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No. 36414-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE PHOENIX INSURANCE COMPANY,
a foreign corporation,

Appellant,

v.

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

Respondents.

BRIEF OF APPELLANT

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Spokesman-Review, June 29, 2017. <http://www.spokesman.com/stories/2017/jun/28/fire-evacuation-orders-issued-in-parts-of-grant-co/>20

A. INTRODUCTION

On June 28, 2015, a fire caused considerable damage in Wenatchee's business district. Located in Wenatchee's warehouse district, Michelsen Packaging Company ("Michelsen") provided packaging services and conducted recycling operations at its site. Northwest Wholesale, Inc. ("Northwest") also provided packaging services from its property for the fruit industry. Their negligent maintenance of their adjoining premises caused combustible materials to catch fire, and that fire spread from their premises to the property of Blue Bird, Inc. ("Blue Bird"), a fruit growers cooperative, whose warehouse burned. Phoenix Insurance Company ("Phoenix") paid for the damages to Blue Bird's warehouse and is subrogated to Blue Bird's claims against Michelsen/Northwest.¹

On summary judgment, the trial court correctly ruled that Michelsen/Northwest owed Blue Bird a duty of care. It erred, however, in ruling as a matter of law on proximate cause in the face of competing expert witness testimony confirming that the damages to Blue Bird's warehouse originated from fires on Michelsen/Northwest's ill-kept premises that housed ample combustible materials.

¹ For the reasons enumerated *infra* in n.5, Phoenix will refer to Blue Bird as the plaintiff/appellant in this action, given its role as Blue Bird's insurer, CP 7 and the subrogee herein.

This Court should reverse the trial court's premature resolution of causation as a matter of law and allow Blue Bird its day in court before a jury.

B. ASSIGNMENT OF ERROR

(1) Assignment of Error

1. The trial court erred in entering its order on summary judgment on November 9, 2018, incorporating an October 2, 2018 letter ruling.

(2) Issue Pertaining to Assignment of Error

Where the trial court correctly ruled that Michelsen/Northwest owed a duty of care to Blue Bird as to the spread of fire from combustible materials negligently maintained on their premises, did the trial court err in ruling as a matter of law that Michelsen/Northwest's breach of that duty did not proximately result in the damages to Blue Bird's premises where proximate cause is ordinarily a question of fact, and Blue Bird provided ample evidence, including expert testimony, on causation? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

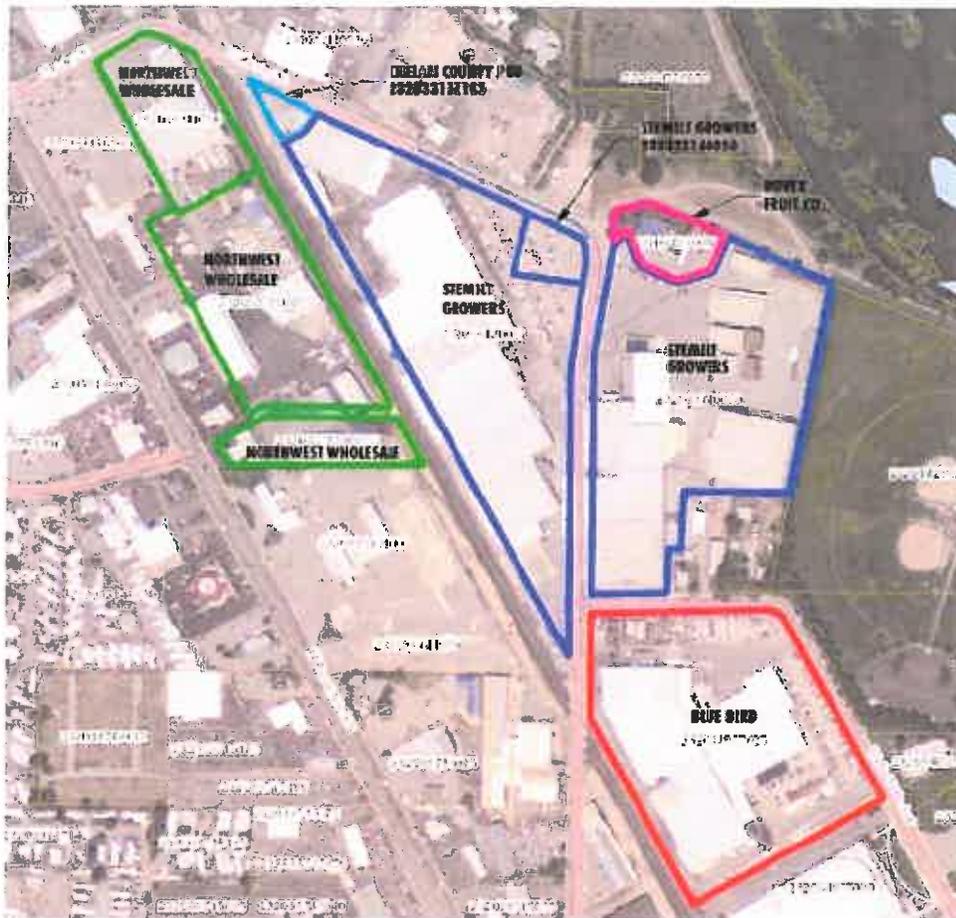
Blue Bird and Michelsen/Northwest operate businesses in the fruit harvesting, packaging, and distribution industries in Wenatchee's commercial warehouse district. CP 572. Operating related businesses in close proximity to one another, they are intermittently both competitors and customers of one another. *Id.*

Phoenix's subrogor, Blue Bird, is the oldest cooperative of fruit growers, packers and shippers in Central Washington. *Id.* Founded in 1913, Blue Bird operates three Washington locations and focuses its operations on pears, apples, and cherries. *Id.* Blue Bird's Wenatchee location is central to its cherry operations. *Id.*

Michelsen is a "leading produce packaging and equipment manufacturer and distributor" with a primary service area covering the entirety of North America. CP 564. Michelsen's business is primarily focused on manufacturing paper and plastic products that have been specially designed for shipping and packaging fresh produce. *Id.* At the time of the fire here, it stored inventory used for that business in an outdoor yard. CP 8, 14-15. Michelsen also provided recycling services at its Wenatchee location, commonly referred to as Central Washington Recycling. CP 566. As part of its recycling services, Michelsen allowed the public to drop off large quantities of loose cardboard, which were then baled, stacked, and stored on its premises. *Id.* The Michelsen recycling facility was open to the public twenty-four hours a day, seven days a week. CP 201. This lot was not monitored or secured, and any person was permitted to enter and exit at any time, day or night, and for whatever purpose. CP 596.

Northwest provides a number of support services to the entire fruit industry. CP 573. In particular, Northwest advertises that it provides “attractive and durable packaging materials to deliver your fruit to the consumer with that ‘just-picked’ appearance.” *Id.* Northwest, too, routinely stored materials in an outdoor yard; the southern line of its yard was shared with Northwest. CP 8, 14, 15.

Michelsen, Northwest, and Blue Bird all operated facilities in the Wenatchee warehouse district in close proximity to one another as depicted in this map:



CP 560.

Michelsen/Northwest both operated their business out of the green area on the map. At the time of the fire that gave rise to this action, Michelsen leased the northernmost portion of the property from Northwest, while Northwest operated its own facilities in the immediately adjacent areas in green, sharing a north-south lot line with Michelsen. Blue Bird's facility is located nearby to the southeast in the area outlined in red.

Michelsen/Northwest regularly stored large amounts of combustible material in their exterior yards. CP 541. Both Michelsen/Northwest stored their inventory in a compact line that ran along the eastern border of their properties and met at their shared north/south lot line. *Id.* Michelsen/Northwest did not leave a sufficient amount of space between their shared lot line and their respective inventory. CP 542. These stacks of combustible products stretched from the north side of the Michelsen property all the way down to the southern lot line. CP 568, 574. Michelsen also did not leave any space between their stacks, so that the stored inventory created a single large stack that collectively covered a massive amount of square footage. *Id.* Northwest, the property's owner, was in a position to observe the situation daily, but did not intervene or address the dangerous state of the combustibles in any way and permitted this situation to persist.

Because Michelsen did not maintain any space between its stacks of inventory along the shared north/south line, it created a continuous fuel load between the two properties that would allow a fire to spread quickly and to be suppressed only with great difficulty, according to Albert Simeoni, Blue Bird's expert. CP 541-43, 572. Further, Michelsen's expert, Mark Yaple, described an area of the Michelsen yard, upon which Michelsen allowed customers to dump truck loads of loose cardboard, as a "natural collection

point” for embers or other burning materials. CP 201-02. The net effect of Michelsen’s practices was that it created a fire hazard at its place of business. It did not secure that fire hazard, and it actively invited the public to have access to that location without supervision. Michelsen created conditions that “amounted to a perfect catastrophe waiting to happen.” CP 542.² Michelsen continued to allow its yard to remain in this condition despite the risks.

At about 2:30 on June 28, 2015, a wildfire was reported near Sleepy Hollow Road in Chelan County. CP 199. That fire consumed approximately 2,950 acres in an area near Wenatchee. CP 596. The affected area is depicted as follows:



² Given this set of circumstances, that a large fire would break out at Michelsen’s property was foreseeable.

CP 562.³

The same night of the wildfire, a fire also broke out on Michelsen's premises. CP 201. That fire was just one of many properties that ignited within, and ultimately consumed, a significant portion of the Wenatchee warehouse district. *Id.*⁴

Significantly, the various experts agree, however, on the critical point in this case – a fire started in the Michelsen yard, and that the Michelsen fire then ultimately spread to the rest of the warehouse district, including Blue Bird's premises. None of the parties dispute that a fire started on Michelsen's premises, on land owned by Northwest, and spread to the south from there. On the night of June 28, 2015, the wind blew from north to south. CP 201. Michelsen's premises were the northernmost boundary of the area damaged by the Michelsen fire. All of the other damaged properties, including Blue Bird's, were "downwind from the recycling center [on Michelsen's premises] and NW Wholcsalc." CP 203. Blue Bird's expert, Paul Way, opined that the fire spread from the Michelsen/Northwest properties to Blue Bird's property. CP 548 ("Once

³ The area consumed by the Sleepy Hollow fire is the large red outline at the top of the picture. The warehouse district was located at the bottom of the picture. The area directly consumed by the wildfire did not include the warehouse district occupied by the parties to this action.

⁴ As will be noted *infra*, whether that fire originated from the Sleepy Hollow fire is irrelevant as to the duty owed by Michelsen/Northwest to Blue Bird.

ignited, the Michelsen fire caused large pieces of burning debris to be lifted into the air and carried by the wind toward other nearby commercial properties including but not limited to, Stemilt and Blue Bird, Inc.”). Yaple, Michelsen’s expert, agreed that the fire at the Blue Bird warehouse emanated from the Michelsen/Northwest properties. CP 204 (“All the fires in the Broadview area are consistent with ignition by a wildland fire originating in the Sleepy Hollow area, or from homes burning from this exposure to the next home, spread through unseasonal hot, dry weather, and extreme wind conditions); *then embers from these fires igniting combustibles in the warehouse district, probably in Michelsen Packaging and/or Northwest Wholesale, which in turn sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.*”) (emphasis added). The trial court acknowledged this agreement of the experts. CP 897 (“Way agrees with Mark Yaple’s conclusion that the fire at Michelsen Packaging and/or NW Wholesale, sent embers to Stemilt warehouse and Blue Bird Fruit warehouse.”). These flaming pieces of debris ultimately landed on Blue Bird’s warehouse and burned it to the ground, causing \$48 million in damages. CP 586, 600-01, 879.

Phoenix paid claims submitted by Blue Bird under a valid insurance policy for its fire loss and then filed the present action in the Chelan County Superior Court on February 1, 2018 to recover against Michelsen/Northwest

for their negligence in causing that loss. CP 1-11.⁵ Michelsen/Northwest moved for summary judgment on duty and proximate cause. CP 32-49, 150-77. Phoenix opposed those motions. CP 569-606. Northwest also moved to strike the Way/Simeoni expert declarations. CP 607-35.⁶

The trial court granted the Michelsen/Northwest motions in an October 2, 2018 letter, ruling that Blue Bird failed to establish that Michelsen/Northwest's negligence was the proximate cause of the fire damage it experienced. CP 883-91. In so ruling, the trial court appeared to labor under the misconception that Blue Bird had to prove that burning debris originated from the Michelsen/Northwest properties in order for Blue Bird to recover against them. CP 890 ("...there is no evidence to establish the origins of these large embers.").⁷ However, the trial court rejected the argument that Michelsen/Northwest owed Blue Bird no duty, CP 898-900,

⁵ In the property insurance setting, under principles of subrogation, a doctrine rooted in equity, an insurer has the right by contract to recover what it pays to an insured under a policy by suing a tortfeasor responsible for the insured's loss. The insurer, in effect, steps into the shoes of the insured. *Touchet Valley Grain Growers, Inc. v. Opp. & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 341, 831 P.2d 724 (1992); *Mahler v. Szucs*, 135 Wn.2d 398, 411-18, 957 P.2d 632 (1998). Subrogation is favored in Washington and is liberally allowed in the interests of justice and equity. *Id.* at 412.

⁶ Michelsen and Northwest joined in each other's arguments on summary judgment. CP 175-77, 391.

⁷ As will be noted *infra*, that was error because Blue Bird is entitled to recover under Washington law if the fire emanated from the Michelsen/Northwest property and spread to Blue Bird's premises; where the fire *originated* is irrelevant to the proper legal analysis.

908-09, and denied their motion to strike the expert declarations. CP 909. A formal order granting the motions was entered on November 9, 2018. CP 906-11. Phoenix filed a timely notice of appeal. CP 892-903, 933-41.⁸

D. SUMMARY OF ARGUMENT

The trial court correctly found that Michelsen/Northwest owed Blue Bird both a common law and statutory duty of care to avoid permitting flames to spread from their property to Blue Bird's. Michelsen/Northwest breached that duty, as noted in expert testimony, by maintaining combustible materials on their premises that could readily explode into flame and in failing thereby to prevent the spread of such flames to Blue Bird's premises, causing it millions of dollars in damages.

The trial court erred when it concluded as a matter of law that Michelsen/Northwest's negligence was not the proximate cause of Blue Bird's damages. The court incorrectly focused on the fire's origin, rather than the salient, undisputed fact that the fire spread from the Michelsen/Northwest properties to Blue Bird's. There was at least a question of fact as to whether fire spread from the Michelsen/Northwest properties as a result of Michelsen/Northwest's breach of their duty of care to Blue Bird, a position amply supported by expert testimony.

⁸ Blue Bird pleaded a nuisance theory below, CP 10-11, that was dismissed by the trial court as subsumed within its negligence claims. CP 891.

This Court must overturn the trial court's premature summary judgment order to afford Blue Bird its day in court before a jury.

E. ARGUMENT

(1) Standard of Review on Summary Judgment

Summary judgment is a drastic remedy “appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c). It is appropriate only where a trial would truly be “useless.” *Wheeler v. Ronald Sewer Dist.*, 58 Wn.2d 444, 446, 364 P.2d 30 (1961). Michelsen/Northwest, as the moving parties, bore the burden of establishing their right to judgment as a matter of law.

In addressing whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to the non-moving party, here, Blue Bird. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Where there are significant witness credibility issues present in a case, it has long been the rule in Washington that summary judgment is inappropriate. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986) (“Credibility issues involving more than collateral matters may preclude summary judgment.”).

When expert opinions come to differing conclusions on a key issue, that creates a plain issue of fact for the jury. In a case involving alleged insurer bad faith, Division I put the point succinctly:

At the summary judgment stage with which we are concerned, both appeared qualified to render opinions whether the accident caused Leahy's DM. There was a clear conflict between two experts on a central question: causation. Could this insurer, on this record, claim that there was no genuine issue of material fact on the reasonableness of its action in solely relying on its expert? We think not.

Leahy v. State Farm Mut. Auto. Ins. Co., 3 Wn. App. 2d 613, 633, 418 P.3d 175 (2018).⁹

This Court reviews decisions on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

(2) The Trial Court Correctly Determined that Michelsen/Northwest Owed a Duty of Care to Blue Bird

For an actionable negligence claim, a party in Washington must prove that the defendant owed the plaintiff a duty of care, the defendant breached that duty, and, as a proximate result of the breach, the plaintiff was

⁹ See also, *Chen v. City of Seattle*, 153 Wn. App. 890, 900, 223 P.3d 1230 (2009), review denied, 169 Wn.2d 1003 (2010). *Bowers v. Marzano*, 170 Wn. App. 498, 290 P.3d 134 (2012) (experts in disagreement on cause of auto crash); *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 295 P.3d 816 (2013) (differing opinions in medical negligence action as to cause of patient's injury). See also, *C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 200, 402 P.3d 346 (2017) ("In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate.").

harmed. *Ranger Ins.*, 164 Wn.2d at 552-53. Duty is generally a question of law for the court, although its scope, bounded by principles of foreseeability, is a fact question. *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 762-63, 344 P.3d 661 (2015). Breach, proximate cause, and harm are issues of fact for the jury. *Hertog ex rel. S. A. H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

Here, the trial court was correct in determining that Michelsen/Northwest owed Blue Bird a duty of care in their maintenance of their premises.¹⁰

The Legislature has created a statutory cause of action for parties harmed by a premises owner's negligence in allowing a fire to spread from that owner's property. RCW 76.04.730 provides that "it is unlawful for any person to negligently allow fire originating on the person's own property to

¹⁰ The court summarized its view as follows:

The issue involved in this matter is whether the defendants allowed their properties to become a hazard wherein, if fire should occur in it, it is reasonably probable that it would spread to other property. It is the recycling center's nature which lends to an issue of fact whether the Michelsen property posed a hazard. The nature of the hazard, involving loose cardboard, was a significant risk because the large embers from such burned materials could be set adrift in the wind and pose a severe risk to the surrounding areas. The photographs show the large embers being carried aloft from the defendants' properties. If the plaintiff is able to show that this breach of the duty proximately caused it damages, it would establish its claim for negligence.

CP 889.

spread to the property of another.” Our Supreme Court in *Oberg v. Dep’t of Natural Resources*, 114 Wn.2d 278, 787 P.2d 918 (1990) had little difficulty in discerning that DNR, as a landowner, had a statutory duty to provide adequate protection against the spread of fire from its land. See also, *State, Dep’t of Natural Resources v. Public Utility Dist. No. 1 of Klickitat County*, 187 Wn. App. 490, 349 P.3d 916, review denied, 184 Wn.2d 1006 (2015) (DNR authorized by RCW 76.04.495(1) to recover fire suppression costs from any entity “whose negligence is responsible for the starting or existence of a fire which spreads on forest lands...”). Critically, the fire’s specific origin does not determine the existence of duty here. Instead, the important point is that the landowner (whatever the fire’s origin) allowed a fire to spread. In *Oberg*, the Court noted that the origin of the fire on DNR’s property was lightning, and that such an origin “is of no consequence.” 114 Wn.2d at 282.

In addition to a statutory duty of care, the trial court’s analysis is also sustained on common law principles. As the *Oberg* court noted:

As to a common law duty upon a landowner to use due care in preventing the spread of fire, DNR admits that such common law duty exists in Washington. *Jordan v. Spokane, P. & S. Ry.*, 109 Wash. 476, 480-81, 186 P. 875 (1920); *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 558-62, 164 P. 200 (1917).

114 Wn.2d at 283. Indeed, as the Supreme Court has noted, a common law duty is present even if the landowner had no fault in the fire's origin; the landowner is still liable for the fire's spread. *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 558, 164 Pac. 200 (1917). In *Sandberg*, the defendant was a logging company engaged in logging on its land. A fire started on its land close to a donkey engine that was being used in the logging operations. The fire spread to plaintiff's farm some two miles away, destroying the barn, outbuildings, hay and feed, and various farm implements. There was a dispute about the defendant's alleged negligence in starting the fire, but as the Court stated, that question "is of no moment in our present inquiry." *Id.* at 557. Rather, the Court stated the question for the establishment of common law liability to be:

Was appellant, having knowledge of the starting of the fire upon its own premises, required by law to exercise due diligence looking to the prevention of the spreading of the fire to respondent's property; and would the failure on the part of appellant to exercise due diligence in that behalf render it liable to respondent as for negligence?

Id. at 558. In affirming the judgment for the plaintiff, the Court confirmed that the evidence supported the jury's verdict:

Contention is made in appellant's behalf that the evidence introduced upon the trial does not support the judgment and verdict, in that it does not warrant a finding that appellant did not exercise due diligence looking to the prevention of the spreading of the fire to respondent's property. A careful reading of the evidence convinces us that this was a question

for the jury. The fire was traced, by creditable evidence, directly from the place it started upon appellant's land to respondent's property. It occurred in early August, during a very dry season. It is true appellant used some effort to stop the fire a day or two following its starting, but very little effort thereafter. On the second or third day following, appellant's foreman was warned by a fire ranger that the fire was proceeding towards the east, threatening the property of others. This ranger also testified that in his opinion the fire could have been subdued, had proper efforts been used in that behalf. Respondent herself testified that about 1 1/2 hours before the fire reached her place she warned appellant's foreman by telephone message of the approach of the fire to her place and asked for help. None was furnished by appellant, according to her testimony. Whether or not her place could then have been saved is somewhat problematical. We deem it unnecessary to pursue this inquiry further. We are quite clear that the question of appellant's negligence, so far as the question of its efforts to control the fire are concerned, was for the jury to decide.

Id. at 563-64.

As the trial court here noted, CP 887-88, decisions like *Prince v. Chehalis Savings & Loan Ass'n*, 186 Wash. 372, 58 P.2d 290 (1936) and *Chicago, Milwaukee, St. Paul & Pac. Railroad Co. v. Poarch*, 292 F.2d 449 (9th Cir. 1961) sustain the view that a premises owner owes a duty of care not to allow conditions on the owner's premises to become a fire hazard. Those cases reinforce the holding in *Sandberg* that the gravamen of the common law duty is whether a landowner has taken appropriate steps to prevent the spread of a fire from its premises ("The courts generally support the rule ... that evidence as to the origin of the fire is not a necessary element to entitle a recovery where the property causing the fire has gotten into such

a condition that it creates a fire hazard, and that, if fire should occur on it, it is reasonably probable that it would spread to the adjacent property.”). *Prince*, 186 Wash. at 375. In *Prince*, the defendants’ garage fell into a state of disrepair. The garage was vacant, its doors were left open, many of the windows were broken, and its wooden floor had absorbed grease and oil over the years. The garage contained an accumulation of combustible material, children played in it at times during the daytime, and vagrants often used it for sleeping quarters at night. The floor was littered with cigarette stubs. One late afternoon, a fire started in the garage and spread to an adjacent apartment house. The Supreme Court affirmed a verdict for the apartment owner:

The fact that the fire might have started from some cause other than through an act of the railroad company does not exculpate the defendant. It may be that the defendant was in no wise responsible for the origin of the fire, and the evidence does not show that it was, but it was responsible for the part its negligence performed. That negligence consisted in bringing about a condition which subjected the plaintiffs’ property to a danger which resulted in its destruction, which did not theretofore exist, and which danger and result was reasonably apparent to and should have been foreseen by a person of ordinary prudence. It is true that the oil of itself did not create the danger, and that the danger therefrom did not arise until some other act was performed, namely, the kindling of the fire which ignited the oil. Neither would the kindling of the fire at a point near or remote from the property have created the danger but for the presence of the oil. It is not always the last act of cause or nearest act to the injury that is the proximate cause, but such act, wanting in ordinary care, as actively aided in producing the injury as a

direct and existing cause. It need not be the sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances.

Id. at 376.

In *Chicago, M., St. P. & P.R.*, the railroad allowed the vacant portion of an ice house to become a fire hazard by permitting inflammable materials to accumulate and had not taken reasonable steps to prevent children and itinerants from gaining access. A fire broke out in the ice house and spread to the plaintiff's buildings resulting in a total loss. The Ninth Circuit affirmed a judgment for the plaintiff, stating:

[O]nce it is established that the owner of a building has negligently allowed it to become a fire hazard and a fire does start the actual cause—whether deliberate, accidental, or act of God—is immaterial. The negligence is not in the ignition of the fire but rather it is in allowing a condition to exist which will be reasonably likely to cause injury to another if a fire does start.

292 F.2d at 451.¹¹ Whether a defendant breaches its duty by maintaining the property in such a manner as to create a fire hazard is for the jury. *Id.*

¹¹ This is in accord with the law of other jurisdictions as well. *See, e.g., Ford v. Jeffries*, 379 A.2d 111 (Pa. 1977) (discuss case). In *Ford*, the Pennsylvania Supreme Court held that a property owner owes a duty to a neighbor to maintain its property in a non-negligent fashion to prevent the spread of fire. It was a fact question for the jury to determine if the property owner breached that duty and whether such breach was a substantial factor in the plaintiff's fire loss.

Further, the *Restatement (Second) of Torts* § 302 confirms that a premises owner owes a duty to anticipate the foreseeable negligent conduct of others or foreseeable risks of “forces of nature.”¹² Specifically, a premises owner must not create conditions on its premises that will cause a fire to start or to spread. § 302 states:

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature.

Comment c to that section notes:

The actor may be negligent in setting in motion a force the continuous operation of which, without the intervention of other forces or causes, results in harm to the other. He may likewise be negligent in failing to control a force already in operation from other causes, or to prevent harm to another resulting from it. Such continuous operation of a force set in motion by the actor, or of a force which he fails to control, is commonly called “direct causation” by the courts, and very often the question is considered as if it were one of the mechanism of the causal sequence. In many instances, at least, the same problem may be more effectively dealt with as a matter of the negligence of the actor in the light of the risk created.

¹² The risk of fire in the Wenatchee area in the summer months is fully foreseeable. After the events in this case, the summer months in the Wenatchee area have seen extensive fire activity. For example, in 2017, news reports in June 2017 reported more than 50,000 acres ablaze near Wenatchee. “Wenatchee area fire grows to 45,000 acres and sends smoke into Spokane,” *Spokesman-Review*, June 29, 2017. <http://www.spokesman.com/stories/2017/jun/28/fire-evacuation-orders-issued-in-parts-of-grant-co/>. A similar number of acres in the same vicinity were burning a little more than a year later. “Wildfires blazing across Washington, fire risk high on Monday,” *Seattle Post Intelligencer*, August 20, 2018. <https://www.seattlepi.com/washington-wildfires/article/Wildfires-across-Washington-blazing-fire-risk-13168894.php>.

In fact, the American Law Institute offered two illustrations for these principles:

1. A sets a fire on his own land, with a strong wind blowing toward B's house. Without any other negligence on the part of A, the fire escapes from A's land and burns down B's house. A may be found to be negligent toward B in setting the fire.

2. A discovers on his land a fire originating from some unknown source. Although there is a strong wind blowing toward B's house, A makes no effort to control the fire. It spreads to B's land and destroys B's house. A may be found to be negligent toward B in failing to control the fire.

Washington recognizes § 302 of the *Restatement* as a basis for a duty of care. See, e.g., *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013); *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007).

In sum, the trial court correctly determined that Michelsen/Northwest owed Blue Bird a duty of care.

(3) The Trial Court Erred in Ruling on Proximate Cause as a Matter of Law Where There Were Genuine Issues of Material Fact for the Jury

While the trial court was correct in its duty analysis, it veered off the mark in deciding proximate cause as a matter of law. In doing so, the trial court improperly focused on whether the fire originated on the Michelsen/Northwest premises, a point as noted *supra*, that was irrelevant

to their breach of duty to prevent the spread of any fire to Blue Bird's property.¹³ As will be noted *infra*, there was testimony from Way, Blue Bird's expert, that the fire damaging the Blue Bird property likely originated from the Michelsen/Northwest properties, a point with which Yapple agreed, as noted *supra*. Further, Simeoni's testimony made clear precisely how the improper maintenance of their premises by Michelsen/Northwest enhanced the risk that any fire there would spread to Blue Bird's property. That created a question of fact for the jury.

¹³ The court stated:

What is lacking in this matter is evidence establishing that any hazardous condition existing on the defendants' properties caused the fire at Blue Bird. Large embers are captured in a photograph drifting in the wind away from the Michelsen/N.W. Wholesale properties. The plaintiff's expert relies upon witnesses who report seeing large embers alighting on the Blue Bird roof. However, there is no evidence to establish the origins of these large embers. Only speculation has been offered to argue that the embers from Michelsen and Northwest Wholesale traveled and landed on the Blue Bird property.

Defendants argue that the yards of Stemilt and Blue Bird contained combustible materials similar to that found on their properties. (Samuelson Decl., Ex. 14). It is just as likely that an ember from another yard landed on Blue Bird's rood as opposed to an ember from the defendants' premises. It is speculative that the embers from defendants' properties landed on the Blue Bird property and started the fire. Without the required evidence to establish causation, the plaintiff cannot show negligence. Phoenix Insurance's claims should be dismissed as a matter of law.

CP 922-23.

Proximate cause in Washington has two elements: legal cause¹⁴ and cause-in-fact. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). “Cause in fact” refers to the actual, “but for,” cause of the injury, *i.e.*, “but for” the defendant’s actions the plaintiff would not be injured. *Id.* Because there can be more than one cause of a harm, causation is often referred to as a “chain” of events without which a harm would not have happened. *See, e.g., Dep’t of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 884, 288 P.3d 20 (2012), *review denied*, 177 Wn.2d 1006, 300 P.3d 415 (2013). In Washington, proximate cause is classically a *question of fact*. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013) (“Cause in fact is usually a jury question and is generally not susceptible to summary judgment”); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011) (where the evidence is conflicting, cause in fact is to be resolved by the trier of fact). Indeed, the trial court quoted a critical passage from Division I’s opinion in *Martini* that the evidence of proximate cause need not prove cause in fact “to an absolute certainty.” CP 922.¹⁵ The evidence on

¹⁴ The legal causation analysis focuses on whether, as a matter of policy, the connection between the ultimate result and the defendant’s is too remote or insubstantial to impose liability. *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). Neither Michelsen nor Northwest seriously argued legal causation in their motions below, so the issue is not before the Court.

¹⁵ The *Martini* court stated:

The plaintiff, however, need not prove cause in fact to an absolute certainty. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564

causation adduced by Blue bird below created a question of fact, rendering summary judgment improper.

(a) Evidence Below Documented that the Fire that Damaged the Blue Bird Property Spread from the Michelsen/N.W. Wholesale Properties

On summary judgment, Blue Bird provided substantial direct and circumstantial evidence on causation. On the night of the Michelsen fire, a professional photographer, Rob Spradlin, happened to be in the immediate vicinity of the blaze and ensuing inferno of combustible cardboard. CP 579-80. Spradlin took a number of photographs that vividly capture the migration of flaming debris from Michelsen/Northwest towards Blue Bird, including this one:

(1947). It is sufficient if the plaintiff presents evidence that "allow[s] a reasonable person to conclude that the harm more probably than not happened in such a way that the moving party should be held liable." *Little [v. Countrywood Homes, Inc.]*, 132 Wn. App. 777, 781, 133 P.3d 944 (2006) (citing *Gardner [v. Seymour]*, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947)). The evidence presented may be circumstantial as long as it affords room for "reasonable minds to conclude that there is a greater probability that the conduct relied upon was the [cause in fact] of the injury than there is that it was not." *Hernandez v. W. Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969) (quoting *Wise v. Hayes*, 58 Wn.2d 106, 108-09, 361 P.2d 171 (1961)).

Martini, 178 Wn. App. at 165.



CP 556.¹⁶

On the night of the Michelsen fire, two Blue Bird employees, Larry Blakely and Roger Sommers, were at the Blue Bird facility. CP 548. From their vantage point, they saw flaming debris drift southward on the wind away from the Michelsen/Northwest properties and ultimately land on Blue Bird's roof. CP 548. Blakely specifically stated that he witnessed a large piece of burning debris, which he believed to be cardboard, land on the roof and cause the fire that ultimately caused all of Blue Bird's damages. *Id.* This piece of flaming cardboard was approximately sixteen by twenty-four inches (16" x 24"). *Id.*

¹⁶ These photographs clearly portray how the fire that rained down on the commercial district from the Michelsen yard. Hundreds, if not thousands, of pieces of burning debris are visible flying high in the air. From the photo, the Court can compare the lofted debris to the building roof lines and electric utility poles. The volume and height of flaming debris are substantial. CP 579-80.

Paul Way's expert testimony was unequivocal – the fire emanated from the Michelsen/Northwest properties and spread to the Blue Bird property:

9. Once ignited, the Michelsen Fire caused large pieces of burning debris to be lifted into the air and carried by the wind towards other nearby commercial properties, including but not limited to Stemilt and Blue Bird, Inc. See photograph taken by Rob Spradlin and attached hereto as Exhibit B.

10. During my investigation, I spoke with Blue Bird employees, including Larry Blakely and Roger Sommers, who were on Blue Bird's premises during the Michelson Fire. Mr. Blakely witnessed a large piece of burning debris, which he believed to be cardboard, land on Blue Bird's exposed roof. Mr. Blakely and Mr. Sommers, [sic] attempted to extinguish the burning debris with a garden hose, but were unable to reach the flames. Both Mr. Blakely and Mr. Sommers witnessed the ignition of the Blue Bird facility due to this large piece of burning debris. Mr. Blakely stated that the debris had dimensions approximating 16 inches by 24 inches.

11. I did not find any evidence that the Blue Bird property was ignited by a wildfire brand. The burning debris witnessed by Mr. Blakely and Mr. Sommers is not material that would originate from a wildland fire. Rather, the large piece of burning debris was consistent in size and shape to cardboard and is consistent with what one would expect to see originating from the Michelsen yard. The Blue Bird property was a victim of the fire that was burning in the commercial district. The fire burning in the commercial district originated on the Michelsen property.

12. I reviewed the report authored by Mark Yaple. I agree with his conclusion that the fire at Michelsen Packaging and/or Northwest Wholesale, [sic] "sent embers to Stemilt warehouse and Blue Bird Fruit warehouses."

13. *It is more likely than not, [sic] that the Blue Bird property was ignited by flaming debris that originated from and/or was caused directly by the fire at the Michelsen yard.*

CP 548-49 (emphasis added). Thus, Way unambiguously opined that the fire, however, it originated, emanated from the Michelsen/Northwest properties and damaged the Blue Bird property.

Way's analysis mirrors the conclusions originally drawn by Yaple in his role as the Wenatchee Fire Marshall in 2015. CP 204. His report stated that he interviewed an unnamed Blue Bird employee who was on the roof at the time of the Michelsen fire because he was attempting to put out fires on the roof with a garden hose. CP 203. Yaple took photographs of the burn holes on an adjacent roof in an area near Blue bird's loading dock that had been timely extinguished. *Id.* After examining these burn marks, Yaple opined that "these holes would require large embers to ignite this roof membrane, similar to those found on the Millers side of the complex." *Id.* Those "similar" pieces of debris were separately described in Yaple's report as being "15-16 inches across." CP 202. Thus, Michelsen's own expert identified secondary burn marks on the Blue Bird warehouse roof that were consistent with the eyewitness testimony of Blue Bird's employees that large pieces of flaming cardboard were the cause of Blue Bird's damages.¹⁷

¹⁷ Yaple's report noted that the debris observed at and around Blue Bird's

Simeoni's testimony was similarly unambiguous in describing precisely how Michelsen/Northwest's actions breached the duty they owed to neighboring property owners and permitted the fire to spread from their properties to Blue Bird's:

6. Michelsen and Northwest stored large amounts of inventory in their exterior yards. The Michelsen yard and the Northwest yard shared a common border. Both Michelsen and Northwest stored inventory in a contiguous line, directly adjacent to the lot line (north/south) between their occupancies.

7. Michelsen stored stacks of fruit packaging material along the eastern edge of its property. The stacked inventory stretched from the north side of the property all the way down to its southern lot line. Michelsen did not leave any space between the stacks of inventory, so that the inventory created one, [sic] large, [sic] stack.

8. By not permitting space between its stacks, Michelsen created a single condensed fuel load that created a high and foreseeable risk of fire too intense to control. With no breaks in the stack, control of the subject fire's spread became impossible.

9. By creating such a large fuel load with no natural breaks, Michelsen contributed to the creation of a large and intense fire in its yard. As a direct result of Michelsen's storage practices, the fire very quickly became uncontrollable. Despite the best efforts of the firefighters, the high intensity of the fire resulted in a large fire plume

warehouse was of a different kind and quality than the Sleepy Hollow fire embers that were found farther to the north. CP 202. The "embers" from the Sleepy Hollow fire primarily consisted of "shakes and pine needle debris," consistent with the type of small and light material that could travel some distance from a wildland fire. *Id.* By contrast, the debris found in the vicinity of Blue Bird appeared to be "from a synthetic product or material." *Id.*

that entrained flaming debris to be lofted high in the air and carried away from the Michelsen property toward other commercial properties located downwind of the fire. As a result, firefighters could not contain the flaming debris from leaving the site of the fire.

10. Had Michelsen appropriately maintained and organized its inventory with necessary breaks, it would have given firefighters the opportunity to contain this fire before the Blue Bird facility ignited.

11. The contiguous line of inventory between the Michelsen yard and the northwest yard, [sic] created conditions that amounted to a perfect catastrophe waiting to happen.

12. *Both the Michelsen and the Northwest yards created an unsafe fire hazard because a fire, once started, would be very difficult if not impossible to be stopped from spreading and distributing flaming debris onto surrounding properties.*

CP 541-43 (emphasis added). Michelsen/Northwest's conduct was a "perfect catastrophe" waiting to happen. RP 22.

The trial court evidenced its improper intrusion into the jury's fact-finding role in its letter ruling.¹⁸ The court noted that certain facts were *undisputed*:

8. Yapple opines that the fires at NW Wholesale and Michelsen Packaging were consistent with spot fires from embers from the Broadview are in wind direction, wind velocity, and timing. Yapple Decl., ¶ 17).

¹⁸ In that letter ruling, the court made what are essentially findings of fact. Ordinarily, "findings of fact" by a trial court on summary judgment are superfluous and must be disregarded by an appellate court. *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 117, 362 P.3d 974 (2015). But the trial court's letter ruling here reveals its error in addressing causation.

9. Michelsen Packaging and NW Wholesale stored large amounts of inventory in their exterior yards. The businesses shared a boundary with Michelsen on the north and NW Wholesale on the south. Inventory was stored “in a contiguous line, directly adjacent to the lot line (north/south) between their occupancies.” (Simeoni Decl., ¶ 6).

10. Michelsen stored stacks of fruit packaging material along the eastern edge of the property stretching from the north side down to the southern lot line with NW Wholesale. There was no space between the stacks of inventory. (*Id.*, ¶ 7-9).

11. Once the Michelsen yard was on fire, large pieces of burning debris was lifted into the air. A photograph by Rob Spradlin shows the large embers flying through the air. (Way Decl., ¶ 9, Ex. B).

CP 895. The court acknowledged Yaple’s opinion that the fire burning Blue Bird’s property emanated from the Michelsen/Northwest property:

As a section for the origin of the fire in the Warehouse complex, Yaple wrote: “--windblown embers landing in protected areas harboring fine fuels for ignition—possibly the cardboard area of Michaelson’s [sic] packaging or combustibles in NW Wholesale yard....which in turn sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.” (*Id.*, Ex. 2 pg 6).

CP 897.

However, by contrast, the court treated Way’s opinion as a *disputed* fact:

1. Phoenix’s expert, Paul Way, offers the following conclusions and opinion: He did not find any evidence that the Blue Bird property was ignited by a

wildfire. The burning debris witnessed by Blakely and Sommers is not material that would originate from a wildland fire. The large piece of burning debris was consistent in size and shape to cardboard and is consistent with what one would expect to see originating from the Michelsen yard. The Blue Bird property burned as a result of the fire which originated on the Michelsen property. (Way Decl., ¶ 11).

2. Way agrees with Mark Yaple's conclusion that the fire at Michelsen Packaging and/or NW Wholesale, "sent embers to Stemilt warehouse and Blue Bird Fruit warehouses." (*Id.*, ¶ 12).

3. It is Way's opinion that "it is more likely than not, that the Blue Bird property was ignited by flaming debris from and/or was caused by the fire at the Michelsen yard." (*Id.*, ¶ 13).

CP 897. In effect, the trial court seemingly made a credibility decision, choosing one expert's view over another. It effectively disregarded Way's testimony.¹⁹ The court acknowledged that Way's opinion supported Blue Bird's position on causation, CP 886, but chose to characterize Yaple's opinion as "speculative," CP 890 at n.4.²⁰ Such a choice between competing

¹⁹ The court was perhaps influenced to do this by Michelsen's counsel's blatant appeal to adopt the opinion of "the local fire marshal wearing the badge" over an expert from Massachusetts. RP 8.

²⁰ Earlier in its opinion, the court *conceded* that both Way and Yaple *agreed* that the fire emanated from the Michelsen/Northwest properties, and that the *cause* of the fire damaging the Blue Bird property was also found on the Michelsen/Northwest properties. CP 886 ("Way agrees with Mark Yaple's conclusion that the fire at Michelsen Packaging and/or NW Wholesale, 'sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.' (*Id.* at ¶ 12).").

expert opinions is an intrusion into the jury's fact-finding role and exceeds the court's role on summary judgment.

The critical point for the proximate cause analysis is that the fire damaging the Blue Bird property spread from the Michelsen/Northwest property to Blue Bird's, and that those firms breached their duty to Blue Bird by maintaining a fire hazard that could readily cause any fire on their premises to spread to Blue Bird's property.²¹ Regardless of whether there was another explanation for Blue Bird's loss, the Way/Simeoni declarations created an obvious and genuine issue of material fact for the jury on proximate cause. *See Mehlert v. Baseball of Seattle, Inc.*, 1 Wn. App. 2d 115, 404 P.3d 97 (2017); *Tessema v. MacMillan-Piper, Inc.*, 5 Wn. App. 2d 1047, 2018 WL 5251954 (2018). Michelsen/Northwest breached a duty to Blue Bird to prevent fire from spreading from their properties to Blue Bird's. As a result, Blue Bird sustained a severe loss. It was premature for the trial court to rule on proximate cause as a matter of law. In effect, the trial court chose to believe one set of experts over another, invading the province of the jury.

²¹ It is important to again reemphasize here that the trial court was too concerned about the origin of the precise ember that started the fire on the Blue Bird premises. CP 890 ("What is lacking in this matter is evidence establishing that any hazardous condition existing on the defendants' properties caused the fire at Blue Bird."); RP 23. The correct factual point for the causation analysis is the undisputed fact that fire started on the Michelsen/Northwest premises and spread to Blue Bird's property.

(b) The Way/Simeoni Expert Testimony Was Admissible

Northwest argued below, and Michelsen apparently joined in the argument, that the Way/Simeoni testimony on causation must be disregarded because that expert testimony should be stricken. CP 620-33. The trial court denied any motion to strike. CP 909.²² Blue Bird anticipates that Michelsen/Northwest will attempt to revive that baseless argument on review and, therefore, it addresses the argument here. Northwest's arguments below on the admissibility of Blue Bird's expert testimony were baseless. In particular, they failed to articulate the relevant test for the admission of expert testimony in Washington. CP 620-33. Rather, their "mantra," articulated in histrionic fashion, was that the Way/Simeoni testimony was "rife with speculation." CP 620-27. The trial court was entirely correct in denying the motion to strike.

Washington law on the admissibility of expert testimony is set forth in four core rules. ER 702 generally establishes when expert testimony may be utilized at trial:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may

²² In connection with a motion on summary judgment, this Court reviews trial court evidentiary issues *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

testify thereto in the form of an opinion or otherwise.

ER 704 authorizes an expert to testify on an ultimate fact issue the trier of fact must resolve.²³

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ER 703 allows an expert to base his or her testimony on facts received before the hearing in the case and may even include facts not otherwise admissible.²⁴

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ER 705 indicates that an expert need not disclose the facts on which his or her opinion is based, although the court may require their disclosure and the expert may be subject to cross-examination on them.

Since *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), Washington has employed a three-part test to determine if expert testimony

²³ An expert may testify on an ultimate issue for the trier of fact so long as the expert does not render a legal conclusion. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007) (expert could testify to “hazardous condition” and existence of “zone of danger” in tort case).

²⁴ Thus, it was not improper for Blue Bird’s experts to rely on the eyewitness accounts of others relating to the fire.

is admissible: (1) is the witness qualified to testify as an expert? (2) is the expert's theory based on a theory generally accepted in the scientific community? and (3) would the testimony be helpful to the trier of fact? *Accord, Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). In applying this test, trial courts are afforded wide discretion and trial court expert opinion decisions will not be disturbed on appeal absent a "very plain abuse" of such discretion. *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013).

Our courts recognize that ER 702-05 express a liberal policy favoring the admissibility of expert testimony.²⁵ Here, both Way and

²⁵ As Professor Tegland stated:

The Evidence Rules reflect the widely-held view that a reasoned evaluation of the facts is often impossible without the proper application of scientific, technical, or specialized knowledge. Expert testimony is expressly permitted under Rule 702, and the normal rules requiring a witness to avoid opinionated testimony and to testify from firsthand knowledge are modified to accommodate the testimony of the expert.

....

Testimony admissible under Rule 702 is not limited to scientific matters. The rule refers, very broadly, to testimony based upon "scientific, technical, or other specialized knowledge." Further, the rules refers to an expert as a person qualified as such by "knowledge, skill, experience, training, or education." Thus the rule contemplates testimony from traditional expert witnesses such as physicians, physicists, and architects, as well as from other skilled witnesses such as bankers, engineers, criminologists, and the like.

The admissibility of expert testimony under Rule 702 will depend upon whether the witness qualifies as an expert and upon whether an expert opinion would be helpful to the trier of fact.

5B Karl B. Tegland, *Wash. Practice Evidence* (5th ed.) at 39.

Simeoni were eminently qualified to render their expert opinions, opinions that would have been of assistance to a jury.

(i) The Experts Were Well-Qualified

Michelsen/Northwest did not argue below that Way or Simeoni were unqualified to testify. CP 620-33. Nor could they. As with ER 702-05 generally, Washington has taken a liberal perspective on experts' credentials. For example, in *Saldivar v. Momah*, 145 Wn. App. 365, 397-99, 186 P.3d 1117 (2008), *review denied*, 165 Wn.2d 1049 (2009), Division II found that the trial court abused its discretion in categorically excluding the testimony of Professor Karil Klingbeil, the former director of social work and founder of Harborview Medical Center's Sexual Assault Center, that the plaintiff suffered from post-traumatic stress disorder. The trial court had concluded the Klingbeil, who has an MSW (master's in social work), could not testify on a psychiatric condition. Division II, however, reaffirmed the principle in Washington that social workers may testify regarding mental conditions so long as such testimony did not constitute an assessment of the victims' credibility. *Id.* at 398-99.

Similarly, in *Katere* the Supreme Court also made clear that focusing only upon an expert's licensure in a particular field with respect to credentials constitutes an abuse of discretion. In *Katere*, the Court rejected a party's insistence that an attorney of 17 years' experience in child

abduction cases was not qualified to testify regarding the risk factors for child abduction and the consequences of a possible abduction to India. 175 Wn.2d at 38-39. *See, also, Taylor v. Bell*, 185 Wn. App. 270, 286-87, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012 (2015) (trial court erred in excluding testimony of law professor who was not licensed in Washington although he had extensive experience on multi-jurisdictional corporate practice).

Experience suffices to qualify a witness as an expert. In *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 991 P.2d 728 (2000), this Court recognized that experience counts. The Court held that a state trooper with 13 years of experience in investigation of traffic accidents was qualified to testify to a truck driver's negligence and the product liability of the truck-tractor manufacturer, and such expert testimony on such ultimate facts creates a question of fact, foreclosing entry of summary judgment.

Here, both Way and Simeoni were well-qualified experts both by virtue of academic training and experience. Simeoni is a professor with 18 years of experience in fire sciences who also served as a firefighter for 10 years, CP 540-41, with impeccable academic and professional credentials. CP 545. Similarly, Way is a professional engineer²⁶ and certified as a fire

²⁶ Although Way is a licensed engineer, Washington courts do not impose *per se* limitations on the testimony of experts because of their license or title and practical

investigator and fire explosion investigator. CP 546-47. His credentials are similarly impressive. CP 551-54.

(ii) The Opinions Did Not Involve Novel Science

The second element of the test, the element that largely incorporates the so-called *Frye* test for novel scientific evidence,²⁷ is not even applicable, although Michelsen/Northwest desperately tried to argue that there was a “novel science” issue lurking in the rendition of their opinions. CP 627-33. It was an argument merely “stapled on” on reply. RP 21. There simply was no novel scientific issue at play here. Michelsen/Northwest failed below to identify with any precision exactly how the Way/Simeoni opinions were not

experience may suffice to qualify an expert. *Breit v. St. Luke's Memorial Hosp.*, 49 Wn. App. 461, 464-65, 743 P.2d 1254 (1987). (“...the modern trend in the law is not to impose *per se* limitations on the testimony of otherwise qualified non-physicians, i.e. less reliance on formal titles and degrees.”). See *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014) (Expert testimony on a computer program that reconstructed an accident, estimating vehicle speeds involved held admissible); *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 393 P.3d 776 (2017) (trial court abused its discretion in excluding the expert testimony of an advanced registered nurse practitioner on proximate cause in a medical negligence case due only to her licensure as a nurse).

²⁷ In *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), a case involving lie detector results, the court ruled that evidence deriving from a scientific theory is admissible only if the underlying theory has gained general acceptance in the relevant scientific community. Washington has adhered to *Frye*, rejecting the federal approach to scientific evidence established in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996) (adhering to the *Frye* analysis, Court permits admission of expert testimony on DNA testing); *State v. Martin*, 101 Wn.2d 713, 684 P.2d 651 (1984) (evidence derived from hypnosis); *State v. Canaday*, 90 Wn.2d 808, 812-13, 585 P.2d 1185 (1978) (breathalyzer results); *State v. Woo*, 84 Wn.2d 472, 572 P.2d 271 (1974) (polygraph results).

based on scientific theories and methods well-recognized in the scientific community. Given both experts' knowledge and long experience in fire investigation, they testified well within the ambit of that knowledge and experience. Michelsen/Northwest's arguments to the contrary merely collapse their argument on the allegedly "speculative" nature of the Way/Simeoni testimony into the *Frye* analysis, distorting that analysis.

Our Supreme Court has rejected efforts by parties to improperly inject *Frye* into routine decisions about the admissibility of expert testimony. *Frye* is only applicable where either the theory and technique or method of arriving at data upon which the expert relies is not generally accepted in the relevant scientific community. *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 919-20, 296 P.3d 860 (2013) (expert's testimony connecting electromagnetic fields exposure to illnesses not novel); *Anderson v. Azko Nobel Coatings, Inc.*, 172 Wn.2d 593, 611, 260 P.3d 857 (2011) (doctor testifying that child's birth defects caused by mother's exposure to organic solvents in paint not subject to *Frye*).²⁸ Not every

²⁸ By contrast, in *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 313 P.3d 408 (2013), *review denied*, 179 Wn.2d 1019 (2014), Division I upheld the exclusion of an expert's testimony in a civil case where the expert, after initially indicating there was no way that an expert could determine from existing rot in a structure when that rot initially started, the expert purported to testify that it was possible to determine the date rotting started based on a formula developed by his colleague that was nowhere supported in the scientific community.

instance in which a party asserts expert testimony is inapplicable implicates *Frye*. *Iverson v. Prestige Care, Inc.*, __ Wn. App. __, 2019 WL 92671 (2019) (expert’s causation opinion based on a differential medical diagnosis does not implicate *Frye*).

Michelsen/Northwest failed to demonstrate how either Way or Simeoni offered a novel theory, technique, or method of arriving at data relied upon for their opinions so as to implicate *Frye*. A party’s mere disagreement with the conclusions offered by qualified experts does not render the science underlying such conclusions novel or the expert testimony inadmissible.

(iii) The Testimony Would Be Helpful to the Trier of Fact

As noted *supra*, the point argued most aggressively by Michelsen/Northwest was that the Way/Simeoni testimony would not be helpful to a jury because it was “speculative.”²⁹ While at trial those defendants would be entitled to argue the weight jurors should give to the Way/Simeoni opinions, Michelsen/Northwest confuse admissibility of expert opinions with the weight to be given them by the trier of fact. The

²⁹ The trial court did not exclude the Way/Simeoni testimony, but it noted that causation could not be established based on speculative testimony, citing *Moore v. Hauge*, 158 Wn. App. 137, 241 P.3d 787 (2010), *review denied*, 171 Wn.2d 1001 (2011), for that view. CP 890. The trial court’s concern must be taken in the context of its own citation of proper authorities like *Martini, supra*, that causation need not be proven to an absolute certainty. CP 890.

Way/Simeoni opinions would be helpful to jurors and were not “speculative.” They were admissible, as the trial court correctly concluded.

Evidence is helpful if it concerns matters beyond the common knowledge of lay people and does not mislead the trier of fact. *State v. King County Dist. Court West Div.*, 175 Wn. App. 630, 638, 307 P.3d 765, review denied, 179 Wn.2d 1006 (2013). This is an issue that is construed “broadly” in Washington and admissibility is favored in doubtful cases. *Id.*; *Philippides*, 151 Wn.2d at 393; *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001).

The Way/Simeoni testimony was not speculative and would have assisted the trier of fact on causation. *Moore*, the case on which the trial court relied, was a roadway design case. There, Division I held that expert testimony on how the accident occurred and how certain precautions might have been taken by a city might have avoided a collision was inadmissible. But in that case, the driver could not explain how the collision actually occurred due to his brain injury and whether he was, in fact, confused in any way by the roadway’s conditions at the time of the accident, salient questions on causation. There simply was “no direct or circumstantial evidence” upon which an expert could testify that the city’s negligence caused the accident. *See also, Miller v. Lileins*, 109 Wn. App. 140, 34 P.3d 835 (2001).

Here, by contrast, when viewed in a light most favorable to Blue Bird, Way/Simeoni were entitled to testify, based on direct evidence of the fire's direction, the conditions then applicable, their own observations of the Michelsen/Northwest properties, the direct and circumstantial evidence from Spradlin, Blakely, and Sommers, and their own professional expertise, that the fire spread from the Michelsen/Northwest properties, and that Michelsen/Northwest breached their duty to Blue Bird by maintaining conditions on their premises that enhanced the risk that fire would spread from their premises to that of their neighbor.

The trial court did not err in considering the Way/Simeoni declarations, rejecting Northwest's motion to strike them. Rather, it erred in concluding that they did not create a question of fact here as to proximate cause.

F. CONCLUSION

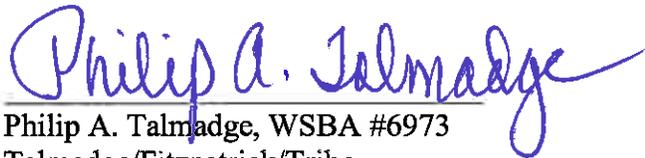
The trial court was correct in concluding that Michelsen/Northwest owed a duty of care to Blue Bird. It erred, however, in concluding as a matter of law that Blue Bird failed to prove causation as to its damages from Michelsen/Northwest's improper maintenance of their premises when fact issues abounded on causation. Improper maintenance allowed the fire to spread from their property to Blue Bird's. The trial court misperceived what

Blue Bird had to prove with regard to causation. It failed to properly credit the expert testimony adduced by Blue Bird on causation.

This Court should reverse the trial court's decision and remand the case for trial on the merits. Costs on appeal should be awarded to Blue Bird.

DATED this 6th day of March, 2019.

Respectfully submitted,



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APPENDIX

Superior Court of the State of Washington
For Chelan County

FILED

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Robert B. C. McSeveney, Judge
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18.2.00109-3

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Re: The Phoenix Ins. Co. v. Michelsen Packaging and Northwest Wholesale
No: 18-2-00109-3

COURT'S DECISION GRANTING
DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT 1

Dear Counsel,

I have considered all briefing, exhibits, case authority and arguments of counsel relating the motion for summary judgment. Given CR56 and the applicable legal standard, the Court grants Summary Judgment to each defendant based on the following analysis.

I. FACTS PRESENTED

Undisputed Facts:

1. At approximately 2:15 p.m. on June 28, 2015, a wildland fire was reported near Sleepy Hollow Road in Chelan County. (Yaple Decl., ¶ 11, Ex. 2, pg 1; Samuelson Decl., Ex. 1, pg 1).
2. The fire was a large conflagration involving extremely dry vegetation which quickly grew out of control in the 100 degree heat. (Yaple Decl., ¶ 11).
3. The fire traveled uphill in a south, southeasterly direction. Winds increased pushing the fire towards the Broadview development. By 8:20 p.m., structures in the Broadview neighborhood had become involved. (*Id.*).
4. Twenty-nine homes in the Broadview subdivision area were destroyed. (*Id.*, ¶ 14).
5. As the evening progressed, "spot fires" were reported in the easterly path of the wind. (*Id.*).
6. During the Broadview fire storm at about 9:14 p.m., a fire was reported at the Sav-Mart which is in the warehouse district. The fire was actually in the warehouse area behind Sav-Mart around the recycling bins and involving pallets of compressed cardboard. (*Id.*, ¶ 12; Samuelson Decl., Ex. 1, pg 4).
7. "There was a large cardboard storage area in the recycling yard adjacent to the Michelsen Packaging building. This area represented the most northern boundary of the fire damage in the Warehouse district. This area was defined by a tall cement wall about 10 feet in height. It was bordered on the east side by two large dumpsters. This area was used 24/7 by customers who could dump off cardboard to be recycled. Its configuration may acted (*sic*) as a natural collection point for an ember as the walls and dumpster orientation ran north and south roughly perpendicular to the wind direction that evening." (Yaple Decl., Ex. 2, pp. 3-4).
8. Yaple opines that the fires at NW Wholesale and Michelsen Packaging were consistent with spot fires from embers from the Broadview are in wind direction, wind velocity, and timing. Yaple Decl., ¶ 17).
9. Michelsen Packaging and NW Wholesale stored large amounts of inventory in their exterior yards. The businesses shared a boundary with Michelsen on the north and NW Wholesale on the south. Inventory was stored "in a contiguous line, directly adjacent to the lot line (north/south) between their occupancies." (Simeoni Decl., ¶ 6).
10. Michelsen stored stacks of fruit packaging material along the eastern edge of the property stretching from the north side down to the southern lot line with NW Wholesale. There was no space between the stacks of inventory. (*Id.*, ¶ 7-9).
11. Once the Michelsen yard was on fire, large pieces of burning debris was lifted into the air. A photograph by Rob Spradlin shows the large embers flying through the air. (Way Decl., ¶ 9, Ex. B).

12. During his investigation, plaintiff's expert Paul Way spoke with Blue Bird employees Larry Blakely and Roger Sommers who told him they were present during the fire. Blakely witnessed a large piece of burning debris, which he believed to be cardboard, land on Blue Bird's roof. Blakely and Sommers attempted to extinguish the burning debris with a garden hose but were unable to reach the flames. Blakely and Sommers witnessed the ignition of the Blue Bird facility due to this large piece of burning debris. Blakely estimates that the dimensions of the debris were 16 inches by 24 inches. (Way Decl., ¶ 10). DEFENDANTS OBJECT ON THE STATEMENTS OF BLAKELY AND SOMMERS WHICH ARE HEARSAY.
13. An ember over a foot in diameter was found at McGlinns' Ale House at 111 Orondo Street over 2 miles southeast of the warehouse district. (Yaple Decl., ¶ 15).
14. Fire Marshal Yaple examined the site of the Stemilt and Bluebird warehouses. "Both of these warehouses were in line with the wind direction of the evening and lay approximately S to SE from the recycling center. At Stemilt and Blue Bird there were very large embers, looking like giant cow pies, lying on the aprons and areas around these warehouses. These were different in nature from embers attributed to the shakes and pine needle debris found around Save-Mart (sic), and appeared to be embers from a synthetic product or material. They measured up to 15-16 inches across, and 3-4 inches thick, and were very light." Such embers were similar to the one collected at McGlinns. "These embers in the two fruit warehouses and other places were all downwind from the recycling center and NW Wholesale and are possibly product that burned from those areas. I could not determine what or where these embers were remnants from." (*Id.*, Ex. 2 pp 4-5).
15. Similar large embers were prevalent on the loading dock of the Stemilt warehouse but were not seen west of the railroad tracks that separate Michelson and Northwest Wholesale from Stemilt warehouse and the Blue Bird warehouse. (*Id.*).
16. On the roofs of undamaged structures at Northwest Wholesale, Michelson Packaging, and Sav-Mart, were "remnants of fire debris that primarily appeared to be wood ash in nature. Most of the debris was very small and found between buildings, or in gutters, which was consistent with the high winds of the evening and the effects of a rain shower during the early morning of June 29, 2015." (*Id.*).
17. During his investigation, Mark Yaple found large embers on the ground on Miller Street near the Blue Bird facility. Yaple states that the large embers did not appear to be made of paper products. The embers were identical to the McGlinns' ember. (*Id.*, ¶ 17, Ex. 5).
18. Yaple interviewed a Blue Bird employee who reported he was on the roof of Blue Bird attempting to put out the embers with a hose. He stated he was unable to reach all spots with a hose. Yaple inspected the roof: "There were two large holes I photographed on the roof area between the loading dock and the old packing line that represented a small bump out in the corner of the two. These had large burn through marks on the roof that had been extinguished and the damage could be seen above. These holes would require large embers to ignite this roof membrane, similar to those found on the Miller side of this complex. Both these indications of ignition and reports from the Blue Bird employee on the roof were consistent with the fire at Blue Bird Warehouse initiated on the roof from wind driven embers." (*Id.*, Ex. 2, pg 5).
19. In his Conclusions for his Report, Fire Marshal Yaple described the sequence of events involving the fire starting near a road near the Sleepy Hollow subdivision and progressed

to the Broadview area. “29 homes were lost, and burned completely, with embers from these fires traveling east, south-east and believed responsible for starting the fire that consumed the yard of Michelsen Packaging and the storage buildings and yard materials at Northwest Wholesale.” As a section for the origin of the fire in the Warehouse complex, Yaple wrote: “--windblown embers landing in protected areas harboring fine fuels for ignition—possibly the cardboard area of Michaelson’s (sic) packaging or combustibles in NW Wholesale yard . . . which in turn sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.” (*Id.*, Ex. 2 pg 6).

20. Jeremy Kendall pled guilty to arson for igniting the Sleepy Hollow/Broadview fire. (Hunter Decl., Ex. 1, (news item)).

Disputed Issues of Fact:

1. Phoenix’s expert, Paul Way, offers the following conclusions and opinion: He did not find any evidence that the Blue Bird property was ignited by a wildfire. The burning debris witnessed by Blakely and Sommers is not material that would originate from a wildland fire. The large piece of burning debris was consistent in size and shape to cardboard and is consistent with what one would expect to see originating from the Michelsen yard. The Blue Bird property burned as a result of the fire which originated on the Michelsen property. (Way Decl., ¶ 11).
2. Way agrees with Mark Yaple’s conclusion that the fire at Michelsen Packaging and/or NW Wholesale, “sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.” (*Id.*, ¶ 12).
3. It is Way’s opinion that “it is more likely than not, that the Blue Bird property was ignited by flaming debris from and/or was caused by the fire at the Michelsen yard.” (*Id.*, ¶ 13).

II. CLAIMS POSTURE

Phoenix Insurance, insurer of Blue Bird, asserted its subrogation rights and filed an action for negligence and nuisance on February 1, 2018. Michelsen and NW Wholesale have filed answers denying the claims responding that the fire was caused by the arsonist who began the Sleepy Hollow/Broadview fire.

Both defendants have filed motions for summary judgment contending that there is no evidence that they breached any duty of care and there is no evidence establishing any causation attributable to the defendants. Phoenix has responded with declarations from its experts opining that the Blue Bird fire was caused by large embers originating from the defendants’ businesses and/or properties and that defendants breached their respective duties of care by the manner in which cardboard and the companies’ inventories consisting of fruit packing materials was stored on the properties.

III. LAW AND ANALYSIS

A. Summary Judgment Standard

An Order granting summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” CR 56(c). “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). The moving party has the initial burden to show that no material fact exists. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once the moving party makes this initial showing, the burden then shifts to the nonmoving party to “make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial” 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The nonmoving party cannot rely solely on allegations of its pleadings, but “must set forth specific facts showing that there is a genuine issue for trial.” 112 Wn.2d at 225 (quoting CR 56(e)). A party opposing summary judgment cannot rely on mere assertions or speculation, but must present specific facts that will show a genuine issue of material fact remains. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 553, 192 P.3d 886 (2008). In reviewing the motion, the court considers only admissible evidence and will disregard inadmissible evidence. *Ebel v. Fairwood Park II Homeowners’ Ass’n*, 136 Wn. App. 787, 790, 150 P.3d 1163 (2007) (citing *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986)). If the nonmoving party does not meet its burden, “there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” 112 Wn.2d at 225 (quoting *Celotex Corp.*, 477 U.S. at 322-23). The facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013); *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).

For negligence actions, causation is usually fraught with issues of fact and not susceptible to summary judgment. However, a question of fact may be determined as a matter of law when reasonable minds can reach only one conclusion. *Moore v. Hagge*, 158 Wn. App. 137, 147-48, 241 P.3d 787 (2010).

B. A Duty To Maintain The Premises

Negligence requires (1) a duty, (2) a breach of the duty, (3) a resulting injury, and (4) that the breach of the duty was the proximate cause for the resulting injury. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). Unfortunately, the parties have not provided Washington law on the existence of a duty under the circumstances involved in this matter. The rule in Washington, as has been established since 1936, is that a possessor of land is held to a standard of care to maintain the premises so that it does not become a hazard wherein “if fire should occur in it, it is reasonably probable that it would spread to the adjacent property.” *Prince v. Chehalis Sav. & Loan Ass’n*, 186 Wash. 372, 375, 58 P.2d 290 (1936).

In *Prince*, the defendants had a garage on their property which had fallen into a state of disrepair. The garage was vacant, its doors were left open, many of the windows had been broken, and it had a floor composed of wood which had absorbed grease and oil over the years. Evidence showed that the garage had an accumulation of combustible material within, children played in it at times during the daytime, and itinerants often used the premises for sleeping quarters at night. The floor had been littered with cigarette stubs. 186 Wash. at 374. One late afternoon, a fire

started in the garage and spread rapidly to an apartment building on adjacent property. The fire then spread to the plaintiffs' property on the other side of the apartment building, destroying their house and garage. 186 Wash. at 373. The Washington Supreme Court affirmed the trial court's judgment in favor of the plaintiffs. 186 Wash. at 377. In adopting the above rule, the Court considered *Texas & New Orleans R. Co. v. Bellar*, 51 Tex. Civ. App. 154, 112 S.W. 323 (1908), wherein it was determined that a railroad company had negligently allowed oil to escape from its oil tanks, saturating the ground, which aided the spread of fire to the plaintiff's adjacent property. The Washington Supreme Court included the following language from that decision:

The fact that the fire might have started from some cause other than through an act of the railroad company does not exculpate the defendant. It may be that the defendant was in no wise responsible for the origin of the fire, and the evidence does not show that it was, but it was responsible for the part its negligence performed. That negligence consisted in bringing about a condition which subjected the plaintiffs' property to a danger which resulted in its destruction, which did not theretofore exist, and which danger and result was reasonably apparent to and should have been foreseen by a person of ordinary prudence. It is true that the oil of itself did not create the danger, and that the danger therefrom did not arise until some other act was performed, namely, the kindling of the fire which ignited the oil. Neither would the kindling of the fire at a point near or remote from the property have created the danger but for the presence of the oil. It is not always the last act of cause or nearest act to the injury that is the proximate cause, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances.

186 Wash. at 376 (quoting *Texas & New Orleans R. Co. v. Bellar*, 112 S.W. at 325-26).

In *Chicago, M., St. P. & P.R. v. Poarch*, 292 F.2d 449 (9th Cir. 1961), the Ninth Circuit affirmed the United States District Court for the Eastern District of Washington in applying Washington law on the basis of the rule pronounced in *Prince*. The railroad had allowed the vacant portion of an ice house to become a fire hazard by permitting inflammable materials to accumulate and had not taken reasonable steps to prevent children and itinerants from gaining access. A fire broke out in this vacant portion of the ice house and spread to the plaintiff's buildings resulting in a total loss. 292 F.2d at 450. The Ninth Circuit commented about the law in Washington:¹

As we view the holding of the *Prince* case, once it is established that the owner of a building has negligently allowed it to become a

¹ The federal courts applied the substantive law of the State of Washington under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

fire hazard and a fire does start the actual cause—whether deliberate, accidental, or act of God—is immaterial. The negligence is not in the ignition of the fire but rather it is in allowing a condition to exist which will be reasonably likely to cause injury to another if a fire does start.

292 F.2d at 451. The duty to maintain the property in such a manner as not to present a fire hazard was a question of fact properly submitted to the jury. 292 F.2d at 451.²

Plaintiff's expert, Albert Simeoni, states that the manner in which Michelsen stored its inventory, stretching from the north end of the property down to the southern lot line, created the source for a high intensity fire. By not providing breaks in its inventory, a large fuel load resulted which resulted in a large fire plume lofting flaming debris into the sky. (Simeoni Decl., ¶¶ 7-9). The plaintiffs do not cite any standard which was breached by Michelsen or NW Wholesale. In contrast, Michelsen provides Yaple's declaration wherein he states that Michelsen had never violated the fire code in the manner in which it stored materials in its yard. (Yaple Decl., ¶ 9).

The issue involved in this matter is whether the defendants allowed their properties to become a hazard wherein, if fire should occur in it, it is reasonably probable that it would spread to other property.³ It is the recycling center's nature which lends to an issue of fact whether the Michelsen property posed a hazard. The nature of the hazard, involving loose cardboard, was a significant risk because the large embers from such burned materials could be set adrift in the wind and pose a severe risk to the surrounding areas. The photographs show the large embers being carried aloft from the defendants' properties. If the plaintiff is able to show that this breach of the duty proximately caused it damages, it would establish its claim for negligence. Proximate cause is the challenge for the plaintiff.

C. Failure To Show Proximate Cause

Proximate cause involves two elements: Cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact is described as the "but for" consequences of an act without which the injury would not have occurred. 108 Wn.2d at 778. Cause in fact is generally a question for the trier of fact. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013). "Cause in fact may be decided as a matter of law, however, if the facts and inferences

² See also *Arnell v. Schnitzer*, 173 Or. 179, 144 P.2d 707 (1944)(defendant liable because it had maintained the property in such a manner to create a fire hazard despite intervening cause of spark originating from a sleeping drunkard's cigarette). The court opined:

The duty to refrain from littering one's premises with inflammable material is imposed for the protection of the neighbors, and a person who breaches that duty thereby creates a causal connection between his negligent act and his neighbor's loss if a fire starts among the debris.

144 P.2d at 717-18.

³In *Prince*, the Washington Supreme Court did state the rule as to fire spreading to adjacent property. However, the plaintiffs' property in that case was not adjacent to the defendants' property. An apartment house was between the plaintiffs' and defendants' properties. 186 Wash. at 375.

from them are plain and not subject to reasonable doubt or difference of opinion." 178 Wn. App. at 164-65. Legal causation rests on policy considerations of how far the consequences of the defendant's act should extend. *Hartley v. State*, 103 Wn.2d at 779. "[L]egal liability will be dependent on 'mixed considerations of logic, common sense, justice, policy, and precedent.'" 103 Wn.2d at 779 (quoting *King v. Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)).

Liability cannot be based on speculation. 178 Wn. App. at 165 (citing *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 378-80, 972 P.2d 475 (1999)). Causation may be speculative when, after considering all the facts, the injuries were *just as likely* to have occurred due to one cause as another. *Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010), *rev. denied*, 171 Wn.2d 1004 (2011). The standard of proof at the summary judgment setting is described by the Court of Appeals:

The plaintiff, however, need not prove cause in fact to an absolute certainty. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). It is sufficient if the plaintiff presents evidence that "allow[s] a reasonable person to conclude that the harm more probably than not happened in such a way that the moving party should be held liable." *Little [v. Countrywood Homes, Inc.]*, 132 Wn. App. 777, 781, 133 P.3d 944 (2006) (citing *Gardner v. Seymour*, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947)). The evidence presented may be circumstantial as long as it affords room for "reasonable minds to conclude that there is a greater probability that the conduct relied upon was the [cause in fact] of the injury than there is that it was not." *Hernandez v. W. Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969) (quoting *Wise v. Hayes*, 58 Wn.2d 106, 108-09, 361 P.2d 171 (1961)).

Martini, 178 Wn. App. at 165.

What is lacking in this matter is evidence establishing that any hazardous condition existing on the defendants' properties caused the fire at Blue Bird. Large embers are captured in a photograph drifting in the wind away from the Michelsen/N.W. Wholesale properties. The plaintiff's expert relies upon eyewitnesses who report seeing large embers alighting on the Blue Bird roof. However, there is no evidence to establish the origins of these large embers. Only speculation has been offered to argue that the embers from Michelsen and Northwest Wholesale traveled and landed on the Blue Bird property.⁴

⁴ Even Mark Yaple, when acting as Fire Marshall, could only speculate:

These embers in the two fruit warehouses and other places were all downwind from the recycling center and NW Wholesale and are *possibly* product that burned from those areas. I could not determine what or where these embers were remnants from.

Defendants argue that the yards of Stemilt and Blue Bird contained combustible materials similar to that found on their properties. (Samuelson Decl., Ex. 14). It is just as likely that an ember from another yard landed on Blue Bird's roof as opposed to an ember from the defendants' premises. It is speculative that the embers from defendants' properties landed on the Blue Bird property and started the fire. Without the required evidence to establish causation, the plaintiff cannot show negligence. Phoenix Insurance's claims should be dismissed as a matter of law.

D. Nuisance Is Based On The Negligence Claim

“[A] negligence claim presented in the garb of nuisance’ need not be considered apart from the negligence claim.” *Atherton Condominium Apartment Owners Ass’n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 527, 799 P.2d 250 (1990)(quoting *Hostetler v. Ward*, 41 Wn. App. 343, 360, 704 P.2d 1193 (1985), *rev. denied*, 106 Wn.2d 1004 (1986). If the conduct, which is alleged to be the basis for negligence without evidence of intentional conduct, is the conduct giving rise to the nuisance, the claim is considered within the negligence claim. 115 Wn.2d at 527-28; *Hostetler*, 41 Wn. App. at 360.

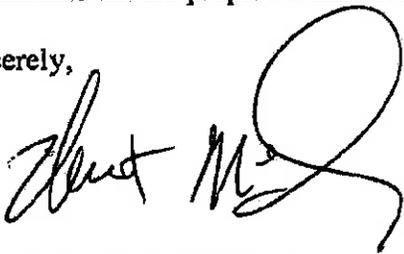
Phoenix has alleged a negligence claim which encompasses its claim for nuisance. In any event, the conduct of Michelsen or Northwest has not been shown to have proximately caused damages to Phoenix. Phoenix's claims fail as a matter of law.

IV. CONCLUSION

Defendants Michelsen Packaging's and Northwest Wholesale's motions for summary judgment are hereby **granted**. The plaintiff is unable to present evidence creating an issue of fact for causation. Determining that the embers responsible for the Blue Bird fire were from the Michelsen and Northwest Wholesale properties is based solely on speculation.

Defendants should prepare a final order for the Court's review and signature.

Sincerely,



Judge Robert B.C. McSeveney

1 THE HONORABLE ROBERT MCSEVENEY

2 FILED

3 NOV 09 2018

4 Kirri Morrison
Chelan County Clerk

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
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9 IN AND FOR THE COUNTY OF CHELAN

10 THE PHOENIX INSURANCE COMPANY, a
foreign Corporation,

11 Plaintiff,

12 v.

13
14 MICHELSEN PACKAGING COMPANY, a
15 Washington corporation; NORTHWEST
16 WHOLESALE INCORPORATED, a
Washington corporation, and DOES 1-20,

17 Defendants.

Cause No.: 18-2-00109-3

ORDER GRANTING DEFENDANT
NORTHWEST WHOLESALE
INCORPORATED'S MOTION FOR
SUMMARY JUDGMENT ON
CAUSATION; DENYING DEFENDANT
MICHELSEN PACKAGING COMPANY'S
MOTION FOR SUMMARY JUDGMENT
ON DUTY; AND DISMISSING ALL
CLAIMS AGAINST ALL DEFENDANTS
WITH PREJUDICE

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20 THIS MATTER came before the Court on Defendant Northwest Wholesale Incorporated's
21 Motion for Summary Judgment on Causation and Defendant Michelsen Packaging Company's
22 Motion for Summary Judgment on Duty. The Court, having carefully considered and reviewed the
23 prior pleadings and filings herein, as well as the following:

- 24
- 25 1. Defendant Northwest Wholesale Incorporated's Motion for Summary Judgment on
Causation;
 - 26 2. Declaration of A. Troy Hunter in Support of Defendant Northwest Wholesale
27 Incorporated's Motion for Summary Judgment on Causation, with Exhibits;
- 28

ORDER DISMISSING ALL CLAIMS WITH PREJUDICE - 1

Conformed
Copy

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3. Defendant Northwest Wholesale Incorporated's [Proposed] Order Granting Motion for Summary Judgment on Causation;
4. Defendant Michelsen Packaging Company's Joinder in Defendant Northwest Wholesale Incorporated's Motion for Summary Judgment;
5. Plaintiff Phoenix Insurance Company's Opposition to Defendant Northwest Wholesale Incorporated's Motion for Summary Judgment;
6. Declaration of Mark C. Bauman in Support of Plaintiff's Opposition to Defendant Northwest Wholesale Incorporated and Michelsen Packaging Company's Motions for Summary Judgment, with Exhibits;
7. Declaration of Paul Way in Support of Plaintiff's Opposition to Defendant Michelsen Packaging Company's and Defendant Northwest Wholesale Inc.'s Motion for Summary Judgment, with Exhibits;
8. Defendant Northwest Wholesale Incorporated's Reply in Support of Motion for Summary Judgment on Causation and Motion to Strike Plaintiff's Expert Declarations;
9. Declaration of A. Troy Hunter in Support of Defendant Northwest Wholesale Incorporated's Reply on Motion for Summary Judgment on Causation, with Exhibits;
10. Declaration of Kenneth Knappert in Support of Defendant Northwest Wholesale Incorporated's Reply on Motion for Summary Judgment on Causation;
11. Defendant Michelsen Packaging Company's Motion for Summary Judgment on Duty;
12. Declaration of Scott Samuelson in Support of Defendant Michelsen Packaging Company's Motion for Summary Judgment, with Exhibits;
13. Declaration of Mark Yaple in Support of Defendant Michelsen Packaging Company's Motion for Summary Judgment, with Exhibits;
14. [Proposed] Order Granting Defendant Michelsen Packaging Company's Motion for Summary Judgment;
15. Defendant Northwest Wholesale Incorporated's Response and Joinder in Michelsen Packaging Company's Motion for Summary Judgment;
16. Declaration of A. Troy Hunter in Support of Defendant Northwest Wholesale's

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Response and Joinder in Defendant Michelsen's Motion for Summary Judgment on Duty, with Exhibits;

- 17. Defendant Northwest Wholesale's [Proposed] Order Granting Motion for Summary Judgment on Duty;
- 18. Plaintiff Phoenix Insurance Company's Reply to Defendant Northwest Wholesale Incorporated's Response and Joinder in Michelsen Packaging Company's Motion for Summary Judgment;
- 19. Plaintiff Phoenix Insurance Company's Opposition to Defendant Michelsen Packaging Company's Motion for Summary Judgment;
- 20. Declaration of Mark C. Bauman in Support of Plaintiff's Opposition to Defendant Northwest Wholesale Incorporated and Michelsen Packaging Company's Motions for Summary Judgment, with Exhibits;
- 21. Declaration of Albert Simeoni in Support of Plaintiff's Opposition to Defendant Michelsen Packaging Company's Motion for Summary Judgment, with Exhibits;
- 22. Declaration of Paul Way in Support of Plaintiff's Opposition to Defendant Michelsen Packaging Company's and Defendant Northwest Wholesale Incorporated's Motion for Summary Judgment, with Exhibits;
- 23. Plaintiff Phoenix Insurance Company's [Proposed] Order Denying Michelsen Packaging Company's Motion for Summary Judgment on Duty;
- 24. Defendant Michelsen Packaging Company's Reply to Phoenix Insurance Company's Opposition to Michelsen's Motion for Summary Judgment of Dismissal of All Claims;

and having heard argument of the Parties, considers itself fully advised on the matter before it and makes the following ruling and order pursuant to the Court's letter ruling of October 2, 2018, which is incorporated herein by reference.

ORDER

Based on the above and pursuant to the Court's letter ruling of October 2, 2018, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

- 1. Defendant Michelsen Packaging Company's Motion for Summary Judgment on

1 Duty is DENIED.

2 2. Defendant Northwest Wholesale Incorporated's Motion for Summary Judgment
3 on Causation is GRANTED as to both Defendants, Northwest Wholesale Incorporated and
4 Michelsen Packaging Company.

5
6 3. Defendant Northwest Wholesale's Motion to Strike the declarations of Plaintiff's
7 experts, Paul Way and Albert Simeoni is DENIED.

8 4. All claims brought by Phoenix Insurance Company against Northwest Wholesale
9 Incorporated and Michelsen Packaging Company are hereby dismissed with prejudice.

10 SO ORDERED this 7th day of November, 2018.

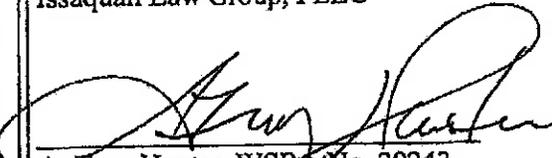
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12 LESLEY ALLAN

13
14 ~~Hon. Robert McSevency~~

Judge Lesley A. Allan

15 Presented by:

16 Issaquah Law Group, PLLC

17
18 

19 A. Troy Hunter, WSBA No. 29243
20 Justin P. Walsh, WSBA No. 40696
21 Of Attorneys for Defendant

22 Approved as to Form; Notice of Presentation Waived

23 Forsberg & Umlauf, P.S

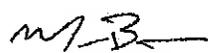
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26 A. Grant Lingg, WSBA No. 24227
27 Scott A. Samuelson, WSBA No. 23363
28 Attorneys for Michelsen Packaging, Co.

ORDER DISMISSING ALL CLAIMS WITH PREJUDICE - 4

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ORDER DISMISSING ALL CLAIMS WITH PREJUDICE - 5

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

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 Via U.S. Mail

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*Attorney for Defendant
Michelsen Packaging
Company*

Via Messenger
 Via Email
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DATED this 7th day of November, 2018.



Eva M. Lee, Legal Assistant

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Brief of Appellant*** in Court of Appeals, Division III Cause No. 36414-3-III to the following:

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Copy electronically served via appellate portal to:
Court of Appeals, Division III
Clerk's Office

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

DATED: March 6, 2019, at Seattle, Washington.



Jacqueline M. Richards, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

March 06, 2019 - 3:43 PM

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Superior Court Case Number: 18-2-00109-3

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