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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,

v.

SLOUGH INVESTMENT COMPANY, LLC,
a Washington LLC,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Honorable David G. Estudillo properly dismissed Appellants' case against Respondent, recognizing the speculative nature of their claims. Respondent requests this Court affirm the decision of the Trial Court.

1) Appellants are unable to establish Respondent breached any duty owed to Susan Wilson. Appellants' claim that Respondent failed to install a functional smoke detector in Wilson's unit at the beginning of her tenancy is entirely speculative and not supported by the evidence. The relevant facts, which Appellants conveniently ignore, are that: (1) Wilson's Lease Agreement acknowledges her unit had been equipped with a functional smoke detector, (2) it was her responsibility under the terms of the lease to maintain the smoke detector, and (3) remnants of a smoke detector were found in her unit after the fire. Even assuming the smoke detector was not working at the time, the reasonable inference is that Wilson failed to maintain the smoke detector—given she had lived in the unit for nearly four years.

Appellants are also unable to establish a breach of duty with regard to their claim that Respondent failed to ensure interior walls in the subject four-plex were fire rated consistent with current construction code. In making such a claim, Appellants ignore the fact that the building complied

with the code in effect at the time of its construction. They also fail to come forward with authority supporting a duty to undertake a massive, structural, remodel under the instant set of facts. Therefore, the Court should disregard the unworkable standard proffered by Appellants.

2) Even assuming Appellants can establish a breach of duty on part of Respondent, they are unable to come forward with sufficient evidence demonstrating that such a breach was a proximate cause of Wilson's death. For instance, the evidence demonstrates Wilson was able to vacate her unit in a timely manner because her front door was found to be open after the fire. However, it appears she went back inside her apartment for reasons unknown to the parties, and that decision resulted in her asphyxiation and subsequent death. Given such evidence, a jury could only speculate as to whether Wilson's death resulted from some act of Respondent rather than from her own conduct.

The Trial Court's dismissal of Appellants' case should, therefore, be affirmed.

II. ISSUES ON APPEAL

ISSUE 1: Did the Trial Court properly dismiss Appellants' claim when they failed to come forward with sufficient evidence demonstrating Respondent breached a duty owed to Susan Wilson?

ANSWER: Yes.

ISSUE 2: Did the Trial Court properly dismiss Appellants' claim when they failed to come forward with sufficient evidence demonstrating that an alleged act of Respondent was the proximate cause of Susan Wilson's death?

ANSWER: Yes.

III. STATEMENT OF THE CASE

A. Background

Susan Marie Wilson died from smoke inhalation in a fire in a rental apartment on November 14, 2012, in Soap Lake, Washington. The fire is believed to have been caused by the occupant of the adjacent apartment, Dennis Trusty, who deposited remnants of a burning cigarette in a wastebasket in his apartment. CP at 251.

The adult children, as personal representatives of the Estate of Susan Marie Wilson, brought this action seeking damages from the owner of the apartment building, Slough Investment Company, asserting a cause of action based on negligence. Petitioners allege that Respondent rented Susan Marie Wilson an apartment which did not comply with codes, ordinances and regulations regarding the health and safety of tenants.

B. Respondent installed a working smoke detector in Ms. Wilson's apartment when she took possession of the unit and, under the plain terms of the Lease Agreement, she assumed the duty of maintaining the smoke detector.

The building at issue is a four-unit, one story, apartment building located at 318 SE Sixth Avenue in Soap Lake, Washington. It was purchased by Slough Investment Company in 1993.¹ Frederick Slough is the principal member of the Respondent LLC and was responsible for managing the building.

As manager of the building, Mr. Slough's duties were to prepare apartment units for new tenants, including cleaning, painting, damage repair, and to explain the terms and conditions of the lease/rental agreement. CP at 244. Mr. Slough was aware of and complied fully with all requirements concerning smoke detectors at the beginning of each new tenancy. Part of his routine business habit and practice was to test smoke detectors in his units prior to new tenants moving in. *Id.* Although he cannot specifically recall each instance where a smoke detector was tested, he can state that he always tested smoke detectors before or at the beginning of each new tenancy, including prior to Ms. Wilson moving into apartment unit number one. *See id.*

¹ No additional construction or remodel work had been accomplished by the Respondent from the time of purchase up through the fire.

Wilson signed her Lease on February 11, 2009. CP 329-331. Section 16 of the Lease includes an acknowledgment that the lessor certifies the property is equipped by a smoke detector as required by RCW 43.44.110, and that the detector has been tested and is/are operational:

SMOKE DETECTOR. Tenant acknowledges and Lessor certifies that the Property is equipped with a smoke detector(s) as required by RCW 43.44.110 and that the detector(s) has/have been tested and is/are operable.

CP at 330.²

The Lease Agreement also specifically provides, consistent with state law, that “It is the *Tenant’s responsibility to maintain the smoke detector(s)* as specified by the manufacturer, including replacement of batteries, if required.” *Id.* (emphasis added); *see* CP at 329 (pursuant to paragraph 7 of Ms. Wilson’s lease, she also agreed to “maintain the property...”). The text in the Lease Agreement mirrors the statutory text as found in the smoke detector statute, Chapter 43.44 RCW.

C. Remnants of Ms. Wilson’s smoke detector were discovered in her unit after the fire, but it was impossible to tell whether or not the smoke detector was working at the time of the fire.

Respondent’s certified fire investigation expert, Ken Rice, TIFireE, CFI, CFEI, CVFI, PI, CFM, CBO, conducted an investigation of the fire.

² Wilson’s neighbor, Dennis Trusty, signed an identical lease and similarly acknowledged that his unit had been equipped with a functional smoke detector. CP at 325.

CP 250.³ He determined the likely origin was a kitchen trash can which was located in an adjoining unit occupied by Dennis Trusty (unit two). CP 251. The cause was determined to be a discarded cigarette. *Id.*

As part of his investigation, Mr. Rice examined the fire scene on a number of occasions, including several days after the fire. CP 250. He found remnants of a smoke detector in Ms. Wilson's apartment. CP at 252. However, due to fire damage, it was impossible to tell whether or not the detector was functioning at the time of the fire. *See id.*

Notably, upon vacating his apartment, Mr. Trusty observed the front door to Wilson's apartment, unit one, was partially open. *See CP 251.* Based upon this information, Rice concluded that Wilson likely was alerted to the fire, possibly by her smoke detector:

The fact that the door to Susan Wilson's apartment unit was partially open tends to prove that Ms. Wilson was somehow alerted to the fire, was able to exit her bedroom, she was able to get to the front door, and able to unlock and open it. Knowing that she had a dog inside the apartment it could be presumed that she turned and went back into the apartment to get her dog.

CP 251.

³ The City of Soap Lake also hired independent investigators, Q Global. However, that entity listed the cause of the fire as "undetermined." *See CP at 152.*

D. Although Appellants claim the wall between units one and two was not sufficiently fire rated, there is no evidence supporting that Respondent had notice of this issue or that he was required by law to bring the building up to current code.

In addition to Appellants' claim regarding smoke detectors, they assert Respondent was negligent for failing to have separation walls between units one and two with a sufficient fire rating. However, Mr. Slough was not "aware of the interior walls of units one and two being deficient with regard to fire rating." CP at 247.

Moreover, Mr. Rice opines that the building codes in effect at the time of construction (1956) did not include requirements for fire resistance performance of walls between apartment units. CP at 251. Appellants present no evidence of construction or remodeling work in the building which would have triggered a duty to bring the walls up to current code.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review

Appellants' Notice of Appeal seeks review of the Order Granting Defendant's Motion for Summary Judgment, entered on June 22, 2017, and Order Denying Plaintiff's Motion for Reconsideration entered on August 7, 2017. CP 633-37, 702-03. The standard of review of a trial court's decision to grant or deny a motion for reconsideration is abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 150, 89 P.3d 726 (2004).

The standard of review of an order on summary judgment is de novo, with the appellate court engaging in the same inquiry as the trial court. *Brower v. State*, 137 Wn.2d 44, 52, 969 P.2d 42, cert. denied, 526 U.S. 1088 (1999).

A defendant may move for summary judgment by simply pointing out to the Court that there is an absence of evidence to support the plaintiff's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548 (1986). Then the inquiry shifts to the party with the burden of proof at trial, the plaintiff, to establish all elements essential to that party's case. *Id.* In order to make this showing, the party opposing summary judgment must submit "competent testimony setting forth specific facts, as opposed to general conclusions, to demonstrate a genuine issue of material fact." *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993).

If a non-moving party fails to make a showing sufficient to establish the existence of an element of that party's case, and on which that party bears the burden of proof at trial, then summary judgment should be granted. *Young*, 112 Wn.2d at 225. In such situations, there can be "no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of a non-moving party's case

necessarily renders all other facts immaterial.” *Id.*, citing *Celotex*, 477 U.S. at 322-23.

The non-moving party may not rest upon the mere allegations or denials of its pleadings. In order for the non-moving party to prevail on a motion for summary judgment, the party must either, by affidavits or as otherwise provided in the civil rules, set forth specific facts showing that there is a genuine issue for trial. CR 56(e). The non-moving party may not rely on speculation or argumentative assertions that unresolved factual issues remain, but instead “must set forth specific facts that sufficiently rebut the moving party’s contentions.” *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. Landlord Liability for Defective Conditions on the Leased Premises.

To maintain a cause of action for negligence, a plaintiff must show each of the following essential elements: (1) the existence of a duty owed to the plaintiff, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between the breach and the injury. *The-Anh Nguyen v. Seattle*, 179 Wn. App. 155 (2014). The threshold question is whether a duty exists under the facts of this case and under the applicable law. *See, e.g., Cummins v. Lewis County*, 156 Wn. 2d 844 (2006) (“In a negligence action, the determination of whether an actionable duty was owed to the

plaintiff represents a question of law to be determined by the court”); *Christensen v. Royal School District No. 160*, 156 Wn. 2d 62, 67 (2005) (“Existence of a legal duty is a question of law and depends upon mixed considerations of logic, common sense, justice, policy, and precedent.”)

Under Washington law, a tenant may base a claim for personal injuries or death against a landlord by showing that the landlord breached a duty under (1) the rental agreement, (2) common law, or (3) the Residential Landlord Tenant Act. *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 470 (2001).

In general, a landlord is not liable to a tenant for injuries that are caused by a defective condition on the leased premises. *Brown v. Hauge*, 105 Wn. App. 800, 804, 21 P.3d 716 (2001); Restatement (Second) of Torts § 356 (1965). However, the Restatement (Second) of Property provides the following exception to the general rule of no liability:

A landlord is subject to liability for physical harm caused to the tenant ... by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:

- (1) an implied warranty of habitability; or
- (2) a duty created by statute or administrative regulation.

Restatement (Second) of Property (Landlord & Tenant) § 17.6 (1977). To establish liability under § 17.6, the tenant must show: (1) the condition

was dangerous; (2) 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) the existence of the condition was a violation of an 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”).

In Washington, the warranty of habitability is codified in the Residential Landlord Tenant Act. *See* RCW 59.18.060:

The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular:

(1) Maintain the premises to substantially comply with any applicable code, statute, ordinance or regulation governing their maintenance or operation ... if such condition substantially endangers or impairs the health or safety of the tenant[.]

Generally, the implied warranty of habitability only applies when the defects in a particular dwelling render it uninhabitable or pose an actual or potential safety hazard to its occupants. *Howard v. Horn*, 61 Wn. App. 520, 525, 810 P.2d 1387 (1991); 17 Wash. Prac., Real Estate § 6.35 (2d ed.) (“[A] duty to keep residential premises in “habitable” condition is not as broad as a covenant to make all kinds of repairs; it reaches to only those defects that make premises uninhabitable.”).

Instructive to the case at bar, the Washington State Supreme Court has noted “[o]ther cases in Washington brought under the implied

warranty of habitability premise recovery upon proof of **defects which profoundly compromise the essential nature of the subject property as a dwelling**” *Stuart v. Coldwell Banker Commercial Grp., Inc.*, 109 Wn.2d 406, 416, 745 P.2d 1284 (1987) (citing *Klos v. Gockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976) (recovery denied where patio and backyard were damaged by a mud slide and the settling of fill, but house itself suffered only minimal damage) (emphasis added); *see also Allen v. Anderson*, 16 Wn. App. 446, 557 P.2d 24 (1976) (alleged foundation faults, cracks and bows in retaining walls, dismissed on other grounds); *Gay v. Cornwall*, 6 Wn. App. 595, 494 P.2d 1371 (1972) (leaks in roof, plumbing defective, sewer pipe dumped raw sewage into crawl space, furnace motor burned out, drain field washed away).

C. Respondent did not breach any of its duties under the Implied Warranty of Habitability or the RLTA with regard to (1) the separation walls or (2) the smoke detectors.

1. There is no evidence supporting that Mr. Slough failed to install a smoke detectors in Wilson’s apartment or that her smoke detector was not working at the time of the fire.

All of the available evidence demonstrates that Mr. Slough installed smoke detectors in units one and two, where the fire occurred. Slough testified that, although he did not specifically recall installing Wilson’s smoke detector (nearly four years before the fire), it was his routine business habit and practice to install smoke detectors in each unit

either before or at the time a tenant first moved in. CP at 244. Both tenants also acknowledged in their respective Lease Agreements that the units were equipped with smoke detectors as required by RCW 43.44.410 and that the detectors had been tested and were operable. *See* CP at 323-331.

Further, the leases and relevant state law provide it was the tenant's responsibility to maintain the smoke detectors as specified by the manufacturer, including the replacement of batteries. Thus, even assuming the smoke detector did not go off in Ms. Wilson's apartment (an assumption which is not supported by any admissible evidence), the most logical inference is that she failed to maintain it as required by law (Wilson had been living in the apartment for nearly four years).

With regard to whether or not the smoke detector in Wilson's unit was working at the time of the fire, Appellants rely entirely on the inadmissible hearsay of Wilson's deceased neighbor, Dennis Trusty. The fact that Trusty may not have heard Wilson's smoke detector "chirping" does not mean it did not go off, particularly given that he vacated the building after the fire began in his unit.

Lacking admissible evidence supporting the claim that the smoke detector in Wilson's unit was improperly installed, Appellants put forth an argument wholly reliant on impermissible speculation and conjecture. For

instance, they speculate that units three and four may not have had fully functional smoke detectors installed at the time of the fire and that it was due to some failure on part of Respondent. However, even if the Court were to accept those assertions, they do not create an issue of fact as to whether a functional smoke detector was installed in Wilson's unit at the outset of her tenancy—particularly given the abundance of evidence to the contrary.

2. Appellants fail to demonstrate Slough breached a duty with regard to the fire rating of the interior wall between units one and two.

Even assuming the requirement that an interior wall was required to be “fire rated,” and that the fire rating of the wall between units one and two did not meet that requirement, such a condition would constitute a latent defect.⁴ A landlord is only liable to a tenant for latent or hidden defects of which he or she has actual knowledge. *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994); *Aspon v. Loomis*, 62 Wn. App. 818, 825-26, 816 P.2d 751 (1991) (latent defect theory does not impose upon the landlord any duty to discover obscure defects or dangers); *see also* Restatement (Second) of Property (Landlord & Tenant) § 17.6 (1977) (to establish liability under § 17.6, the tenant must show, *inter alia*, that the landlord was aware of the condition or had a reasonable opportunity to

⁴ Moreover, Respondent contests Appellants assertion that this constituted a dangerous condition.

discover it). Since Respondent had no knowledge that the interior wall between units one and two was not fire rated, he had no duty to inspect and/or rectify that alleged condition (even assuming the wall was non-compliant).

The Uniform Code of Abatement of Dangerous Buildings, referenced by Appellants, does not create an affirmative duty for property owners to seek out potentially dangerous conditions. Rather, it is an administrative mechanism for the local “building official” to abate the hazard of a dangerous building. Nothing in the code speaks to an individual landowner’s duty to inspect and discover latent defects:

The provisions of this code were developed *to afford jurisdictions reasonable procedures* for the classification and abatement of dangerous buildings.

...

If properly followed, the provisions of this code *will provide the building official* with the proper legal steps in abating dilapidated, defective buildings which endanger life, health, property and public safety within concepts of fair play and justice.

Uniform Code of Abatement of Dangerous Buildings 15.20.010 (emphasis added).

Appellants’ reliance on *Lian v. Stalick*, 115 Wn. App. 590, 62 P.3d 933 (2003) is misplaced. First, there is no evidence supporting their contention that Mr. Slough had a “reasonable opportunity” to discover that the interior wall between units one and two was not properly fire rated,

assuming that was even the case. Second, even a cursory review of *Liam* reveals the “reasonable opportunity” requirement still necessitates that the landowner have some reasonable form of notice regarding the alleged dangerous condition, which is plainly not the case here.

Appellants’ assertion that property owners have an affirmative duty to inspect and then bring a pre-existing building up to new code is not only unsupported by law or fact, it seeks to create an unworkable standard that simply does not exist. This argument should be disregarded, for policy reasons alone.

3. Appellants cannot establish the mechanism of Wilson’s death. The injury alone is insufficient to impose liability on Respondent.

In a negligence action, the claimant has the burden of establishing a defendant's negligence proximately caused the injury alleged. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). The “proximate cause” of an injury is that cause which, in a natural and continuous sequence, unbroken by any new independent cause, produces the event, and without which that event would not have occurred. *Stoneman v. Wick Construction Co.*, 55 Wn.2d 639, 643, 349 P.2d 215 (1960).

Proximate cause contains two separate elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact “refers to the physical connection between an act

and an injury.” *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 194, 252 P.3d 914 (2011) (internal quotation marks omitted) (quoting *Ang v. Martin*, 154 Wn.2d 477, 482, 114 P.3d 637 (2005)). Although cause in fact is usually a question for the jury, it may be decided as a matter of law if the causal connection between the act and the injury is “so speculative and indirect that reasonable minds could not differ.” *Doherty v. Metro. Seattle*, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996).

As the Court in *Hansen v. Wash. Natural Gas Co.* held, injury alone is insufficient to prove a breach of duty, and a claim of negligence cannot be inferred from the mere fact that an injury occurred. 95 Wn.2d 773, 778, 632 P.2d 504 (1981). A plaintiff must establish that there is a causal connection between the injury and the alleged negligent conduct. The court observed that “proof of negligence in the air, so to speak, will not do.” *Id.* at 779 (quoting 2 F. Harper & F. James, *Torts* § 18.2, at 1019 (1956)). Here, Appellants cannot establish a direct causal link to the alleged conduct of Respondent and Wilson’s death.

In *Marshal v. Bally's Pacwest, Inc.*, the Court of Appeals addressed a similar issue. 94 Wn. App. 372, 381; 972 P.2d 475 (1999) (“A claim of liability resting only on a speculative theory will not survive

summary judgment.").⁵ In *Marshal*, plaintiff claimed to have been injured while exercising on a treadmill at a Bally's health club. *Id.* at 374. Plaintiff alleged that the machine was defective in that it started to move the tread too quickly causing her to be thrown from it. *Id.* However, in testimony it was established that plaintiff had no memory of and could not articulate specific facts about how the accident occurred; only that she had fallen. *Id.* at 379. The Court of Appeals held that plaintiff's inability to offer evidence, as contrasted with a "theory" of the injury causing event, was insufficient and dismissal was required as a matter of law. *Id.* at 370-81.

The Court held that a verdict cannot be founded on a mere theory of speculation by a jury:

If there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

Id. at 379 (quoting *Gardner v. Seymour*, 27 Wn 2d 802, 809; 180 P.2d 564 (1947)).

⁵ *Marshal* has been favorably cited in a number of recent opinions. See *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006) (affirming summary judgment for contractor where plaintiff had no memory of accident); *Wilson v. City of Seattle*, 146 Wn. App. 737, 194 P.3d 997 (2008) (affirming summary judgment for city with regard to plaintiff's fall into manhole).

The cause of an injury is considered speculative “when, from a consideration of all the facts, it is as likely that it happened from one cause as another.” *Cho v. City of Seattle*, 185 Wn. App. 10, 16, 341 P.3d 309 (2014). Indeed, evidence demonstrating a defendant may have caused the claimant’s injury does not suffice:

Testimony that goes no further than to indicate that the injury *might have* caused the condition is insufficient; there *must* be some evidence of probative value that removes the question of causal relation from the field of speculation and surmise. *If there is no evidence of causation beyond a possibility, it is error to submit the case to the jury.*⁶

Lewis v. Simpson Timber Co., 145 Wn. App. 302, 323, 189 P.3d 178, 190 (2008) (quoting *Zipp v. Seattle Sch. Dist.*, 36 Wn. App. 598, 599, 676 P.2d 538 (1984) (emphasis added).

Here, Appellants case would require a jury to speculate at every turn. For instance, there is no evidence on the record establishing Wilson’s level of hearing. As she was an elderly woman in ill health, it is possible she simply did not hear the alarm provided. The evidence also demonstrates that Wilson likely exited her unit safely, yet returned in order to look for her dog or other personal items, given that her door was open. Under these facts, a jury could only speculate as to whether some act of Mr. Slough rather than Ms. Wilson led to her death.

⁶ *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 323, 189 P.3d 178, 190 (2008) (quoting *Zipp v. Seattle Sch. Dist.*, 36 Wn. App. 598, 599, 676 P.2d 538 (1984) (emphasis added).

Regardless, Wilson's lease states her unit was equipped with a smoke detector when she moved in. Further, Mr. Slough provided corroborating testimony concerning the fact that he installed a smoke detector in Wilson's unit when she moved into her apartment. Any argument by Appellants to the contrary relies on the exact type of speculation and conjecture which courts have repeatedly held to be insufficient for purposes of overcoming summary judgment.⁷ *See Marshal and Lewis, supra.*

Appellants' lengthy discussion debating whether or not Respondent checked off certain disclosures in Wilson's lease further highlights the futility of their argument. *See* Brief of Appellant at pp. 17-19. For example, the failure to provide a diagram showing the emergency evacuation route from Wilson's 500 square foot, one bedroom apartment, could not possibly be considered a proximate cause of her death.

As far as the Declaration of Dr. Selove is concerned, Respondent does not dispute that Ms. Wilson died from smoke inhalation. However, Selove's ultimate opinion concerning causation clearly constitutes an inadmissible legal conclusion and is based upon several layers of speculation. Appellants cannot establish that some act of Respondent was

⁷ For instance, Appellants speculate that units 3 and 4 never had smoke detectors installed. However, even if that is the case, it has no bearing on the instant analysis concerning Ms. Wilson's unit.

the cause of Wilson's death by simply having their expert state that was the case.

Finally, even assuming Appellants could somehow establish a duty on part of Respondent to conduct a major remodeling project in order to bring the building up to current code, a jury could only speculate as to whether a fire rated wall would have prevented Wilson's death. This is particularly true given that Wilson appears to have successfully vacated her apartment and then returned.

The cases relied upon by Appellants in support of their causation argument are either distinguishable from the instant case or support dismissal. For instance, *Rucschner v. ADT, Sec. Systems, Inc.*, 149 Wn. App. 665, 204 P.3d 271 (2009) and *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) involved clearly established conduct on part of the defendants, rather than a mere speculative theory that the defendants "may have" done something—such as alleged here.⁸

Lynn v. Labor Ready, Inc., 92 Wn. App. 326, 966 P.2d 351 (1998) and *Hartley v. State*, 103 Wn. 2d 768, 698 P.2d 77 (1985) support

⁸ In *Rucschner*, the court held there was an issue of fact concerning whether ADT's failure to conduct a background check was a proximate cause of a minor being raped. However, there was no dispute concerning whether ADT failed to conduct a background check or whether the rape occurred. Similarly, in *Taggart* there was no disputing that the parole board had released prisoners and that those individuals conducted assaults upon their release.

dismissal of Appellants' claims as both of those cases affirmed dismissals due to insufficient evidence of proximate cause.

Appellants also misleadingly cite to the dissenting opinion in *Lowman v. Wilbur*, 178 Wn.2d 165, 178, 309 P.3d 387 (2013) for the proposition that establishing duty and breach automatically resolves the issue of causation. See Appellants' Brief at p. 20. *Lowman* involved an easily distinguishable set of facts where a breach clearly would be considered a proximate cause of the plaintiff's injuries. *Id.* at 171 ("If Lowman's injuries were in fact caused by the placement of the utility pole too close to the roadway, then they cannot be deemed too remote for purposes of legal causation.").

Appellants' case requires the fact finder to speculate at every turn. First, the Court must find there to be sufficient evidence to allow a jury to conclude Ms. Wilson's smoke detector was not working at the time of the fire. Yet, there is no admissible evidence supporting such an assertion. Second, the Court must find there to be sufficient evidence supporting the claim that the smoke detector was not properly installed when Wilson moved into the apartment, even though her lease and the testimony of Mr. Slough directly contradict that assertion. Thus, since Appellants are only capable of presenting a speculative theory to a jury, the Court should

affirm the decision of the Trial Court dismissing the claims against Slough Investment Company.

D. The Court should not consider the inadmissible testimony contained in the Declaration of Daniel M. Selove, M.D.

In considering the merits of a motion for summary judgment, the court is required to consider only “such facts as would be admissible in evidence.” CR 56(e). Inadmissible evidence should be disregarded by the court in a summary judgment proceeding pursuant to CR 56(e), which states:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

See also ER 402.

Washington courts routinely exclude opinions, whether lay or expert, which are based on “unsubstantiated assumptions” or speculation. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 762, 27 P.3d 246 (2001) quoting *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994) (“[w]here there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.”).

Dr. Selove’s testimony which was submitted in support of Appellants’ motion for reconsideration contains inadmissible legal

conclusions, offers unqualified opinions on topics for which he lacks sufficient experience or expertise, and is speculative. *See* CP 443-446. These portions of Selove’s Declaration are inadmissible pursuant to ER 702 and should be stricken.

1. Selove’s inadmissible legal conclusions should be disregarded.

Selove’s Declaration recites the following inadmissible legal conclusion regarding causation:

Ultimately...I am of the opinion that had Susan Wilson been notified by a smoke detector of the smoke accumulating in her apartment unit at an earlier point in time – that is, a matter of minutes, if not less than a minute, earlier – it is more likely than not that she would have been able to navigate and exit her apartment unit and survive the structure fire and the resulting byproducts of combustion.⁹

CP at 446.

Experts may not offer legal opinions or conclusions under the guise of expert testimony. *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003). Expert opinions offering legal conclusions are barred under Rule 702 because they do not “assist the trier of fact to understand the evidence or to determine a fact in issue.” ER 702; *Stenger v. State*, 104 Wn. App. 393, 408-09, 16 P.3d 655, 664 (2001). No witness, lay or expert, is permitted to express an opinion that is a conclusion of law, or

⁹ Declaration of Dr. Selove at ¶ 4.

merely tells the trier of fact what result to reach. ER 704; Opinion on Ultimate Issue, 5D Wash. Prac., Handbook Wash. Evid. ER 704 (2016-17 ed.). Expert opinions cannot create an issue of material fact based solely on legal conclusions. *Stenger*, 104 Wn. App. at 408-09.

The primary focus of Selove's Declaration is an inadmissible legal conclusion stating that the "cause" of Ms. Wilson's death was the lack of a functioning smoke detector in her apartment. This "opinion" is not helpful to the finder of fact but, rather, is a clear attempt to usurp the function of the fact finder. It should be excluded.

2. Selove's unqualified opinions should be stricken.

Selove's Declaration states the following opinions on matters for which he lacks special knowledge, skill, experience, or training and is not a qualified expert:

My opinion, as I stated, is ... that her experience is that she experienced several minutes or longer of consciousness before dying of smoke inhalation, and during that time, **she had an inability to adequately see. She would have been feeling her way around in the apartment to try to navigate whether -- well, she would have been impaired in what she could see. She would have had difficulty trying to breathe inability to adequately breathe. She would have had the discomfort of breathing hot air, which didn't satisfy what we call our air hunger or our thirst for air.... She would have been at various progressing stages of her experience with headache, confusion,** the nonmedical lay understanding that we all have of being afraid in a smoke-filled room with the knowledge that there's a fire and being afraid or panicked

about how to get out or how to save one's self from being burned in a burning building. In addition, **the heat would be painful, whether it's in her airways or on her face and her skin, because a smoke-filled room is not only obscuring her vision, but it's a very hot environment. So panic, fear, confusion, pain and discomfort from the heat, inability to breathe, inability to see, those are experiences over a period of a few minutes until she becomes unconscious and subsequently dies.**

CP at 445 (emphasis added).

But in addition, her vision is impaired by the opaqueness of the density of smoke in the room. **So she couldn't see adequately. She had to find her way by feel or like a blind person in this smoke-filled residence.**”

Id. (emphasis added).

“Ultimately...I am of the opinion that **had Susan Wilson been notified by a smoke detector of the smoke accumulating in her apartment unit at an earlier point in time – that is, a matter of minutes, if not less than a minute, earlier – it is more likely than not that she would have been able to navigate and exit her apartment unit and survive the structure fire and the resulting byproducts of combustion.**”

Id. (emphasis added).

These portions of Selove’s Declaration should be stricken because they offer opinion on matters for which he is not an expert. “A witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ER 702. Conversely, an expert whose affidavit does not show how he is qualified to make the determination is not competent to testify to the

matters stated therein. *See Lilly v. Lynch*, 88 Wn. App. 306, 320 (1997) (striking the affidavit of an expert who did not state how he was qualified to make the determination).

Dr. Selove is a pathologist and does not have any stated experience in fire investigation. Although he may have spoken with a firefighter about structure fires, this does not qualify him as an expert capable of rendering opinions concerning how the fire impacted Wilson's ability to escape her apartment.¹⁰ These are opinions on topics for which Selove has no expertise and, thus, they should be disregarded.

3. Selove's declaration is based upon speculation and conjecture.

Dr. Selove's ultimate opinion is largely based upon Appellants' speculation that the smoke detector in Wilson's unit was not working at the time of the fire. He also speculates about the very circumstances surrounding her death (*e.g.*, the process of her becoming asphyxiated). As such, the Court should disregard Selove's speculative opinions. *See Cho v. City of Seattle*, 185 Wn. App. 10, 20-21, 341 P.3d 309 (2014) (two expert declarations disregarded as speculative; summary judgment granted).

¹⁰ Although an expert may rely on hearsay to assist in forming their opinions, they cannot simply regurgitate the opinions of an unknown third party. *See* ER 703.

V. CONCLUSION

Appellants fail to present a genuine issue of material fact to justify a trial on the merits of their claims against Respondent. First, they are unable to establish a breach of duty based upon their argument that Respondent failed to install a functional smoke detector in Wilson's unit. Second, Appellants fail to raise a genuine issue of fact with regard to the fire rating of the interior wall between units one and two. Not only was Mr. Slough unaware of this alleged latent condition, but Appellants fail to cite authority creating an affirmative duty to bring a building up to current code under the instant facts.

Appellants also fail to establish that the alleged acts of Respondent were the proximate cause of Wilson's death. At best, a jury could only speculate as to whether such a causal connection exists. It is well-established in Washington that a party cannot use speculation in order to overcome summary judgment. The Trial Court's dismissal should be affirmed.

DATED this 12th day of January, 2018

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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

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

Appellants,

v.

SLOUGH INVESTMENT COMPANY,
LLC, a Washington LLC,

Respondent.

No. 354873

DECLARATION OF SERVICE FOR
BRIEF OF RESPONDENT

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.

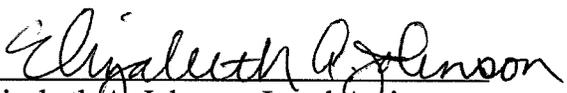
On January 12, 2018, I caused to be filed and served with the Clerk of the Court of Appeals, Division III, the Brief of Respondent in this matter, along with this Declaration of Service, on the following individuals in the manner indicated:

The Court of Appeals Division III Court Administrator/Clerk 500 N Cedar Street Spokane, WA 99201	VIA E-FILING
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<u>Attorney for Appellants:</u> Lincoln C. Beauregard Connelly Law Offices, PLLC 2301 North 30th Street Tacoma, WA 98403 (253) 593-5100 lincolnb@connelly-law.com	VIA E-FILING AND EMAIL
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DATED this 12th day of January, 2018.

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