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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

THE PHOENIX INSURANCE COMPANY,
a foreign corporation,

Appellant,

vs.

MICHELSSEN PACKAGING COMPANY,
a Washington corporation;
NORTHWEST WHOLESALE INCORPORATED,
a Washington corporation; and DOES 1-20,

Respondents/Cross-Appellants.

**BRIEF OF RESPONDENT/CROSS-APPELLANT
MICHELSSEN PACKAGING COMPANY**

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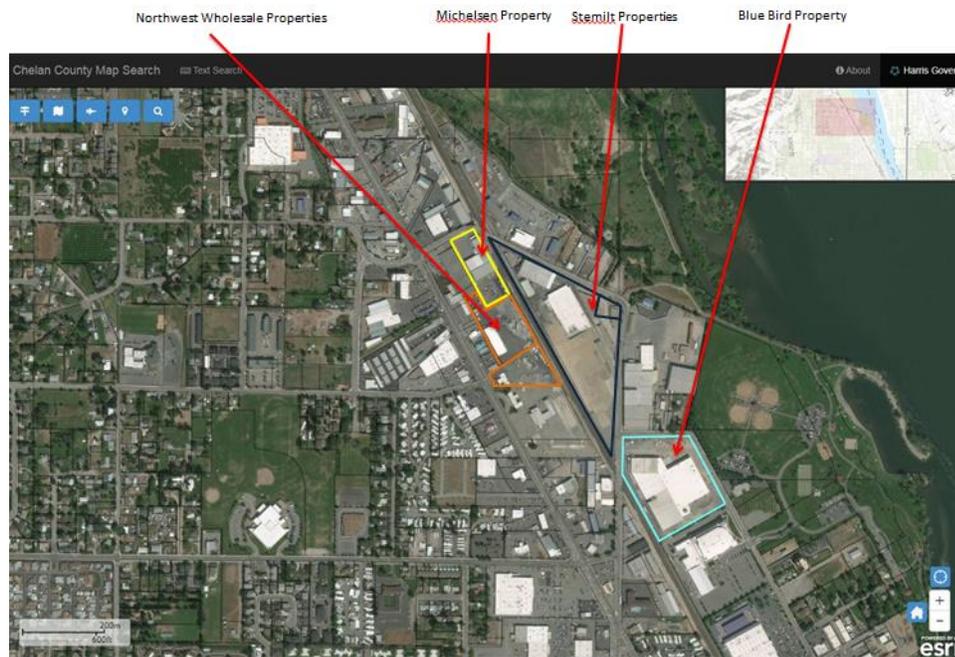
I. INTRODUCTION

On Sunday, June 28, 2015, an arsonist started a brush fire along Sleepy Hollow Road, northwest of Wenatchee, Washington. *CP 306-309*. The fire grew quickly and spread south and east due to gusty winds, extremely dry vegetation, and temperatures approaching 100 degrees. *CP 226-27*. Within ten hours, the Sleepy Hollow Fire spread over 2,950 acres of land, burning 30 homes and four business properties in Wenatchee's warehouse district, including Michelsen Packaging ("Michelsen"), Northwest Wholesale ("Northwest"), Stemilt Growers, and Blue Bird, Inc. ("Blue Bird"). *CP 229-30, 233*.

A total of 268 emergency responders were mobilized to assist the public in response to the fast moving fire. *CP 231*. Winds on the evening of June 28th "were very high." *CP 201*. Embers from the initial wave of the fire "blew over much of this part of Wenatchee and embers were reported in many areas." *Id.* Dozens of homes in the Broadview area of Wenatchee caught on fire and generated countless embers that traveled more than a mile in the gusty east/southeast winds. *CP 201, 204*. These embers started fires in the Wenatchee warehouse district. *CP 204*. The Blue Bird warehouse eventually caught fire and burned.

Appellant Phoenix Insurance Co. ("Phoenix"), the insurer for Blue Bird, sued Michelsen and Northwest for negligence and nuisance. *CP*

245. Phoenix alleged that Michelsen and Northwest negligently stored material on their lots, that such material was ignited by embers from the Sleepy Hollow fire, and the fires allegedly “ignited and spread, thereby causing the damages alleged in the Complaint.” CP 245. Phoenix argues that embers from the Michelsen plant lifted into the air, joined the other countless embers from the Sleepy Hollow fire, traveled several city blocks, crossed the railroad tracks and then ignited Blue Bird’s warehouse. See aerial photo below, CP 238.



Respondent Michelsen moved for summary judgment dismissal on the grounds that: (1) Michelsen owed no duty to serve as a “firebreak” to ensure that the Sleepy Hollow Fire did not ignite the Blue Bird warehouse;

(2) there was no evidence Michelsen breached any duty to Blue Bird – to the contrary, Michelsen “had all the necessary permits for storage of materials in its yard, and the manner in which the materials were stored was in compliance with the issued permits,” per Fire Marshal Mark Yaple; and (3) the nuisance claim was subsumed by the negligence claim, and both claims should be dismissed. *CP 151, 182.*

During oral arguments at the summary judgment hearing on October 1, 2018, Phoenix’s counsel answered two key questions that laid bare the lack of evidence supporting plaintiff’s specious liability theory:

MR. BAUMAN: “So, ... is your question: Do we know where the flying piece of what we believe was cardboard that caught Blue Bird on fire, do we know the origin at this point of this litigation? That’s your question, Your Honor?”

THE COURT: “Yes.”

MR. BAUMAN: “At this point of litigation, we do not.”

THE COURT: “So it’s just as likely it could have come from the other yard or another structure or something that was on fire.”

MR. BAUMAN: “... But ... even if it had, it’s our contention that if it did not come from the Michelsen or Northwest yard, it was their failure to properly maintain their yard that caused the perfect catastrophe and put this all in motion. ... I don’t believe we have to prove that the offending piece of flying cardboard came from their yard to prevail in this case...”

RP 23-24.

The trial court properly granted summary judgment. However, there were three independent grounds for dismissing Phoenix's claims: (1) lack of duty, (2) lack of breach, and (3) lack of causation. The trial court based its decision solely on lack of causation. If this Court determines that the trial court erred in ruling that causation was lacking as a matter of law, then Michelsen submits that the error was harmless, because there are two alternative compelling grounds on which summary judgment could and should still have been granted – lack of duty and lack of breach. Michelsen therefore cross-appeals these portions of the trial court's October 2, 2018 letter opinion that discusses duty and breach, i.e. CP 887-89 (Section III B).

II. ASSIGNMENTS OF ERROR

A. Appellant's Assignment of Error.

1. The trial court correctly determined that all claims against Michelsen should be dismissed based upon the lack of any competent or admissible evidence that Michelsen's alleged breach proximately caused damages to Blue Bird.

B. Respondent/Cross Appellant's Assignments of Error.

1. The trial court erred when it determined that Michelsen owed some legal duty to neighboring landowners other than the duties

imposed by statute, local ordinances and regulations and Michelsen's permit for the storage of cardboard at its facility.

2. The trial court erred when it determined that there was a genuine issue of material fact on the issue of whether Michelsen breached its duty to Blue Bird. The trial court noted that plaintiff did not cite "any standard which was breached by Michelsen or Northwest," and yet it found that "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." *CP 889 (emphasis added)*. However, there was no evidence presented of any loose cardboard at the Michelsen facility. Rather, the first Wenatchee police officer called to the scene confirmed that "several pallets of compressed cardboard were on fire at Michelsen Packaging." *CP 229 (emphasis added)*.

3. The trial court erred by denying Northwest's motion to strike Phoenix's expert declarations of Paul Way and Albert Simeoni, which contained numerous speculative, unfounded, and inadmissible assertions and improper expert opinions under ER 702-705.

III. STATEMENT OF THE CASE

A. The Rapid Spread of the Sleepy Hollow Fire, and the Destruction It Caused In Ten Hours.

The Sleepy Hollow Fire began in the foothills northwest of Wenatchee around 2:15 p.m. on June 28, 2015. *CP 199; 306-309.* The fire was particularly fast moving and dangerous. *CP 227.* It required law enforcement officials to initiate Level III door-to-door evacuations of the Sleepy Hollow and Horse Lake neighborhoods. *CP 228-29.* The fire later spread to homes in the Broadview neighborhood of Wenatchee where another Level III evacuation was initiated. *Id.* The fire eventually consumed 2,950 acres in and around Wenatchee. More than 100 homes were evacuated, and 30 homes and 4 businesses were ultimately destroyed by the fire. *CP 229-231.* Below is a photo showing the fire engulfing the Wenatchee Valley on June 28, 2015.



CP 235.

The hot weather and the extremely dry vegetation made conditions ripe for rapid fire spread. *CP 182-83.* The fire response net was cast far and wide, and over 268 personnel, fire crews and law enforcement officers from multiple state and local agencies worked to evacuate affected neighborhoods and keep the fire away from homes. *CP 183; 231.* The first structure fire 911 call was made at 8:20 p.m. that Sunday evening at 2020 Broadview North. *CP 183.* Numerous primary roadways and streets were closed off. *CP 229.* Twenty-four homes in the Broadview subdivision were destroyed, and five homes nearby were also destroyed. *CP 230.* As the evening progressed, “spot fires” were reported in the easterly path of the wind, and large burning embers were seen travelling through the air to the east. *CP 183, 229-30.*

At the time of the fire, Mark Yaple was the Fire Marshal for the City of Wenatchee Fire Department. *CP 179.* Mr. Yaple was off duty when the first Wenatchee fire tones went out, but responded to the Broadview area to assume his duties. *CP 183.* He contacted Bill Nickels, Broadview Command on site, and worked to report conditions, secure access for fire crews, notify residents off evacuation orders, and direct crews to fight spot fires on roofs and between houses until the early

morning on June 29, 2015. *Id.*; see *CP 236* (the photo below shows airborne embers in the Wenatchee area that night).



CP 236.

As it became dark on June 28, 2015, large embers from the Sleepy Hollow Fire were observed floating through the air and landing in the warehouse district of Wenatchee. *CP 228, 233.* Some of the embers travelled more than one mile in the air. *CP 184.*

Fire Marshall Yapple heard radio reports of a fire at Sav-Mart in the Wenatchee Warehouse District, but arriving crews determined at 9:14 p.m. that the fire was actually in the warehouse area behind the Sav-Mart, where several pallets of compressed cardboard were on fire at Michelsen's yard. *CP 229.* About thirty minutes later, all night shift employees at the Stemilt Growers facility were being evacuated. *CP 230.*

Mr. Yaple conducted an investigation of the Sleepy Hollow Fire beginning on June 29, 2015. *CP 183-85*. He specifically investigated the warehouse district. The spread of fire from Sleepy Hollow to the Broadview area was well documented, but the distance from the Broadview area to the warehouse district was over one mile. *CP 184*. Fire Marshall Yaple investigated the possible connection between these fires. *Id.* He noted that the wind direction was on a path from the Broadview area to the warehouse district. *Id.* Wind velocities were high. *Id.* There were reports of embers landing on the event center (which is past Blue Bird), and an ember over a foot in diameter was found at McGlinn's Ale House, at 111 Orondo Street, which is over two miles southeast of the warehouse district. *Id.* Yaple also obtained reports of embers landing in East Wenatchee. *Id.*

Yaple examined the roofs at Michelsen, Northwest and Sav-Mart, and found remnants of fire debris that appeared to be primarily wood ash in nature. *CP 185*. Most of the debris was very small and found between buildings or in gutters. *Id.* Yaple's observations and witness interviews in the warehouse district failed to reveal any viable ignition sources other than embers from the Sleepy Hollow Fire. *Id.*

Yaple determined that the fires at Michelsen and Northwest were consistent with spot fires ignited by embers from the Broadview fire area.

Id. Yaple also found larger embers on the ground on Miller Street near the Blue Bird property, but these embers had a different composition and did not appear to be paper or cardboard type products. *Id.* Yaple could not determine where these larger embers came from or what they were made of. *CP 185.* These embers near Blue Bird were identical to the ember found two miles away at 111 Orondo Street. *Id.*

Wenatchee Fire Marshal Mark Yaple could not determine the source of the embers that ignited Blue Bird's warehouse. *CP 203.* The Fire Marshall officially classified the cause of the Blue Bird warehouse fire as "Undetermined." *CP 204.*

B. Michelsen's Storage Practices Complied with All Fire Codes, Ordinances, Regulations and Published Industry Standards; Michelsen Also Passed Regular Fire Safety Inspections by the Wenatchee Fire Marshal.

Fire Marshal Yaple spent three decades working various positions at the Wenatchee Fire Department. *CP 178-79.* From June 1985 to April 2007, he served as a firefighter, engineer, captain and fire safety program administrator. *Id.* From April 2007 to December 2015, he was the Assistant Fire Chief/Fire Marshal. *Id.* He also has personal knowledge of the annual fire safety inspections conducted by the Wenatchee Fire Department of numerous warehouses and commercial facilities in

Wenatchee over the past twenty years, including Michelsen Packaging.

CP 180. In his August 1, 2018 Declaration, Yaple testified as follows:

Previously, as a fire company officer, I had conducted several of those [fire safety] inspections in the warehouse area. Over the years, I observed how Michelsen stored its paper-based fruit packing materials and cardboard recycling materials in its yard. Michelsen stored its ... materials ... in shrink wrapped palletized packs that were stacked in accordance with local fire safety standards and codes. These included International Fire Code 2015 edition section 315.4. ...

In 2015 Michelsen stored [materials] ... in the yard routinely and in compliance with these codes. ... Michelsen Packaging was not cited for any violation involving the outdoor storage of combustible materials. In my experience conducting fire inspections for the City of Wenatchee and overseeing the inspections of company level inspectors, **Michelsen had an exemplary safety record and took great steps to minimize fire exposure within their yard.** ...

Wenatchee City Ordinance 3.12.030(2) governed the storage of “all empty boxes, bins, pallets, cartons, and/or trays.” This code requires a 20-foot separation of combustible materials from a concrete or brick building. ... Michelsen complied with this code....

Michelsen obtained and [updated] permits for Flammable Liquids Storage, Hi Piled Combustible Storage, Cutting and Welding, Hazardous Materials Storage, Combustible Materials Storage, and Liquefied Petroleum Gas (LPG) Storage. Michelsen stored its ... materials in substantially the same manner as Blue Bird, Northwest, and Stemilt. ... I did not note or issue a violation notice for any issues with the manner in which Michelsen stored materials in its yard. ... At the time of the Sleepy Hollow Fire, Michelsen had all the necessary permits for storage of materials in its yard, and the manner in which the materials were stored was in compliance with the issued permits.

CP 180-181 (emphasis added).

Michelsen satisfied all requirements, fire safety standards and local customs in the manner in which it stored materials in its yard. *CP 182.* Fire Marshal Yaple concluded that Michelsen was not required to do anything more than it did to safely store materials in its yard. *Id.*

C. Phoenix Insurance Co. Files Negligence Lawsuit in Feb. 2018.

Blue Bird was insured by the Phoenix Insurance Company, which paid a first party fire loss insurance claim to rebuild and re-equip the Blue Bird warehouse after the fire. On February 1, 2018, Phoenix filed a Complaint for Damages against Michelsen and Northwest alleging two causes of action: (1) negligence; and (2) nuisance. *CP 240-46.* Phoenix's negligence claim alleges:

- 3.2 Defendants owed a duty to Bluebird and the general public to exercise reasonable care in the maintenance, occupancy, organization and control of their respective properties and inventory, including, but not limited to the proper storage of inventory items, fruit packaging and/or recycling materials in a safe and reasonable manners [*sic*] so as not to cause or contribute to fire ignition and spread.
- 3.3 Defendants breached their duty by negligently and carelessly storing inventory items, fruit packaging and/or recycling materials, and/or maintaining, occupying, organizing and/or controlling their respective properties, so that a fire ignited and spread, thereby causing the damages alleged in the Complaint.

Phoenix's nuisance claim alleged as follows:

- 3.7 The acts and/or omissions of Defendants created a condition that was an obstruction to the free use of and enjoyment of Plaintiff's insured in the use of its property.
- 3.8 A reasonable person would be reasonably disturbed by the nuisance caused by the conduct of Defendants.
- 3.9 The nuisance created by Defendants was a substantial factor in causing Plaintiff's insured's damages.

CP 245.

Phoenix suggests that the fire at Michelsen's facility was "negligently" allowed to spread to the Blue Bird plant, despite the certainties that Michelsen did not start the fire, Michelsen had no staff or employees on site at the time of the fire, the Fire Department was evacuating personnel from the area within 30 minutes of the start of the fire, and Michelsen had been storing material in its yard under permit, with the annual express approval of the Fire Department and in the same manner as several other businesses (including Blue Bird) in the area.

Michelsen filed its Answer to the Complaint on March 23, 2018, denying liability and asserting multiple defenses. *CP 248-256.*

D. Defense Summary Judgment Motions Filed in August 2018.

Defendants Northwest and Michelsen both filed motions for summary judgment in August 2018. *CP 150-174.* Michelsen argued in its

motion that: (1) it owed no duty to serve as a “firebreak” to save Blue Bird from the larger Sleepy Hollow Fire; (2) Michelsen did nothing improper in the eyes of the City Fire Marshal and complied with all applicable laws, fire codes, customs and standards regarding storage of material in its yard; and (3) the nuisance claim failed because it is subsumed in the negligence claim and suffered the same lack of evidence. *CP 151-174*. Northwest argued in its motion that Phoenix had no admissible evidence of causation. *CP 032-49*. Northwest and Michelsen filed joinders to each other’s summary judgment motions. *CP 175-76; CP 391-409*.

In its opposition to summary judgment, Phoenix submitted the Declarations of two experts – Paul Way and Albert Simeoni. Northwest moved to exclude these declarations. *CP 607-635*. Northwest rightly pointed out that Phoenix, through its two experts, conflated arguments on causation and duty in an effort to avoid dismissal for failure to adduce admissible evidence of either element of negligence. *CP 607*. The Simeoni Declaration attempted to address the issues of duty and breach, whereas the Way Declaration attempted to address the causation element, i.e., what or whose embers ignited the fire at Blue Bird. *CP 540-45; CP 546-56*. Michelsen and Northwest argued in their reply briefing that both

declarants lacked personal knowledge and speculated on a number of levels. *CP 859-73; CP 607-35.*

Appellant Phoenix stated in its Brief of Appellant that “the various experts agree ... 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.” *Appellant’s Brief at 8.* That is incorrect. Fire Marshal Yaple did not state such an opinion. To the contrary, Yaple stated: “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.**” *CP 203 (emphasis added).* In his Declaration, Yaple stated: “**I do not know where these embers came from or what they were made of...**” *CP 185 (emphasis added).*

On the equally compelling issues of duty and breach, Michelsen argued in its summary judgment motion that it owed no duty to prevent the spread of a large wind-driven fire from its facility to any nearby facilities. Indeed, even the heroic efforts of first responders were unable to stop the spread of the fire from building to building and neighborhood to neighborhood due to the gusty winds and extremely dry, hot weather conditions on June 28, 2015. As opined by Fire Marshal Yaple,

Michelsen's storage practices complied with all applicable laws, customs and standards. *CP 182*. Michelsen stored its materials no differently than did Blue Bird, Stemilt and Northwest. *Id.* The trial court even observed that plaintiff could not cite "any standard" allegedly breached by Michelsen or Northwest. *CP 889*.

E. The Trial Court Ruling and Letter Opinion Dated October 2, 2018.

The trial court granted Northwest's motion for summary judgment and Michelsen's joinder, issuing an eight-page letter opinion with a restatement of numerous facts, discussion of the elements of Phoenix's claims, i.e., duty, breach, causation and damages, legal analysis and the reasoning behind its ruling. *CP 883-91*. The trial court found issues of fact on duty and breach and focused on proximate cause as "the challenge for plaintiff." *CP 889*. The trial court denied Northwest's motion to strike the expert declarations submitted by Albert Simeoni and Paul Way with Phoenix's opposition.

IV. ARGUMENT

The standard of review for this Court in considering the trial court's summary judgment ruling is *de novo*. *Leaky v. State Farm Mut. Auto. Ins. Co.*, 3 Wn. App. 2d 613, 633, 418 P.3d 175 (2018).

A. **The Trial Court Correctly Dismissed Blue Bird's Claims Based on the Lack of Any Evidence That Michelsen Proximately Caused the Fire at the Blue Bird Facility.**

In its appellate brief, Phoenix argues that 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.” *Brief of Appellant at 10*. Quite to the contrary, that was not a “misconception” the trial court labored under, it was a correct statement of the plaintiff’s burden to present evidence that its damages were proximately caused by Michelsen’s alleged breach of duty. If the embers that ignited Blue Bird’s warehouse did not originate from the Michelsen property, it is axiomatic that plaintiff cannot recover from Michelsen. Phoenix’s counsel of record also admitted at oral argument that plaintiff did not know the origin of the debris that started the fire at Blue Bird. When the trial court questioned counsel as to whether it was just as likely that the fire-igniting debris had come from some source *other than* Michelsen Packaging, Blue Bird’s counsel stated: “I don’t believe we have to prove that the offending piece of flying cardboard came from their yard to prevail in this case.” *RP 24*.

However, that is exactly what Blue Bird must prove. No other result supports the “but for” standard of causation needed to send the matter to a jury. Surely Michelsen cannot be held liable to Blue Bird if the

Blue Bird warehouse was ignited by an ember that originated from a home in the Broadview area of Wenatchee.

Given the conflagration existing in Wenatchee on June 28, 2015, and the documented distance that embers were traveling on the night of the fire, it is certainly possible that whatever ignited the Blue Bird warehouse came from a location other than the Michelsen facility. Lacking evidence that any particular ember came from any particular place, a jury would be asked to speculate as to the cause of the fire. And, of course, this is improper under Washington law:

Where causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.

Sanchez v. Haddix, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981) (emphasis added).

Phoenix may argue that embers from the Michelsen facility started another facility in the warehouse district on fire. And fire from the second facility started a third facility on fire. And finally, embers from the third facility landed on Blue Bird's warehouse roof and started the Blue Bird warehouse on fire. This speculation must fail. First, it is unlikely to be true. The first report of a fire at the Michelsen facility was called in at

9:14 p.m. on the evening of June 28. CP 229. However, only 13 minutes later, at 9:27 p.m., flames were reported to be threatening a large propane tank “adjacent to the Blue Bird fruit processing facility.” CP 230. Meanwhile, the Stemilt facility located *between the Blue Bird and Michelsen facilities* did not start to burn until an hour later, at 10:29 p.m. CP 230.

Clearly, there were numerous fires in the warehouse district burning simultaneously. And while Phoenix would like to argue that Michelsen’s facility was the first in the warehouse district to burn, that is far from clear. CP 548. More importantly, there is absolutely no evidence that “but for” the fire at Michelsen the Blue Bird facility would have been saved. Lacking such “but for” evidence, summary judgment dismissal was appropriate. *See, e.g., Kennett v. Yates*, 45 Wn.2d 35, 39 272 P.2d 122 (1954) (“the causal connection between each of the claimed expenses and defendant’s negligence must be shown to justify its submission to the jury”).

B. The Trial Court Erred in Its Determination of the Issue Whether Michelsen Owed a Duty of Care to Blue Bird and, If So, What That Duty Was.

In the absence of a *recognized* duty, the court determines whether there is a tort duty of care owed to a particular plaintiff. *Steinboch v. Ferry County PUD No. 1*, 165 Wn. App. 479, 269 P.3d 275 (2011). In

deciding whether a duty exists, the court must consider “logic, common sense, justice, policy, and precedent.” *Id.*

No case cited by Appellant suggests a landowner storing flammable materials pursuant to a permit, and acting in compliance with all recognized statutes and ordinances, owes a duty to stop the spread of an uncontrolled fire originating outside of its property from racing through its property toward neighboring landowners. Likewise, Washington law imposes no duty on Michelsen to prevent a third party from starting a fire on property not owned by Michelsen.

At its core, Appellant’s argument is that Michelsen’s warehouse should have been the “last line of defense” to a fire that raged through a town, overwhelmed the ability of firefighters to respond, and ultimately consumed 2,950 acres of property and 30 homes. Apparently, Blue Bird’s insurer believes that the Michelsen facility should have been impervious to embers landing on its fruit packing materials and should have “done something different” for the benefit of Blue Bird.

This is nonsense. Logic, common sense, justice, policy dictate that a landowner innocently complying with all recognized statutes, ordinances and permits regulating fire dangers owes no duty to serve as a “firebreak” for the benefit of other landowners. The trial court erred when it decided otherwise.

1. Michelsen’s Only Duty to an Adjacent Property Owner Was Defined by Existing Ordinances, Regulations and Customs.

Appellant cites no legal authority for the proposition that a landowner owes a third party a duty to store fruit packing materials or cardboard in any particular fashion.¹ However, Michelsen undoubtedly had a duty to follow the ordinances and regulations in place at the time of the fire. It also had a duty to comply with its storage permits. In such cases, Washington courts often look to such published standards to define the tort duties owed to third parties.

For example, in *Hurley v. Port Blakely Tree Farms, L.P.*, 182 Wn. App. 753, 332 P.3d 469 (2014), the court was faced with a similar situation. In *Hurley*, defendant Zepp was a logger who allegedly caused earth movement by clearing a piece of land. Zepp argued that it was reasonable for him “to log in accordance with a forest practices application that was reviewed and approved by experts at the Department of Natural Resources.” *Hurley*, 182 Wn. App. at 773.

In analyzing this argument, the Court of Appeals noted that compliance with applicable regulations, customs and permits does not *per*

¹ Of course, landowners may owe a specific duty to outsiders when handling “ultra-hazardous” materials. See *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 500, 687 P.2d 212 (1984). Cardboard packaging is not alleged to be “ultra-hazardous.”

se excuse a defendant from a claim of negligence and entitle the defendant to summary judgment as a matter of law. However, the court also held:

But in cases holding that the defendant's duty of care required more [than compliance with law and permits], the defendant possessed the specialized knowledge, skills, and expertise to assess the situation and take reasonable additional action.

Id. at 773-74. The court went on to hold:

We cannot conclude as a matter of law that Zepp had a duty to take additional steps to know and ensure that logging the land was reasonable given its geological and hydrological features. Because there was no material question of fact for the jury to decide, the trial court properly dismissed appellant's negligence claim against Zepp.

Id. at 774.

As in *Hurley*, this court should determine that Michelsen had no greater duty to prevent the spread of fire than to follow the requirements of its permits, Washington statutes, and local ordinances and regulations. Michelsen is in the business of packing fruit. There is absolutely no evidence that Michelsen had "specialized knowledge, skills, and expertise to assess the situation and take reasonable additional action" to prevent the spread of fire from its property. Indeed, by Blue Bird's standards, even the Wenatchee Fire Marshall lacks such knowledge and expertise as he vehemently disagrees with Phoenix's experts that Michelsen's storing of flammable materials was improper and unreasonable.

There can be no dispute that fire regulations have been put into place at the state and local levels to prevent the occurrence and spread of fires. The City of Wenatchee requires permits for the storage of flammable cardboard and fruit packing materials for the same reason. No reasonable person expects those standards to be lacking. Like the logger in *Hurley*, Michelsen was fully entitled to rely on its permits and compliance with all applicable law to guide its storage practices. No legal duty should be created simply because an expert in Massachusetts (who has never seen the facility) says fruit packers must do more than what the law requires.

2. There Is No Statutory Duty Owed by Michelsen to Blue Bird Under RCW 76.04.370.

Appellant begins its legal argument on duty by citing to RCW 76.04.730, a statute that applies only to forestlands, and consequently does not apply to a commercial warehouse district in the heart of a city like Wenatchee. Although the trial court did not reference the forestlands statute, Appellant referenced the statute in its opposition brief at the trial court level and again in its Appellant's Brief (pp. 14-15).

Title 76 of the Revised Code of Washington is entitled "Forests and Forest Products." RCW 76.04.730 specifically applies only to

“forestlands” and was enacted to apply to wildland fires. The definitions section of the statute provide as follows:

(11) "Forestland" means any unimproved lands which have enough trees, standing or down, or flammable material, to constitute in the judgment of the department, a fire menace to life or property. Sagebrush and grass areas east of the summit of the Cascade mountains may be considered forestlands when such areas are adjacent to or intermingled with areas supporting tree growth. *Forestland, for protection purposes, does not include structures.*

RCW 76.04.005(11) (2015) (emphasis added). Nothing in RCW Title 76 imposes a statutory duty of care upon Michelsen.

3. The Cases Cited by Phoenix Involve Negligence When Fighting Existing Fires, Not Preventing Fires Caused by Others.

All of the cases cited by Phoenix for the proposition that Michelsen owed a duty to others outside their land are inapplicable and distinguishable. None of these cases examine a fire involving materials that were regulated, permitted, and routinely inspected by the local Fire Marshall. Rather, Phoenix’s cases deal with falling trees, personal assaults, and slip/fall accidents on sidewalks adjoining the landowner’s property.

Phoenix cites to *Oberg v. Dep’t of Natural Resources*, 114 Wn.2d 278, 787 P.2d 918 (1990). This case lends no support to Phoenix. First, *Oberg* involved the forestlands statute, which does not apply to this case. Second, Phoenix misinterprets the holding of *Oberg*, a case that concerned

Washington's "public duty doctrine." *Oberg* has nothing to do with the storage of materials on a property. Rather, *Oberg* and the cases discussed in *Oberg* involve the obligation of a landowner *to take reasonable steps to fight existing fires*. There is no allegation in this case that Michelsen had any opportunity to extinguish the fire that was discovered on its property.

In *Oberg*, firefighters battling multiple fires failed to stop *an existing fire* from traveling onto plaintiff's property. The negligence alleged in *Oberg* arose *after the fire ignited*. The mechanism of that negligence was the State of Washington's choices with regard to *fighting the fire*.² In the present case there is absolutely no evidence of negligence occurring *after* Michelsen's facility began to burn. Nothing in *Oberg* sets forth any duty with regard to an obligation to store materials in a particular way to *prevent a fire*.

In making its statements regarding duty, *Oberg* pointed to prior Washington cases that also involved situations where owners allegedly failed to take reasonable care to fight *known, existing* fires to prevent them from burning other properties. Chief among these was *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 558, 164 P. 200 (1917), which was cited by the *Oberg* Court for the proposition that:

² "In its briefs DNR recounts much detail about fighting these fires. All of the firefighting difficulties faced by DNR and all of the demands placed upon its resources were before the jury." *Oberg*, 114 Wn.2d at 280.

... there may be negligence [by the landowner] ... in his failure to use due diligence in preventing the spread of a fire originating upon his own land though it so originate[d] without any act or fault of his own.

Sandberg, 95 Wash. at 558. But *Sandberg* considered only the landowner's efforts to extinguish *an existing fire*. In *Sandberg*, the Washington Supreme Court held:

After he discovered the fire on his premises, he was bound to exercise reasonable care and diligence to prevent it from spreading so as to endanger his neighbor's property. His duty in this respect, after discovering the fire, would be the same as that resting upon a person who, without negligence, starts a fire on his own premises. He was bound to put forth such reasonable effort to prevent the fire endangering his neighbors as a man of ordinary prudence would put forth who was actuated by a proper regard for his neighbors' rights and safety.

Sandberg, 95 Wash. at 560 (emphasis added) (*quoting Baird v. Chambers*, 15 N.D. 618, 109 N.W. 61 (1906)).

Likewise, the *Oberg* court cited *Jordan v. Spokane, Portland and Seattle Rwy. Co.*, 109 Wash. 476, 186 P. 875 (1920) as a source of the supposed duty. But *Jordan* held only that the landowner's duty was to have "extinguished the fire before it was so communicated ... [and] that [the landowner] was negligent in not so doing." *Jordan*, 109 Wash. at 481 (emphasis added).

Oberg also cites *Arnhold v. United States*, 284 F.2d 326, 328 (9th Cir.1960), *vacated* 166 F. Supp. 373 (W.D. Wash. 1958), *cert. denied*, 368

U.S. 876, 82 S. Ct. 122, 7 L.Ed.2d 76 (1961). In *Arnhold*, the court held that:

[A]n owner or occupant of forest land *with knowledge of a fire burning on such land*, even though started by strangers, must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others.

Arnhold, 284 F.2d 330 (emphasis added). See also, *Walters v. Mason Cty. Logging Co.*, 139 Wash. 265, 246 P. 749 (1926) (finding no negligence on the part of a logging company that failed to successfully extinguish a fire that the logging company may or may not have started).

In sum, there is no statute or common law precedent requiring Michelsen to have stored its materials in any way *other* than how it and other warehouses in the area (including Blue Bird) stored these materials.

4. The *Prince v. Chehalis Sav. & Loan Case* Is Distinguishable and Does Not Support the Trial Court's Finding that Michelsen Owed a Duty to Blue Bird.

The trial court's letter opinion begins its discussion of duty by looking at the 1936 Washington case of *Prince v. Chehalis Sav. & Loan Ass'n*, 186 Wash. 372, 375, 58 P.2d 290 (1936). The trial court cited *Prince* for establishing the rule in Washington 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*, 186 Wash. at 375 (emphasis added). In *Prince*, the defendant had a garage on

its 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 “the floors and walls ... had become saturated with grease and oil” over the years. *Id. at 374*. The “defendant ... allowed debris and ... combustible and inflammable material and permitted and allowed ... itinerants and vagabonds to use, sleep in and smoke in said building.” *Id.* Moreover, the defendant “knew of all this.” *Id. at 374-75*. Late one afternoon, a fire started in the garage and spread rapidly to an apartment building and garage on plaintiff’s adjacent property.

Plaintiff Prince sued the defendant for negligence, and the case went to trial to the court without a jury. The court found for the plaintiff and the defendant appealed. The Washington Supreme Court affirmed, because there was significant evidence supporting the defendant’s negligence. *Id. at 376-77*. The defendant in *Prince* had neglected its property for years, effectively abandoning it and allowing it to decay and become a fire hazard.

The *Prince* case is distinguishable from the case at bar. First, the rule announced in *Prince* relates to a duty owed to the “adjacent property,” not to a property several blocks away and across the railroad tracks.

Second, the fire in *Prince* originated on the owner’s property as a result of the owner’s foreseeable disregard. In the current case,

Michelsen's facility started on fire through no fault of its own. Even the appellant does not suggest that Michelsen's negligence *caused* the fire on Michelsen's own property. Rather, Blue Bird argues that Michelsen was negligent simply because it stored its materials too close together, creating "such a large fuel load" that firefighters were unable to put out the fire before it could spread. *CP 542*.

Third, the defendant in *Prince* clearly neglected its property and allowed it to decay, collect grease, oil, and become inhabited by squatters. The property in *Prince* became an obvious fire hazard that was recognizable even to observers with no particular fire expertise. None of that can be said about Michelsen or its warehouse. In fact, the opposite is true. The Michelsen facility was well-kept, routinely inspected and found to have violated no regulation or ordinance governing the storage of flammable materials.

C. The Trial Court Erred If It Found a Question of Fact as to Whether Michelsen Breached a Duty Owed to Neighboring Landowners.

The trial court's letter ruling indicates the nature of the hazard on the Michelsen property was "loose cardboard," which posed "a significant risk because the large embers from such burning materials could be set adrift in the wind and pose a severe risk to the surrounding areas." *CP 889*. This reference to "loose cardboard" conjures images of unkempt,

poorly managed, sloppily maintained recyclable materials littered throughout Michelsen's yard. The trial court also found that such unkempt materials constituted a breach of duty and stated, "If the plaintiff is able to show that this breach of duty proximately caused damages, it would establish its claim of negligence." CP 889. The problem with this analysis is that *there is absolutely no evidence that any "loose cardboard" was ever on fire at the Michelsen facility.* This is clear error. The only evidence of burning cardboard at the Michelsen facility is from the Chelan County EMD report, which states that a Wenatchee Police Department officer confirmed at 9:14 p.m. on June 28 that "several pallets of compressed cardboard" were on fire at the Michelsen facility. CP 229.

"Compressed cardboard" and "loose cardboard" are two different things. Compressed cardboard was stored at the Michelsen facility pursuant to a valid combustible materials storage permit. CP 206. Loose cardboard is garbage. Below is a picture of the compressed, palletized cardboard typically stored at Michelsen's facility. There is no evidence of any loose or improperly stored material anywhere at the facility on June 28, 2015 (or any other time). To the extent the trial court assumed that Michelsen breached a duty by improperly storing materials, the trial court erred.



CP 390.

In the absence of Washington cases analyzing a fact pattern similar to the one presented in this case, Michelsen cited to *Comfort v. Stadelman Fruit, Inc.*, 285 Or. 525, 592 P.2d 213 (Or. 1979), where the Oregon Supreme Court considered a similar situation. In *Comfort*, adjoining landowners brought suit against a neighboring fruit company (Stadelman Fruit) for property damage to their trailer court resulting from a fire which originated at the fruit processing plant. *Id.* at p. 215. The cause of the fire in *Comfort* was unknown, but it was agreed that the fire originated on the fruit processing plant property and spread to the neighboring trailer court. *Id.*

As in the present case, the plaintiff in *Comfort* contended that the defendant “carelessly” stored packing materials outside its fruit packing plant. The plaintiffs in *Comfort* also alleged defendant Stadelman Fruit was negligent in piling storage boxes close to a common property line, in piling storage boxes adjacent to the propane tanks, in failing to have a night watchman on the premises to patrol for fires, and in failing to have a sprinkler system in the yard. *Id.*

At the close of evidence at trial, defendant moved for a directed verdict arguing that: (1) the warehouse was located in an industrial zone and the property was being put to a lawful purpose; (2) the owners of the fruit packing plant were “not responsible for a fire that spread through no fault of their own and that a reasonable person would not anticipate.” *Id.* The trial court denied defendant’s motion for a directed verdict and the jury returned a judgment in favor of the plaintiffs.

On appeal, the Oregon Supreme Court reversed, holding that the evidence was insufficient to support a finding of liability. *Comfort*, 592 P.2d at 221. The court first noted that the fruit packing facility’s compliance with local laws prohibited a finding of negligence. It held:

The substance of the first two allegations of negligence in this case is more properly regulated by statute or ordinance. In this heavy industrial zone there was no restriction on the size of tote box stacks and there were no set-back requirements with regard to property lines or requirements

for fire breaks between the boxes. We do not find that defendant breached its duty of reasonable care in these circumstances.

Comfort, 592 P.2d at 219 (*emphasis added*).

With regard to the argument that the fruit packing plant had a duty to employ night watchmen or automated fire extinguishing equipment, the Oregon Supreme Court quoted the following statement from a federal district court decision (*Centraal Stikstof Verkoopkantoor v. Pensacola Port Authority*, 205 F. Supp. 724, 727 (N.D. Florida 1962)) to support its decision that such measures were not required to meet the standard of care:

In this case the Court finds that the complaint fails utterly to show a duty owing from defendant to plaintiff to maintain fire extinguishing apparatus, alarms, and watchman. Nowhere in the common law has the Court been able to find a duty on a property owner to provide these things merely because it is possible that the adjacent property, being combustible, could catch fire. This is valid in the absence of allegation that the premises contained dangerously inflammable or explosive materials or that the defendant used fire for its own purposes on the premises. Such allegations raise a different standard. The imposition of such a duty here could lead to results at once harsh and unreasonable.

Comfort, 592 P.2d at 220 (*quoting Centraal*).

In both *Comfort* and *Centraal*, the fires at issue originated on land owned by the defendant, whereas the Sleepy Hollow Fire originated over three miles away from Michelsen. Michelsen had no duty to anticipate

that an arsonist would start a fire many miles from its facility, that embers would travel more than a mile in the air and land on Michelsen's property on a night when the warehouse was closed.

In *Comfort*, the Oregon Supreme Court determined that a fruit company owed no particular duty to neighboring landowners in such circumstances – *other* than to adhere to statutes, local regulations and ordinances. The Court noted:

The substance of the first two allegations of negligence in this case is more properly regulated by statute or ordinance. In this heavy industrial zone there was no restriction on the size of tote box stacks and there were no set-back requirements with regard to property lines or requirements for fire breaks between the boxes. We do not find that defendant breached its duty of reasonable care in these circumstances.

Comfort, 592 P.2d at 219 (emphasis added).

Logic, common sense, justice, and policy militate in favor of adopting the well-reasoned opinion of the Oregon Supreme Court in *Comfort*. There is absolutely no evidence that Michelsen violated any particular statute, ordinance or law governing how to store inventory or materials out in its yard. The testimony of Wenatchee Fire Marshall Yaple makes that clear. As in *Comfort*, the Court should determine that Michelsen's duties in such a circumstance extend no further than compliance with the regulations, ordinances and statutes enforced by the

City of Wenatchee and Chelan County. The trial court erred by refusing to find that Michelsen breached no duty owed to Blue Bird.

D. The Trial Court Erred by Considering the Declarations of Mr. Way and Mr. Simeoni.

Rule of Evidence 702 governs opinions by expert witnesses. It provides as follows:

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 testify thereto in the form of an opinion or otherwise.

ER 702.

The test for admissibility of a properly qualified expert witness is whether the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Ensley v. Costco Wholesale Corp.*, 1 Wn. App. 2d 852, 407 P.3d 373 (2017) (quoting *Davidson v. Mun. of Metro Seattle*, 43 Wn. App. 569, 571-72, 719 P.2d 569, review denied, 106 Wn.2d 1009 (1986), citing ER 702) 5A Karl B. Tegland, Wash. Prac. Sec. 291 (1982); *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984); *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979).

ER 703 governs what data an expert may rely upon:

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 703.

It is “well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.” *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). In addition, “when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert.” *Miller*, 109 Wn. App. at 148. “When there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.” *Queen City Farms, Inc. v. Central National Ins. Co. of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994); *see also, Griswold v. Kilpatrick*, 107 Wn. App. 757, 761, 27 P.3d 246 (2001) (quoting *Queen City Farms*). “The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert’s conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact.” *Griswold*, 107 Wn. App. at 761-62, *citing Sanchez v. Haddix*, 95 Wn.2d 593, 627 P.2d 1312 (1981).

1. Phoenix's Retained Expert, Albert Simeoni, Cannot Opine on Michelsen's Duty.

Phoenix argued that its expert, Albert Simeoni, whose gratuitous opinions in his declaration were submitted in opposition to summary judgment, created an issue as to what Michelsen's duty *should* be. This is wrong on two accounts. First, experts may not testify as to legal duties. *Hyatt v. Sellen Const. Co.*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985). When the trial court is presented with a question of law, such as whether a defendant owes a legal duty to a particular plaintiff, the court may properly disregard expert affidavits that contain conclusions of law. *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 788, 732 P.2d 1008 (1987). "Questions of law, except foreign law, are *not* the subject of expert testimony." *In re Ramos*, 181 Wn. App. 743, 752, 326 P.3d 826 (2014) (emphasis added).

Mr. Simeoni's incompetent declaration failed to provide any evidence that he had firsthand personal knowledge of much of the substance and assertions in his Declaration. *CP 540-43*. He does not state how someone from Massachusetts would have firsthand personal knowledge of what Michelsen's pre-fire storage practices were, yet he asserted that Michelsen's storage practices created a risk of harm to Blue Bird. *CP 546-49*. Mr. Simeoni stated that he had reviewed case materials

and examined the scene of the fire, but the materials he alleges were stored improperly were destroyed in the fire. He cites no recognized standards, laws, or regulations that Michelsen allegedly breached. He claims that Michelsen put no space between the stacks of inventory in its yard, so that the inventory “created one, large, stack,” without a proper foundation or basis to claim so. He offers his opinion that the Michelsen and 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,” but his statements and opinions are utterly speculative and devoid of foundation. They should have been stricken and rejected. *CP 540-43*.

In its discovery answers, Phoenix did not contend that Michelsen owed or breached any statutory duty, regulatory, or contractual duty to Blue Bird. *CP 260-63*. The evidence Phoenix does provide in opposition is both speculative and inadmissible.³ To survive summary judgment in a negligence action, the plaintiff’s showing on an essential element of its case must be based on more than mere speculation or conjecture. *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001). Conclusory or speculative

³ Phoenix relies upon unsworn statements cited in the Declaration of Paul Way that were purportedly obtained from two Blue Bird employees (Larry Blakely and Roger Summers) who claim to have been eyewitnesses to the fire that ignited on the Blue Bird property. *Opposition*, p. 13. The statements are both unsworn and double hearsay.

expert opinions lacking an adequate foundation are not admissible. Summary judgment is proper if the plaintiff fails to make showing sufficient to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Id.*

Mr. Simeoni then leaps to the conclusion that the practice created a "foreseeable risk of fire too intense to control." *CP 542*. This opinion is purely speculative and lacks foundation. Moreover, it is probative of nothing. Assuming *arguendo* that embers from the Michelsen facility led to a fire on Blue Bird's roof, there is no suggestion that Wenatchee firefighters tried and failed to extinguish a fire at Michelsen's facility because the fire was "too intense to control." There is certainly no testimony that firefighters would have extinguished the fire in a timely fashion had Michelsen stored its inventory in the manner prescribed by Mr. Simeoni. There is no evidence that if only one (or two, or three, or four) stacks of Michelsen's inventory burned that Blue Bird would have been saved. Instead, the Plaintiff asks the court to *assume* that some different storage configuration would have spared Blue Bird. The trial court should have rejected this speculation as improper under ER 702-703 and stricken Mr. Simeoni's Declaration and opinions.

2. Phoenix's Fire/Causation Expert, Paul Way, Improperly Speculated About the Source of the Ember(s) That Ignited the Fire at Blue Bird.

Even assuming Michelsen had some duty to store its materials in a different manner, and even assuming there was a genuine issue of material fact about whether such a duty was breached, there is no evidence that Michelsen's lawful practices proximately caused the Blue Bird fire. Phoenix's fire expert, Paul Way, stated in his Declaration that Roger Blakely told him he "believed" that a smoldering piece of cardboard caused the Blue Bird fire. *CP 548*. A jury should not be told by an expert what some third-party fact witness "believed" a piece of fiery debris was made of. *CP 548*. This is clearly insufficient to avoid summary judgment.⁴

Mr. Blakely's statements and beliefs are hearsay. Even if Mr. Blakely had actually signed a declaration, his statement that he saw a large piece of burning debris that he "believed" was cardboard land on the roof of Blue Bird is still insufficient to defeat summary judgment. What Mr. Blakely "believes" is not evidence; it is speculation. Further, Phoenix presents no evidence or opinion testimony that the debris seen at Blue Bird

⁴ Phoenix relies upon unsworn statements cited in the Declaration of Paul Way that were purportedly obtained from two Blue Bird employees (Larry Blakely and Roger Summers). *CP 548*. The statements are inadmissible because they are unsworn and double hearsay. Phoenix could have submitted declarations from the two gentlemen, but chose not to do so.

actually came from Michelsen's facility – it could have come from the yards at Stemilt, NW Wholesale, or elsewhere.

Further, Mr. Way takes unacceptable liberties with the evidence. These do not create a question of fact. Mr. Way states that the “fire burning in the commercial district originated on Michelsen property.” *CP 547*. Mr. Way not only lacks foundation to make such a statement (he was not there), but he may be incorrect. The fire report issued by the City of Wenatchee states that both the Michelsen Packaging yard and Northwest Wholesale were on fire when the first fire crews arrived at the warehouse district. *CP 548*.

Mr. Way also misrepresents the evidence in his declaration when he takes one sentence from Mr. Yapple's report out of context, i.e., that “the fire at Michelsen Packaging and/or Northwest Wholesale, ‘sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.’” *CP 549*. Mr. Yapple's report actually reads:

These embers in the two Fruit warehouses (Stemilt and Blue Bird) and other places were all downwind from the recycling center and Northwest Wholesale and are possibly product that burned from those areas. *I could not determine what or where these embers were remnants from.*

CP 203 (emphasis added). Mr. Way's mischaracterization of Mr. Yapple's report does not create a question of fact. As a result, Phoenix failed to

meet its burden of proof to show the fire at Blue Bird was started by cardboard from Michelsen.

V. CONCLUSION

The trial court did not err when it granted the defense motions for summary judgment dismissal of all claims against Michelsen and Northwest. Although the trial court should have granted their motions on the grounds of lack of duty and/or lack of evidence of breach, the trial court nonetheless properly ruled that Phoenix presented “no evidence to establish the origins of these large embers” started the Blue Bird fire. The trial court also correctly concluded that “only speculation has been offered to argue that the embers from Michelsen and Northwest Wholesale traveled and landed on the Blue Bird property ... and started the fire.” Finally, the trial court properly determined that “[w]ithout the required evidence to establish causation, the plaintiff cannot show negligence.”

If this Court finds that the summary judgment ruling on causation was improvidently granted, it should still affirm the dismissal of all claims as the trial court should have determined that Michelsen owed no legal duty to serve as a firebreak protecting Blue Bird, or alternatively because there was no admissible evidence of breach of any duty by Michelsen.

RESPECTFULLY SUBMITTED this 5th day of April, 2019.

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CERTIFICATE OF SERVICE

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

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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: April 5, 2019, at Seattle, Washington.

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