developed from the testimony of at least the insurance agent, Fran Jene, the testimony of Merita Dysart, the testimony of Plaintiff Stan Ames, and the testimony of Defendants Arleta Parr and

Darleen Ames. Due to the lower court's premature termination of the case, none of those individuals testified at all and therefore testimonial evidence is completely absent. It is difficult to imagine a case more in need of further factual development than the present case.

**E. Summary Judgment Based on Causation would be Wrong.**

The basic standards controlling summary judgment motions are very well known. That is, summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 346; 96 P.3d 979 (2004); *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602; 611 P.2d 737 (1980)(citations omitted). The facts are viewed in the light most favorable to the non-moving party, however, a non-moving party must set forth sufficient facts to rebut the moving party's contentions, and may not rely on speculation or argumentative assertions that a material fact exists. *Id.* The court must resolve any doubts as to the existence of a genuine issue of material fact against the moving party. *Ventures Northwest Ltd. Partnership v. State*, 81 Wn.App. 353, 361, 914 P.2d 1180 (1996) (citing *Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990)). Summary judgment is appropriate only if reasonable persons could reach but one conclusion. *Id.* at 362 (citing

*Safeco Ins. Co. of Am. v. Butler*, 118 Wash.2d 383, 394-95, 823 P.2d 499 (1992)).

As discussed above, the issue of causation is clearly not ripe for appellate review, and therefore not ripe for consideration in a motion for summary judgment. Further, even if we ignore the lack of ripeness of the issue for appellate review or for consideration on summary judgment, Appellants have presented sufficient evidence of record demonstrating a motion for summary judgment based causation must fail.

**1. Sufficient Evidence and Indication of Causation is already of Record to Negate Summary Judgment on Causation.**

As discussed above, the record of proceedings in the court below were severely truncated, resulting in severe truncation of the needed factual development. Nonetheless, sufficient information has been developed and is of record in the case to show summary judgment against Appellants for alleged lack of causation would be incorrect.

In particular, documents actually submitted by Mr. Montgomery on behalf of Respondents show substantial questions of material fact exist. CP at 413-416, 423-426 (portions of Ex. E Statement of Stan R. Ames and Wesley B. Ames Concerning Damage and Risks of Loss to Their Property Due to Randall Ames, Darleen Ames, and Arleta Parr), 455-456 (portions of Ex. F), 473-476 (Ex. G Declaration of Arleta Parr), 480-482 (Ex. H

Declaration of Darleen Ames) of Declaration of Chris A. Montgomery Authenticating Documents).

An email sent by the insurance agent to Stan Ames relates the basic events during Ms. Jenne's visit to the Farm. CP at 423-424. Darleen Ames and Arleta Parr confessed their actions in trapping the insurance agent on the Farm in their own declarations. CP 473-476 (Ex. G), 480-482 (Ex. H). The declarations of Darleen Ames and Arleta Parr, especially Arleta Parr's declaration, make it clear they knew Fran Jenne was the insurance agent for the property insurance held by Appellants.

The Statement of Stan R. Ames and Wesley B. Ames Concerning Damage and Risks of Loss to Their Property Due to Randall Ames, Darleen Ames, and Arleta Parr describes a subsequent telephone call between the insurance agent and Stan Ames during which the insurance agent stated the reasons why the insurance agent would not work further on the insurance coverage and would not recommend the insurance company continue insurance coverage. CP at 414-416. The resulting notice of non-renewal (CP at 326) was received as a direct result of Darleen Ames and Arleta Parr trapping the insurance agent. If the Superior Court had not improperly truncated the process, testimony would have been elicited concerning this telephone call between Stan Ames and the insurance agent, as well as testimony concerning telephone calls

between those two individuals. The lack of such testimony clearly demonstrates the absolute need for further factual development in this case.

This chain of events and communications leads to the strong inference Respondents' trapping the insurance agent on the Farm (likely false imprisonment) led directly to non-renewal of the pre-existing insurance policy, and the requirement for Stan Ames and Wes Ames to pay the resulting higher insurance premium. Stan and Wes were only relieved from the excess burden created by Respondents when the Stevens County court assigned responsibility for future insurance premiums to Roy and Rubye Ames in accordance with standard life tenant obligations. Notably, the Stevens County court did not require Roy and Rubye Ames to reimburse Stan and Wes Ames for the excess insurance premiums or any associated costs incurred to Respondents' wrongdoing.

The further clear inference is the subsequent letter from Fred Lee, a personal friend of Darleen Ames and her husband, Randall Ames, is nothing more than an after-the-fact fiction constructed to try to absolve Darleen Ames and/or to shield the insurance company from further entanglement in the mess created by Darleen Ames and Arleta Parr.

**2. Remand, not Premature Consideration of Motion for Summary Judgment is Correct Approach.**

As set out below, controlling and persuasive precedent establishes the correct approach is to remand a case for further proceedings when factual development on a particular issue in the court below is deficient.

A Washington case analogous to the present causation issue establishes the proper course of action for the Court in the present case. In *Greengo v. Public Employees Mut. Ins. Co.*, 153 Wn.2d 799, 959 P.2d 657 (1998), there was an issue relating to causation disputed by the parties, and prior proceedings in the lower court had not addressed the issue. The court had raised the new issue relating to causation under RAP 12.1(b) and requested and received additional briefing. *Id.* at 813. The Washington State Supreme Court determined the record was inadequate on the issue because the prior proceedings had not addressed the issue, and therefore remanded the case for further proceedings on the issue, stating “[t]he record below was not factually developed on this point.” *Id.* at 815.

In the present case, the proceedings below involved consideration of a motion to dismiss based only on res judicata and/or estoppel. The motion to dismiss did not raise and the court below did not consider any issue of causation. CP at 18-32 (Memorandum in Support of Defendants’ Motion for an Order Dismissing Plaintiffs’ Complaint); CP at 120-127 (Findings of Fact and Conclusions of Law); RP. The Superior Court incorrectly added the purported ground of lack of standing.

The direct and undeniable result was the facts concerning causation were not developed at all in the prior proceedings and, just as in *Greengo*, consideration of causation on appeal is wrong and this case must be remanded.

The same correct solution of remanding for further factual development when the proceedings in the lower court did not provide proper factual development was taken in *Associated General Contractors of Washington v. King County*, 124 Wn.2d 855, 865, 881 P.2d 996 (1994) (“Because the issue ... is a genuine issue of material fact which was not resolved by the trial court, we remand for a determination on [the issue] and for further proceedings consistent with this decision.”). The Federal courts take the same approach, with the Ninth Circuit ruling summary judgment was inappropriate when further factual development on the issue was needed, and therefore remanded for further proceedings. The court specifically noted that, under these circumstances, summary judgment is inappropriate. *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883 (9th Cir., 2007) (“[the issue] is a question that can be answered only through further factual development. The need for further factual development renders summary judgment ... inappropriate.”).

In this case, the Superior Court cut short proceedings by dismissing Appellants’/Plaintiffs’ claims with prejudice. By cutting proceedings

short, the Superior Court severely restricted factual development. The factual restrictions notably included complete curtailment on evidence relating to causation. As a result, under controlling law, the issue of causation cannot be ripe for consideration by this Court, and cannot be ripe for consideration in any motion for summary judgment.

#### **V. ATTORNEY FEES**

In the event and to the extent allowed under Washington law for attorney fees to an attorney licensed in a state other than Washington, Wesley Ames and Stanley Ames renew their request for attorney fees on appeal.

#### **VI. CONCLUSION**

As discussed above, the court below improperly truncated the fact finding process by dismissing the case on purported lack of standing, collateral estoppel, and judicial estoppel grounds. The court below thus never considered the substantive evidence or even heard any testimony in the case. As a result, facts relating to all substantive issues, including all questions of causation, have not been adequately developed.

As a result of the improper truncation of factual development by the court below, the issue of causation is not ripe for review and should not have been raised by this Court. Rather, the appropriate action would have been to reverse the decision of the court below dismissing the case

on purported lack of standing, res judicata, and estoppel grounds, and sending the case back to the Superior Court for further proceedings.

Further, the improper truncation of factual development by the court below makes summary judgment improper because substantial questions of material fact remain undetermined. However, even with the limited factual development in this case, the facts in the record show summary judgment would be incorrect because even the limited available facts establish that substantial questions of material fact will remain until adjudication on all facts is carried out.

As a result, Appellants respectfully request this Court reverse the decision of the court below dismissing the case, find the question of causation is not ripe for review and/or find further factual development is required before consideration of summary judgment alleging lack of causation and/or find the available facts show summary judgment based on an alleged lack of causation would be incorrect.

Submitted this 2nd day of May, 2016 by



Wesley B. Ames  
Pro Se Appellant  
4154Q Deer Creek Rd.  
Valley, WA 99181



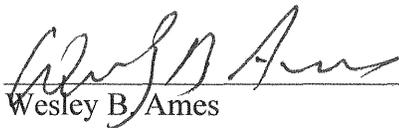
Stanley R. Ames, Pro Se  
Appellant  
2180 SW Pheasant Dr.  
Beaverton, OR 92003

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 2<sup>nd</sup> day of May, 2016, I personally served a copy of the attached Appellants' Supplemental Brief on Defendants/Respondents Darleen Ames and Arleta J. Parr by delivering a copy to Chris A. Montgomery, attorney for Defendants/Respondents, via email addressed to mlf@cmlf.org.

I hereby certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Signed at Valley, Washington on May 2, 2016.

  
\_\_\_\_\_  
Wesley B. Ames