

NO. 354873

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SHAWN D. KENSINGER and GILLIAN O. TIPPERY, as Personal
Representatives of the ESTATE OF SUSAN MARIE WILSON,
Deceased

Appellants,

vs.

SLOUGH INVESTMENT COMPANY, LLC,
a Washington LLC,

Respondent.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

A. INTRODUCTION	1
B. ARGUMENT	1
1. Appellants Have Provided Probative, Non-Speculative Evidence that Slough Breached Its Duties Under the Implied Warranty of Habitability and Residential Landlord-Tenant Act (“RLTA”) with Respect to Both Smoke Detectors and Separation Walls.....	1
a. Smoke Detectors.....	3
b. Separation Walls.....	7
2. Appellants Have Provided Probative, Non-Speculative Evidence Creating Reasonable Inferences That Slough’s Breaches Were the Proximate Cause of Ms. Wilson’s Death. .	10
a. Respondent’s Arguments Regarding “Speculative” Evidence Fail in Their Entirety.	12
b. Cause in Fact: Physical Evidence and Witness Testimony. 13	
c. Cause in Fact: Dr. Selove’s Admissible Expert Testimony.	17
d. Respondent’s Causation Arguments are Highly Speculative.	20
3. Dr. Selove’s Opinions are Admissible, Qualified, Non- Speculative, and Solely Address <i>Factual</i> Causation.....	21
C. CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Berglund v. Spokane County</i> , 4 Wn.2d 309, 315, 103 P.2d 355 (1940)	8
<i>Carlton v. Vancouver Care LLC</i> , 155 Wn. App. 151, 168, 231 P.3d 1241 (2010)	22
<i>Chen v. State</i> , 86 Wn.App. 183, 192, 937 P.2d 612 (1997).....	20
<i>Cho v. City of Seattle</i> , 185 Wn. App. 10, 341 P.3d 309 (2014)	13
<i>Eriks v. Denver</i> , 118 Wn.2d 451, 457, 824 P.2d 1207 (1992)	22
<i>Hansen v. Friend</i> , 118 Wn.2d 476, 483, 824 P.2d 483 (1992)	8
<i>Hertog</i> , 138 Wn.2d 282-83	11
<i>Hill v. Sacred Heart Medical Center</i> , 143 Wn. App. 438, 448, 177 P.3d 1152 (2008).....	10
<i>Lewis v. Simpson Timber Co.</i> , 145 Wn. App. 302, 189 P.3d 178 (2008)	13
<i>Lian v. Stalick</i> , 106 Wn. App. 811, 25 P.3d 467 (2001)	1
<i>Lian v. Stalick</i> , 115 Wn. App. 590, 595, 62 P.3d 933 (2003)	2, 7, 8
<i>Little v. Countrywood Homes, Inc.</i> , 132 Wn. App. 777, 133 P.3d 944 (2006)	13
<i>Lynn v. Labor Ready, Inc.</i> , 136 Wn. App. 295, 307, 151 P.3d 201, 208 (2006)..	11
<i>Marshal v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372, 972 P.2d 475 (1999)	12
<i>Martini v. Post</i> , 178 Wn. App. 153, 164-65, 313 P.3d 473 (2013).....	11
<i>Meridian Minerals Co. v. King Co.</i> , 61 Wn.App. 195, 203, 810 P.3d 31 (1991) 20	
<i>Philippides v. Bernard</i> , 151 Wn.2d 376, 393, 88 P.3d 939 (2004).....	23
<i>Rucshner v. ADT, Sec. Systems, Inc.</i> , 149 Wn. App. 665, 686, 204 P.3d 271 (2009).....	11
<i>Seattle Police Officers Guild v. City of Seattle</i> , 151 Wn.2d 823, 830, 92 P.3d 243 (2004).....	3
<i>State v. Smith</i> , 191 Wn. App. 1037 (2015)	25
<i>State v. Woods</i> , 157 Wn. App. 1026 (2010).....	25
<i>Taggart v. State</i> , 118 Wn.2d 195, 225-26, 822 P.2d 243 (1992)	10
<i>Tanner Elec. Co-op. v. Puget Sound Power & Light Co.</i> , 128 Wn. 128 Wn.2d 656, 675, n. 6, 911 P.2d 1301 (1996).....	20
<i>Wilson v. City of Seattle</i> , 146 Wn. App. 737, 194 P.3d 997 (2008).....	13

Statutes

RCW 19.27	10
RCW 43.44.110	3
RCW 5.44.040	5
RCW 59.18.060	6

Rules

ER 704	22, 24
ER 803(a)(1)	5
ER 803(a)(8)	5

Regulations

WAC 50-51-003.....	10
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A. INTRODUCTION

Appellants filed this appeal to reverse the trial court’s order granting summary judgment in favor of the Respondent, Slough Investment Company, LLC (“Slough”). Appellants provided extensive admissible evidence and testimony at the trial court level to establish – beyond speculation – each element of their legal claims. At a minimum, there are numerous genuine issues of material fact precluding summary dismissal; the trial court therefore committed reversible error when it evaluated the evidence as if it were the trier of fact and in favor of the *moving* party – contrary to Washington law. As discussed herein, Respondent’s arguments that Appellants lack probative, non-speculative evidence are not only baseless, but also premised on narrow, surface-level analyses that either misconstrue or completely ignore the central implications of the probative evidence in question. Respondent’s arguments therefore fail in their entirety, and the trial court erred by granting summary judgment in favor of Slough and denying the Appellants’ motion for reconsideration.

B. ARGUMENT

1. **Appellants Have Provided Probative, Non-Speculative Evidence that Slough Breached Its Duties Under the Implied Warranty of Habitability and Residential Landlord-Tenant Act (“RLTA”) with Respect to Both Smoke Detectors and Separation Walls.**

Under the Restatement (Second) of Property § 17.6, adopted by this Court in *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001) (“*Lian I*”), a landlord is under a duty to exercise reasonable care to remedy or repair dangerous conditions, whether existing before or arising after a tenant has

taken possession, where the existence of the condition is in violation of either: (1) the implied warranty of habitability, or (2) a duty created by statute or administrative regulation. To prevail on a claim under § 17.6, the tenant must show: (1) that the condition was dangerous, (2) that the landlord was aware of the condition or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition, and (3) that the existence of the condition was a violation of the implied warranty of habitability or a duty created by statute or regulation. *Lian v. Stalick*, 115 Wn. App. 590, 595, 62 P.3d 933 (2003) (“*Lian II*”). “[T]he warranty applies whenever the defects in a particular dwelling render it uninhabitable or pose an actual or potential safety hazard to its occupants.” *Lian I*, 106 Wn. App. at 818.

In this case, Slough had a duty under both the implied warranty of habitability and RLTA with regard to: (1) installing operable smoke detectors in each apartment unit, and (2) providing walls with appropriate fire-resistance rating. Appellants provided substantial non-speculative evidence supporting Slough’s failure to fully comport with both these duties. Indeed, even the trial court recognized that there was sufficient evidence – including Slough’s own testimony – to create a triable issue as to whether an operable smoke detector was ever installed in Ms. Wilson’s unit. RP at 5. Ultimately, Appellants presented considerable admissible, non-speculative evidence and testimony to establish Slough’s breaches of these duties with regard to the smoke detector and separation walls in Ms.

Wilson's apartment unit, thus precluding dismissal.

a. Smoke Detectors.

Slough had a duty under the implied warranty of habitability to ensure that there were functioning smoke detectors in each apartment unit. Additionally, Slough had statutory duties under RLTA and RCW 43.44.110 to respectively: (1) provide and install smoke detectors in each unit; (2) ensure that the devices were operational upon the occupancy of each unit; and (3) inform the residents of each unit of their responsibility to maintain the devices in operational condition. Notably, Respondent does not contest the existence of these duties owed to Ms. Wilson.

However, Respondent incorrectly argues that there is no evidence indicating that Slough failed to comply with these duties. Appellants have presented concrete evidence establishing Slough's failure to install an operable smoke detector in Ms. Wilson's unit. As noted, this evidence is both probative and non-speculative: not only did Appellants provide physical evidence from the scene of the fire, but also presented sworn, admissible testimony from Ms. Wilson neighbor, Dennis Trusty, as well as Slough himself. At a minimum, this evidence creates reasonable inferences that Slough breached its duties to Ms. Wilson, as detailed below.

In adjudicating a motion for summary judgment, the trial court must weigh all reasonable evidentiary inferences in favor of the non-moving party – here, the Appellants. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). Here, the trial court acted

improperly in failing to resolve reasonable and probative interpretations of evidence in favor of Appellants.

To begin, Appellants provided considerable evidence that there was no properly installed or operational smoke detector in any of the apartment units – including Ms. Wilson’s unit – thereby establishing a breach of the above-mentioned duties: for example, during the post-fire investigation, an uninstalled smoke detector in its original and unopened box was discovered in the hallway closet of Unit 3 (CP at 339); Unit 4 did not contain any smoke detector whatsoever (CP at 198); and similar to Unit 3, charred remnants of a smoke detector were found in Ms. Wilson’s unit (Unit 1) in the hallway area on the floor (CP at 199).

In addition, Appellants presented admissible testimony by Ms. Wilson’s next-door neighbor, Dennis Trusty, wherein he offered sworn statements to the City of Soap Lake Police Department that he had not heard any smoke detectors going off on the morning of the fire. CP at 95, 117-119, 136. Mr. Trusty further stated that during his entire occupancy, there had never been an operational smoke detector in his unit. CP at 135-136.

In passing, and without citation to any legal authority, Respondent claims that Mr. Trusty’s statements are inadmissible hearsay. Br. of Resp’t at 13. Respondent’s assertion is incorrect. Dennis Trusty’s statements were recorded in a transcript of an official police interview given to Soap Lake Police Department on the day of the fire that killed Ms. Wilson. CP at 95-97. The transcript of this interview qualifies as a public record, and

therefore is admissible as evidence under ER 803(a)(8) and RCW 5.44.040. Moreover, Mr. Trusty's testimony is offered to establish that there were no functioning smoke detectors on the premises, not that Mr. Trusty did not hear the alarms sounding. Finally, Trusty's statements to the Soap Lake Policy Department are admissible under ER 803(a)(1).

Furthermore, at deposition, Mr. Slough admitted to not having a recollection of installing a smoke detector in Ms. Wilson's unit. CP at 379-380. Moreover, the charred smoke detector found in the hallway-area of Ms. Wilson's unit was laying on the ground similar to Unit 3 – in other words, Respondent presents no evidence that the smoke detector had been attached to a wall or the ceiling. CP at 199. Conversely, physical evidence from the other apartment units create reasonable inferences of Slough's failure to install smoke detectors: in Unit 4, no smoke detector was located at all, and in Unit 3, a smoke detector was found unopened and in its original box. CP at 339. Indeed, when asked about the uninstalled, unopened smoke detector in Unit 3, Mr. Slough even acknowledged that he "could feel comfortable that he was the one that purchased it" – thereby creating a reasonable inference as to his failure to install a smoke detector in that unit, as well. CP at 376. Mr. Slough's statement also creates a genuine issue of material fact regarding his assertion that it was his pattern and practice to install operable smoke detectors in all apartment units. Br. of Resp't at 12; CP at 244. This genuine issue of fact is further bolstered by Mr. Trusty's statement that on the morning of the fire, he did not hear any smoke detector

going off, despite between the units. CP at 110-111, 114-118.

Briefly, Respondent asserts that “the most logical inference” from the fact that no alarms sounded on the morning of the fire “is that [Ms. Wilson] failed to maintain [her smoke detector] as required by law.” Br. of Resp’t at 13. In support of this argument, Respondent relies solely on Ms. Wilson’s lease agreement as purported evidence that Slough properly installed an operable smoke detector. However, as previously discussed, this conclusion is directly refuted by Mr. Slough’s testified uncertainty as to whether he installed a smoke detector in Ms. Wilson’s unit, as well as the physical evidence from the burnt building, Mr. Slough’s testimony regarding Unit 3, and the testimony of Mr. Trusty, as discussed. At a minimum, reasonable inferences from evidence must be resolved in favor of the non-moving party at summary judgment – here, the Appellants.

Finally, Ms. Wilson’s lease was not in compliance with RLTA requirements. First, the only mandated fire protection and safety disclosure with a checked box pertains to the type of smoke detector device in the unit. All of the other six (6) disclosures mandated under RCW 59.18.060(12)(a)(i)-(vii) are unchecked and/or incomplete – despite having both “does have” and “does not have” boxes. CP at 330. Slough also violated its statutory duty by failing to provide a diagram showing the fire emergency evacuation route, as required under RCW 59.18.060(12)(b). *Id.* As evidenced by Ms. Wilson’s defective, uncompleted lease, Slough breached its duty to fully disclose and notify Ms. Wilson of critical fire

safety and protection information required under Washington law.

b. Separation Walls.

As noted, the “[Restatement (Second) of Property § 17.6] applies even when the dangerous condition occurs in an area of the premises under the control of the tenant so long as the defect constitutes a violation of either the implied warranty of habitability or a duty imposed by statute or regulation.” *Lian II*, 115 Wn. App. at 594.

Hence, to prevail on a § 17.6 claim, the tenant must show: (1) that the condition was dangerous, (2) that the landlord was aware of the condition or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition, and (3) that the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation.

Lian II, 115 Wn. App. at 595. In other words, actual knowledge *is not* required – despite Respondent’s legally unsupported arguments otherwise.

Here, Slough owed a duty – and breached its duty – to Ms. Wilson under § 17.6 in permitting non-fire-resistant separation walls. First, the lack of a fire-rated separation wall was dangerous, as confirmed by expert analysis. Appellants’ fire engineer expert, Adam Farnham, opined that Slough’s apartment building was a “dangerous building,” due to the fact that the separation walls in the building had a fire-resistance rating of far less than even 50% of the resistivity requirement for a new building of like character in the same location. Mr. Farnham also opined that the building was “dangerous” under the Uniform Code for the Abatement of Dangerous Buildings, which is adopted by the Soap Lake Building Code. CP at 415.

Second, in the exercise of ordinary care, Slough should have known about and discovered the highly deficient separation walls in the subject apartment complex. Respondent incorrectly states the “reasonable opportunity” standard under *Lian II* and improperly contends that some degree of “notice” is required. Pursuant to *Lian II*, formal notice *is not* required – rather, the “reasonable opportunity” standard is based on a question of whether the landlord exercised ordinary care: “a landlord is subject to liability under § 17.6 only for those conditions he is aware of or for those conditions he could have known about **in the exercise of ordinary care.**” *Lian II*, 115 Wn. App. at 595 (citing Rest. (2d) of Property § 17.6 (1977), cmt. c) (emphasis added). Ordinary care is defined as the level of “care which an ordinarily reasonable person would exercise in the same or similar circumstances. Inherent in this definition is the principle that the care requires in a given instances must be commensurate with the risk of harm, or danger, to which others might be exposed by one’s conduct.” *Berglund v. Spokane County*, 4 Wn.2d 309, 315, 103 P.2d 355 (1940).

Here, to begin, whether a defendant exercised ordinary care is a question for the trier of fact, and therefore, not subject to summary dismissal. *Hansen v. Friend*, 118 Wn.2d 476, 483, 824 P.2d 483 (1992). In addition, Appellants provided sufficient evidence to create, at a minimum, a reasonable inference that Slough did not exercise ordinary care. For example, at deposition, Mr. Slough testified to the following: he was familiar with the Soap Lake building code but was unsure as to the fire

rating construction requirements; he acknowledged that not having a 30-minute fire wall could endanger the life of tenants; he was aware of general fire-rating construction standards at the time of the construction of his personal residence in 2007; and ultimately admitted that “I could have put in a firewall” to have prevented the fire spreading from Unit 2 to Unit 1 where Ms. Wilson resided. CP at 39-42. This testimony establishes that Mr. Slough: (1) was aware of the concept of fire-rated walls prior to the subject fire; (2) knew that an improperly fire-rated wall could be dangerous; and (3) of particular relevance here, acknowledged that it would have been feasible for him to have installed a firewall. Appellants therefore provide sufficient evidence to submit to the trier of fact the issue of whether Slough failed to exercise ordinary care in light of Mr. Slough’s acknowledged awareness of – and ability to have installed – a properly fire-rated wall. The above would also establish notice for the common law/latent defect claim.

Third and finally, due to its insufficient fire-rating, the separation wall between Units 1 and 2 was a violation of numerous statutes and regulations, as well as the implied warranty of habitability. In support of this conclusion, Appellants submitted the report of fire engineering expert, Adam Farnham. Mr. Farnham’s report was based on his extensive experience and the evidence in this case, including the investigative reports, findings, and photographs prepared on behalf of the City of Soap Lake. CP at 412-416. In his report, Mr. Farnham’s opines that the separation walls between Units 1 and 2 were insufficiently fire-rated under RCW 19.27,

WAC 50-51-003, Soap Lake Municipal Code, and the IBC. CP at 415. Mr. Farnham also opines that the building was considered a “dangerous building” under the Soap Lake Municipal Code and the Uniform Code for the Abatement of Dangerous Buildings. *Id.* Finally, Mr. Farnham opines that the building did not comply with the Residential Landlord-Tenant Act of Washington due to the lack of a fire-rated partition. *Id.*

In closing, Appellants have provided substantial evidence and expert testimony to, at a minimum, create numerous reasonable inferences establishing that: (1) the separation wall was dangerous; (2) in the exercise of ordinary care, Slough had a reasonable opportunity to discover and repair the condition but failed to do so; and (3) the existence of the condition was a violation of an implied warranty of habitability and applicable statutes and regulations under which duties were owed to Ms. Wilson.

2. Appellants Have Provided Probative, Non-Speculative Evidence Creating Reasonable Inferences That Slough’s Breaches Were the Proximate Cause of Ms. Wilson’s Death.

Proximate cause has two elements: (1) cause in fact and (2) legal causation. *Hill v. Sacred Heart Medical Center*, 143 Wn. App. 438, 448, 177 P.3d 1152 (2008). “The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter.” *Taggart v. State*, 118 Wn.2d 195, 225-26, 822 P.2d 243 (1992) (citations omitted). Regarding legal causation, Appellants have provided substantial evidence and expert testimony to establish that Slough owed – and breached – its duties to: (1) provide and install a smoke detector in Ms. Wilson’s unit; (2) ensure that the smoke detector was operational upon

occupancy; (3) provide and review with Ms. Wilson all of the fire safety and protection disclosures mandated under Washington law; and (4) exercise ordinary care in ensuring that Ms. Wilson's unit was equipped with an adequately fire-rated separation wall. With Slough's duties and breaches established, legal causation is similarly resolved.

Cause in fact concerns "but for" causation and asks whether, but for the breach, would the injury still have occurred. *Hertog*, 138 Wn.2d 282-83. Relevant here, cause in fact may be decided as a matter of law only where the facts and inferences therefrom are plain and are not subject to reasonable doubt or difference of opinion and interpretation. *Martini v. Post*, 178 Wn. App. 153, 164-65, 313 P.3d 473 (2013). Cause in fact merely requires "some physical connection between an act and an injury" and is "**generally left to the jury.**" *Rucshner v. ADT, Sec. Systems, Inc.*, 149 Wn. App. 665, 686, 204 P.3d 271 (2009); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 307, 151 P.3d 201, 208 (2006) (emphasis added).

With respect to cause in fact, as discussed below, Respondent's arguments are not only unsupported by evidence or testimony but also – ironically – highly speculative. Moreover, Respondent's specific responses to Appellants' arguments are merely different interpretations of the non-speculative, probative evidence and sworn testimony that Appellants rely upon to establish cause in fact – which, resoundingly confirms that any dispute regarding "but for" causation is by no means confined to a single interpretation necessitating summary dismissal, but rather, necessarily

reserved for determination by a trier of fact. Ultimately, when juxtaposed, Appellants provide considerably *more* non-speculative, probative evidence and testimony that “but for” Slough’s failures to maintain Ms. Wilson’s unit in a safe and habitable condition as required under Washington law, Ms. Wilson would have survived the subject fire.

a. Respondent’s Arguments Regarding “Speculative” Evidence Fail in Their Entirety.

As a preliminary matter, Respondent incorrectly argues and hyperbolizes that Appellants’ cause in fact arguments rely solely on speculation. Indeed, the opposite could not be truer, as discussed below. Nevertheless, regarding this argument, Respondent relies heavily on *Marshal v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999). *Marshal* is easily distinguished from this case. In *Marshal*, the plaintiff sustained personal injuries while exercising at a health club. *Id.* at 476. However, the plaintiff later testified that she had no recollection of the accident. *Id.* Given that she was the only witness to the alleged incident, and had no recollection of the incident, the Court explained that she had provided no evidence that she was ever thrown from the machine. *Id.* at 379-80 (“Given this failure to produce evidence explaining how the accident occurred, proximate cause cannot be established”).

Here, by contrast – and as discussed in greater detail below – Appellants have provided the admissible testimony of Ms. Wilson’s neighbor; Mr. Slough’s own testimony; physical evidence indicating non-installation – and even complete absence of – smoke detectors; and both fire

engineering and forensic pathologist expert opinion confirming that Slough failed to provide Ms. Wilson a safe and habitable residence, thus directly leading to her asphyxiation, loss of consciousness, and then death.

Respondent also cites, in passing, *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006), *Wilson v. City of Seattle*, 146 Wn. App. 737, 194 P.3d 997 (2008), *Cho v. City of Seattle*, 185 Wn. App. 10, 341 P.3d 309 (2014), and *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 189 P.3d 178 (2008) – all are readily distinguishable. In *Little*, the plaintiff had no recollection of the subject incident, and there were no other witnesses or corroborating evidence. In *Wilson*, the issue was speculation regarding how a certain condition could theoretically be dangerous. In *Cho*, the issue was speculation on predictive behavior over the theoretical construction of traffic signal, which did not exist. And in *Lewis*, the issue was speculative medical evidence as to whether toxic chemical exposure resulted in injury (*i.e.* the lack of a “more probable than not” opinion).

b. Cause in Fact: Physical Evidence and Witness Testimony.

Respondent fundamentally misconstrues the highly probative, non-speculative evidence that Appellants present to establish cause in fact. Respondent’s statement that Appellants’ causation arguments and evidence would require “speculat[ion] at every turn” is indicative of not only Respondent’s ignorance and non-response to the majority of Appellants’ probative evidence, but also, a narrow, surface-level analysis of select evidence that – when examined outside of Respondent’s circumscribed

interpretation – readily supports reasonable inferences of causation.

Here, Appellants provided substantial probative evidence creating the foundation for logical, non-speculative reasonable inferences establishing, at a minimum, genuine issues of material fact necessitating that the issue of cause in fact be presented before a jury. For example:

(i) Ms. Wilson’s death was caused by asphyxiation/inhalation of the byproducts of combustion/smoke. In support, Appellants provided probative evidence consisting of: Grant County Coroner/Medical Examiner records indicating that Ms. Wilson died of asphyxia due to the inhalation of products of combustion (CP at 165).

(ii) There is evidence that an operable smoke detector was never installed in Ms. Wilson’s unit. In support, Appellants provided probative evidence consisting of: Mr. Slough testified that he did not recall ever installing or testing a smoke detector in Unit 1 before Ms. Wilson moved into the unit, and moreover, did not recall ever discussing the smoke detector with Ms. Wilson, including whether it functioned, prior to her occupation of the unit (CP at 379-80); and Mr. Trusty’s sworn, admissible, public record testimony that he did not hear any smoke detector alarms sound off from any of the units on the morning of the fire (CP at 136).

(iii) There is evidence that there were no operable smoke detectors installed in any of the units. In support, Appellants provided probative evidence consisting of: during the post-fire investigation of Unit 3, an uninstalled smoke detector in its original and unopened box was

discovered in the hallway closet (CP at 339); when asked about the smoke detector in its original box, unopened and uninstalled, Mr. Slough testified that he “could feel comfortable that he was the one that purchased it,” and had no recollection of installing a smoke detector prior to the United 3 tenants moving in, or even checking to see whether there was a functional smoke detector in the unit at all (CP at 336, 376, 378); Unit 4 did not contain a smoke detector whatsoever (CP at 198); and Mr. Trusty’s testimony that he had “never known [the smoke detector in his unit] to work” during the eleven (11) months that he had lived there, and that Slough had never done any sort of walkthrough with him of the apartment unit (CP at 135-136).

(iv) The separation wall between Unit 2 (Mr. Trusty) and Unit 1 (Ms. Wilson) was not fire-rated and adequately fire-resistant, thus allowing the rapid spread of fire and smoke. In support, Appellants provided probative evidence consisting of: the report of fire engineer expert Adam Farnham, PE, CSP, IAAI-CFI, in which Mr. Farnham renders opinions on a more probable than not basis based on his review of scene records, measurements, and photographs, as well as his extensive experience and training in fire safety and fire engineering (CP at 403-417).

(v) Ms. Wilson was sleeping at the onset of the fire and not awoken by a smoke detector alarm. In support, Appellants provided probative evidence consisting of: Mr. Trusty’s admissible testimony that Ms. Wilson was generally asleep during the early-morning hour at which the fire began; she generally slept in her bedroom; and Mr. Trusty did not

hear any smoke detector alarm go off. CP 116, 121, 136, 143.

(vi) When Ms. Wilson did wake up, she was only able to reach and slightly open her front door before immediately losing consciousness. In support, Appellants provided probative evidence consisting of: Mr. Trusty’s admissible testimony that while standing in front of his unit, which was immediately next to Ms. Wilson’s unit, he heard Ms. Wilson yell for the first time; this moment was also the first time that Mr. Trusty saw that her front door was now slightly cracked open, despite having previously been outside his unit; Mr. Trusty then immediately “went back over by [Ms. Wilson’s] door to see if I could help her, but I think she might of been unconscious at that time from that smoke” – that is, just moments after hearing her yell – and “was trying to yell back at her” to no avail (CP at 117-119); Mr. Trusty also testified that Ms. Wilson could ambulate in her apartment unit without a walker (CP at 121); and Grant County Coroner’s Office photographs show the charred remains of Ms. Wilson’s body just feet from her front door (CP at 116-18, 488-490).

(vii) If Ms. Wilson had been able to maintain consciousness for a short while longer and not asphyxiated – e.g. if she had been alerted at an earlier point in time by an operable smoke detector or subjected to less combustion byproducts due to a properly fire-rated separation wall – Ms. Wilson would have survived the fire. In support, Appellants provided probative evidence consisting of: *see above* evidence and testimony cited in Sections (i)-(vi), in particular records indicating that

Ms. Wilson died of asphyxia due to the inhalation of products of combustion (CP at 165); Mr. Trusty's testimony that while standing in front of his unit, he heard Ms. Wilson scream, saw for the first time that her door was slightly cracked, immediately went to her front door and yelled, but did not receive a response (CP at 117-119); Mr. Trusty's testimony that Ms. Wilson could ambulate in her unit without a walker (CP at 121); and photographs showing Ms. Wilson's body just feet from her front door (CP at 116-18, 488-490), as well as the expert opinions of Dr. Daniel Selove, discussed below.

In sum – and even before turning to the admissible expert opinions of Dr. Selove – Appellants have provided extensive probative, non-speculative evidence consisting of physical evidence from the subject apartment, admissible eyewitness testimony of Ms. Wilson's next-door neighbor, Mr. Slough's own testimony, professional fire investigator reports and photographs, autopsy records, and the expert opinions of Appellant's expert fire engineer to establish cause in fact. On this strong evidentiary basis alone, there is sufficient probative, non-speculative evidence to establish that: "but for" Slough's failures to maintain Ms. Wilson's unit in a safe and habitable condition as required under Washington law, Ms. Wilson would have survived the subject fire.

c. Cause in Fact: Dr. Selove's Admissible Expert Testimony.

Cause in fact is also supported by the expert testimony of board certified forensic pathologist Daniel Selove, M.D. Dr. Selove has over 25 years of experience as a pathologist and medical examiner. As discussed in

greater detail below, Respondent wholly misrepresents the content and scope of Dr. Selove's expert testimony in an attempt to improperly argue for the exclusion of admissible expert opinions. A cursory review of Dr. Selove's declaration shows that his opinions are centered on the impact of smoke and fire on Ms. Wilson's physiological and pathological responses. These opinions fall squarely within the scope of admissibility for a forensic pathologist. *See Martini*, 178 Wn. App. at 162-163 (forensic pathologist's opinions regarding cause of death and whether plaintiff could have survived the smoke created by a structure fire if she had access to fresh air through open window was admissible). Dr. Selove's opinions are offered neither with respect to the dynamics of smoke and fire structural dissemination, nor "fire investigation." Rather, based on relevant experience and training, the crux of Dr. Selove's opinion is that: Ms. Wilson died from smoke inhalation, and had she been exposed to smoke/carbon monoxide for a smaller period of time (minutes – if not one minute – less) or in less quantity, she would have survived the fire on a more probable than not basis.

Specifically, Dr. Selove's key, distilled opinion regarding cause in fact is "had Susan Wilson been notified...of the smoke accumulating in her apartment unit at an earlier point in time...if not less than a minute, earlier...it is more likely than not that she would have been able to...survive the structure fire and the resulting byproducts of combustion" – an opinion based on Dr. Selove's review of Ms. Wilson's autopsy records, medical records, and other scene records, as well as an analysis of her carbon

monoxide level, blood oxygen levels, and internal organs. CP at 445-447. Dr. Selove further opined that: (1) Ms. Wilson's pre-existing medical conditions did not contribute to – or expedite – her loss of consciousness and death by asphyxia and inhalation of products of combustion; and (2) there is no evidence that Ms. Wilson had any notable health problems impacting her ability to hear (*e.g.* a smoke detector alarm). CP at 446-47.

Dr. Selove also provided qualified, admissible opinions regarding Ms. Wilson's physiological and pathological responses to combustion byproducts, including that: the smoke would have irritated Ms. Wilson's eyes and made it difficult for her to see; as the smoke increased, Ms. Wilson's visual impairment would also increase; as the smoke increased, Ms. Wilson's difficulties breathing would also increase, thus detrimentally impacting her cognition; and as the smoke increased, Ms. Wilson would breathe in more-and-more smoke, thus increasing her chances of becoming unconscious from carbon monoxide intake and asphyxiation. CP at 445-46.

Even if the Dr. Selove's testimony were to be narrowed solely to the aforementioned opinions regarding the physiological responses and pathological analyses of Ms. Wilson's body – that is, isolated from his more comprehensive, albeit wholly admissible, opinions set forth in the context of Ms. Wilson's apartment unit layout – the remaining, fundamental expert opinion regarding cause in fact would remain true: namely, had Ms. Wilson's exposure to smoke/carbon monoxide been for a shorter period of time or in less quantity, Ms. Wilson would have not asphyxiated due to the

byproducts of combustion and survived the fire on a more probable than not basis. As a final point, on reconsideration, Appellants provided – and the trial court accepted and considered – Dr. Selove’s declaration; as such, Dr. Selove’s opinions are properly part of the Appellate Court’s de novo review. *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn. 128 Wn.2d 656, 675, n. 6, 911 P.2d 1301 (1996).¹

d. Respondent’s Causation Arguments are Highly Speculative.

Briefly, Appellants would be remiss to not address several of the Respondent’s bald-faced misstatements of evidence and testimony. Respondent contends that Ms. Wilson “likely exited her unit safely, yet returned in order to look for her dog or other personal items, given that the door was open.” Br. of Resp’t at 19. This statement is supported by zero (0) evidence or eyewitness testimony, but rather, is pure speculation of the nature which Respondent incessantly bemoans. Respondent claims that “there is no evidence...establishing Wilson’s level of hearing.” *Id.* This statement is also wholly unsupported by any evidence and directly contradicted by Dr. Selove who reviewed Ms. Wilson’s medical records. CP at 446-47. Respondent also claims that “Mr. Slough provided corroborating testimony concerning the fact that he installed a smoke detector in Wilson’s unit when she moved into her apartment.” Br. of Resp’t at 20. This contention is directly contradicted by Mr. Slough’s

¹ Trial courts can consider additional evidence presented for reconsideration. *Chen v. State*, 86 Wn.App. 183, 192, 937 P.2d 612 (1997); *see also Meridian Minerals Co. v. King Co.*, 61 Wn.App. 195, 203, 810 P.3d 31 (1991).

deposition testimony, as discussed at length above. CP at 379-80. Finally, without explanation, Respondent posits that “the failure to provide a diagram showing the emergency evacuation route from Wilson’s...apartment, could not possibly be considered a proximate cause of her death.” Br. of Resp’t at 20. First, in making this statement, Respondent concedes that it failed to comply with its statutory duty; second, this question is a genuine issue of material fact reserved for a jury who could easily determine that such a diagram could have assisted an elderly woman.

3. Dr. Selove’s Opinions are Admissible, Qualified, Non-Speculative, and Solely Address *Factual Causation*.

As noted above, Respondent blatantly misconstrues the content and scope of Dr. Selove’s testimony in an attempt to improperly argue for the exclusion of qualified and admissible expert opinions. At the core of Respondent’s improper arguments is a fundamental mischaracterization of Dr. Selove’s testimony as unqualified legal conclusions regarding “fire investigation” and “how the *fire* impacted Wilson’s ability to escape.” Br. of Resp’t at 27 (emphasis added). Dr. Selove never purports to be a fire investigation or fire dynamics expert. Rather, when read in context, Dr. Selove’s opinions pertain solely to Ms. Wilson’s physiological and pathological responses *to* the fire, and how these physiological and pathological responses would impact Ms. Wilson from a medical perspective, such as motor function, cognition, and ability to maintain consciousness. These opinions fall squarely within Dr. Selove’s medical expertise as a pathologist and are based his extensive review of records.

To begin, Dr. Selove's cited opinion – which Respondent incorrectly labels as a *legal* conclusion – is in fact an opinion (1) regarding the underlying *factual* issue of causation, and (2) the synthesis of his opinions regarding Ms. Wilson's physiological and pathological responses to the byproducts of combustion. Under Washington law, an expert witness may properly testify “as to the ultimate *factual* issue of causation.” *Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 168, 231 P.3d 1241 (2010) (emphasis in original). Indeed, ER 704 specifically provides that experts are permitted to testify regarding issues such as cause in fact, even though those issues will generally be decided by the trier of fact. *Id.*; ER 704. “[A]n expert opinion on an ‘ultimate issue of fact’ is sufficient to defeat a motion for summary judgment.” *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992). The “necessary degree of certainty is established if the expert can testify that his or her opinion regarding causation is more probable than not.” *Carlton*, 155 Wn. App. at 168.

Here, Dr. Selove's opinions are confined solely to a medical analysis of Ms. Wilson's physiology/pathology and a cause in fact analysis of how decreased exposure to combustion byproducts would have impacted Ms. Wilson's physiological/pathological functionality. Specifically, Dr. Selove's admissible, qualified medical expert opinions can be summarized as: (1) the byproducts of combustion (*e.g.* carbon monoxide/heat) impaired Ms. Wilson's physiological processes and ultimately resulted in loss of consciousness/death, and (2) if she had been exposed to the byproducts of

combustion for a shorter period of time and/or in less quantity, Ms. Wilson would have retained the requisite physiological capacity to maintain consciousness and motor function such that – on a more probable than not basis – she would have survived the fire – based on not only medical/autopsy records, but also evidence from the scene of the fire. These opinions are in no way “legal,” but rather, draw upon Dr. Selove’s expertise as a forensic pathologist to explain the impact of combustion byproducts on Ms. Wilson from a medical perspective. Respondent’s arguments misleadingly isolate and misstate the true scope of Dr. Selove’s opinions.

In fact, the Rules of Evidence permit and encourage expert testimony where such testimony would be helpful to the trier of fact. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). Such testimony is generally necessary to establish issues regarding medical causation in areas beyond an ordinary person’s lay knowledge. Rule 702 permits expert testimony in the form of an opinion. Rule 703 provides latitude for the expert to base his opinion on evidence made available before, or even at, a hearing, if the materials are of a type reasonably relied upon by experts in the field, regardless of whether they are admissible into evidence. ER 704 also permits opinions and inferences even if they embrace the ultimate issue to be decided by the trier of fact.

Respondent also argues that significant portions of Dr. Selove’s deposition and declaration testimony should be stricken as “unqualified.” Again, the subject, wholly admissible testimony pertains to Ms. Wilson’s

physiological and pathological responses to combustion byproducts – an area falling squarely within Dr. Selove’s expertise. Nevertheless, Respondent incorrectly re-frames Dr. Selove’s opinions as based in “fire investigation” and fire dynamics principles and expertise for which he lacks training. Br. of Resp’t at 27. A cursory review of the subject testimony demonstrates that Dr. Selove in no way attempts to opine on these purported topics; rather, Dr. Selove’s opinions are properly confined to explaining how – from a medical perspective – Ms. Wilson’s body, motor function, and cognition would have responded to exposure to smoke and fire.

Respondent also contends that Dr. Selove fails to articulate his qualifications for, and the evidentiary foundation of, his aforementioned admissible opinions. This contention is baseless as Dr. Selove articulates at length his decades of experience and training as a pathologist, doctor, and medical examiner, as well as the extensive records, photographs, and materials that he relied upon in forming his expert opinions. CP at 443-50.

Finally, Respondent incorrectly argues that Dr. Selove’s testimony is based on speculation. Respondent first argues that Dr. Selove’s “ultimate opinion” is based on speculation that the smoke detector in Ms. Wilson’s unit was inoperable. Br. of Resp’t at 27. Again, this wholly misstates Dr. Selove’s testimony. Dr. Selove’s central opinion is, based on his expert medical analysis, that if Ms. Wilson had less exposure to the byproducts of combustion (either temporally or in quantity), she would have survived the fire. *That is the core opinion*, which has nothing to do with smoke detectors.

Dr. Selove simply expands on this core opinion by stating that, assuming the smoke detector were inoperable, Ms. Wilson’s exposure would have been less if she had been awoken at an earlier point in time by the smoke detector alarm. Finally, without explanation, Respondent also argues that Dr. Selove speculates about “the very circumstances surrounding [Ms. Wilson’s] death.” *Id.* Again, this argument is without merit as the circumstances surrounding her death are undisputed: asphyxia due to the inhalation of products of combustion. CP at 165.

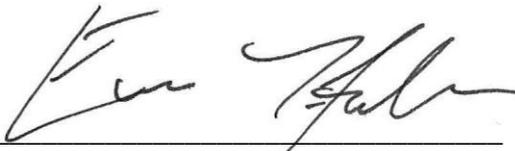
In closing, even if the Dr. Selove’s testimony were confined to a bare medical analysis of Ms. Wilson’s physiological and pathological responses, the following central, qualified expert opinion would remain admissible: had Ms. Wilson’s exposure to smoke/carbon monoxide been for a shorter period of time or in less quantity, Ms. Wilson would have retained the requisite physiological capacity to maintain consciousness and motor function such that – on a more probable than not basis – she would have survived the fire, thus establishing cause in fact and precluding dismissal.²

C. CONCLUSION

The trial court erred when it weighed facts and evidence in favor the moving party, granted the Respondent’s motion for summary judgment, and denied Appellants’ motion for reconsideration. The Court should reverse the trial court’s summary dismissal and remand this case for trial.

² See also, e.g., for purely illustrative purposes, these unpublished cases in which Dr. Selove has testified as an expert forensic pathologist: *State v. Bailey*, 157 Wn. App. 1026 (2010), and *State v. Smith*, 191 Wn. App. 1037 (2015) (both regarding causation and “physical processes in the body” underlying a victim’s loss of consciousness).

Dated this 15th day of February, 2018, in Seattle, Washington.

By 

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STATE OF WASHINGTON

SHAWN D. KENSINGER and GILLIAN O.
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ESTATE OF SUSAN MARIE WILSON,
Deceased;

Plaintiffs,

v.

SLOUGH INVESTMENT COMPANY,
LLC, a Washington LLC,

Defendant.

No. 354873

DECLARATION OF SERVICE FOR REPLY
BRIEF OF APPELLANTS

The undersigned declares and states under the penalty of perjury pursuant to the laws of the State of Washington as follows:

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

On February 16, 2018, I caused to be filed and served with the Clerk of the Court of Appeals, Division III, the Reply Brief of Appellants in this matter, along with this Declaration of Service, on the following individuals in the manner indicated:

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ATTORNEY FOR RESPONDENT:	<input checked="" type="checkbox"/> VIA EFILING THROUGH COURT

THOMAS J. COLLINS, ESQ. MERRICK, HOFSTEDT, & LINDSEY, P.S. 3101 WESTERN AVENUE, SUITE 200 SEATTLE, WA 98121	OF APPEALS [X] VIA EMAIL [] VIA FACSIMILE [] VIA U.S. MAIL
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Dated this 16th day of February, 2018.

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