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No. 36414-3-III

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

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THE PHOENIX INSURANCE COMPANY,  
a foreign corporation,

Appellant,

v.

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

Respondents.

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**BRIEF OF RESPONDENT NORTHWEST WHOLESALE  
INCORPORATED AND CROSS-APPEAL BRIEF**

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## I. INTRODUCTION

This appeal arises out of the Sleepy Hollow Fire, an arson-set fire that raged through Wenatchee, Washington on June 28, 2019. The fire burned through approximately 30 homes and 2,950 acres, including the Broadview residential neighborhood and the commercial warehouse district along the Columbia River, which included several large fruit packing facilities and the local businesses that catered to them. Among the fruit packing warehouses ravaged by the Sleepy Hollow Fire were Appellant Phoenix Insurance Company's ("Phoenix") insured Blue Bird, Inc. ("Blue Bird") and nonparty Stemilt Growers, LLC ("Stemilt"). Among the local businesses that provided services to these packing companies that were also damaged by the runaway fire were Respondents Northwest Wholesale Incorporated ("Northwest") and Michelsen Packaging Company ("Michelsen").

Nearly three years after the Sleepy Hollow Fire, Phoenix brought suit against Michelsen and Northwest (but not Stemilt) alleging facts that Michelsen negligently caused the fire that damaged the Blue Bird fruit packing facility. CP 1-11. It is important to point out early and often that Phoenix throughout this litigation, and throughout this appeal, conflates the two Respondents when asserting facts and making its arguments on the negligence elements of breach and proximate cause. This is critical to the

Court's analysis of the issues on appeal since Michelsen and Northwest are subject to separate facts and separate claims and arguments. What may apply to Michelsen does not necessarily or automatically apply to Northwest, despite Appellant's best efforts to make them one and the same. The long and the short of it is that Phoenix and its experts almost exclusively make arguments against Michelsen as the party liable for their damages and then try to tack on Northwest as an afterthought without presenting any new evidence or argument specific to Northwest.

After conducting extensive written discovery in the case below, the Respondents filed for summary judgment dismissal of Phoenix's suit. Michelsen brought its motion on the negligence issues of duty and breach, which Northwest joined. Northwest's motion was brought solely on the negligence issue of causation, which Michelsen joined. After Phoenix disclosed for the first time, expert witnesses and their declarations in response and opposition to Northwest's motion, Northwest moved the trial court to strike the experts' unfounded opinions that relied upon nothing more than speculation and conjecture on the issue of causation in their unsuccessful effort to avoid dismissal.

On summary judgment, the trial court denied Michelsen's motion for summary judgment on duty and breach, which Respondents believe was in error. CP 883-891. The trial court also denied Northwest's motion to

strike Phoenix's unfounded expert opinions based upon nothing more than pure speculation. *Id.* Nevertheless, the trial court correctly granted Northwest's motion on the issue of causation and dismissed Phoenix's claims against Respondents. *Id.*

In doing so, the trial court correctly found that "Only speculation has been offered to argue that the embers from Michelsen and Northwest Wholesale traveled and landed on the Blue Bird property." CP 890. "It is speculative that the embers from defendants' properties landed on the Blue Bird property and started the fire." CP 891. Based upon these findings by the trial court, Northwest believes that the trial court erred in denying its motion to strike Phoenix's unfounded expert opinions and cross appeals on this issue.

Therefore, Northwest respectfully requests that this Court affirm the trial court's dismissal of Phoenix's cause of action due to its failure to satisfy its burden of proof on the issue of causation by offering nothing more than speculation to support its claims. Furthermore, Northwest requests that this Court reverse the trial court's denial of Northwest's motion to strike Phoenix's expert's unfounded opinions offered on summary judgment. Michelsen is addressing the issue of the trial court's denial of its motion on duty and breach on cross-appeal and to the extent Northwest joined in Michelsen's motion below, Northwest also supports this Court's reversal of

the trial court's denial of Michelsen's motion on duty and breach, particularly as it pertains to Northwest since Phoenix has failed to bring forth any evidence or expert opinion sufficient to raise a genuine issue of material fact as to Northwest.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by ruling that Northwest breached any duty owed to Blue Bird that led to a fire on Blue Bird's property resulting in Blue Bird's claimed damages. While Phoenix has specifically made such arguments against Michelsen, and the trial court specifically found that there was an issue of fact as to Michelsen's breach sufficient to go to the jury, the trial court erred in finding the same was true for Northwest.

2. The trial court erred in denying Northwest's motion to strike Phoenix's unfounded expert opinions when the trial court expressly found that the opinions offered by Phoenix's experts on the issue of causation were based upon nothing more than speculation.

## **III. STATEMENT OF ISSUES**

1. Should this Court reverse the trial court's ruling denying summary judgment dismissal of Phoenix's claims against Northwest where the trial court erred in holding that there was an issue of fact as to whether Northwest breached any duty owed to Blue Bird when there is no evidence

that Northwest failed to reasonably respond to the Sleepy Hollow Fire when it spread to Northwest's property.

2. Should this Court reverse the trial court's ruling denying summary judgment dismissal of Phoenix's claims against Northwest where the trial court erred in holding that there was an issue of fact as to whether Northwest breached any duty owed to Blue Bird by allowing any condition on Northwest's property to become a hazard from which it was reasonably probable that if a fire occurred it would spread to neighboring property, when the trial court specifically found that it was the nature of Michelsen's recycling center that raised an issue of fact as to whether Michelsen's property posed such a hazard, not Northwest's property.

3. Should this Court reverse the trial court's ruling denying Northwest's motion to strike the unfounded opinions of Phoenix's experts, Paul Way and Albert Simeoni, when the trial court properly found that on the issue of causation, Mr. Way and Mr. Simeoni only offered speculation in support of unfounded arguments that the embers from Michelsen or Northwest traveled to and landed on the Blue Bird property starting the fire that caused Blue Bird's damages.

4. Should the trial court's ruling granting summary judgment dismissal of Phoenix's claims against Respondents Michelsen and Northwest for negligence, be affirmed because Phoenix failed to present

sufficient reliable evidence to take to a jury on the element of proximate cause.

#### **IV. STATEMENT OF THE CASE**

##### **A. FACTUAL BACKGROUND**

##### **1. The Parties and Their Properties**

In the underlying lawsuit, Phoenix Insurance Company, insurer of Blue Bird Inc., alleged damages as subrogor arising from a fire ignited on June 28, 2015, in Wenatchee, Washington, commonly referred to as the Sleepy Hollow Fire. CP 7. At all relevant times, Respondent Michelsen leased and controlled property located at 1105 Hawley Street, Wenatchee, Washington, which was owned at all relevant times by Respondent Northwest. CP 823. This lease to Michelsen had been in effect since 1973. *Id.* Under the lease terms, Michelsen had exclusive possession and control of the leased premises. *Id.*

Northwest also owned and occupied for its own business purposes property at 1567 North Wenatchee Avenue, Wenatchee, Washington, directly south of the Michelsen property and sharing a common property line that ran east/west. CP 7, 560. There was a chain link fence along the common property line that separated the Michelsen leased premises from Northwest's operations. CP 823.

East/Southeast of the Michelsen and Northwest properties, across a

wide expanse of railroad tracks, is the large Stemilt Growers fruit packing facility. CP 560. Further East/Southeast of the Stemilt facility is the Blue Bird fruit packing warehouse located at 1470 Walla Walla Avenue, in Wenatchee, Washington, approximately 1/2 of a mile from Michelsen's property. *Id* and CP 7.

Michelsen and Northwest are both in the business of procuring and supplying produce packaging materials to fruit packing businesses in Wenatchee, including Blue Bird. CP 564. Michelsen manufactures paper and plastic packing products specifically designed for shipping and packaging fresh produce products like cherries, Blue Bird's main product in Wenatchee. *Id.* and CP 572. Likewise, Northwest brokered the purchase and sale of fruit packing materials to the many fruit packing warehouses in Wenatchee, including Blue Bird. CP 573.

Besides procuring and supplying produce packaging materials to fruit packing businesses in Wenatchee, Michelsen also provided cardboard recycling services at its Wenatchee location, which it referred to as Central Washington Recycling. CP 566. There were drop off bins located on the Michelsen property for the public to deposit cardboard, which was then bailed and stacked by Michelsen and stored on Michelsen's premises. *Id.* Northwest had no such cardboard or recycling activities on its property.

## 2. The Arson-Set Sleepy Hollow Fire

On the afternoon of June 28, 2015, Jeremy J. Kendall set fire to the hillside outside of Wenatchee, Washington, for which he plead guilty to first-degree arson on or about July 3, 2018. CP 58. On June 28, 2015, the city of Wenatchee and surrounding region had been in a prolonged drought, and the temperature that day was approximately 108 degrees Fahrenheit. CP 67-72. The Sleepy Hollow Fire (as it was later dubbed) burned through approximately 30 homes and 2,950 acres, raging through the Broadview residential neighborhood. *Id.* Winds at this point were very high, driving embers as far as East Wenatchee and Malaga. *Id.* Due to these extreme wind and weather conditions, windblown embers from the Sleepy Hollow Fire reportedly traveled from the Broadview neighborhood to the fruit packing warehouse district along the Columbia River, at least initially igniting a fire on the Michelsen property. *Id.*

At the time of the Sleepy Hollow Fire, Northwest had no inventory stocked anywhere along the south side of the East/West common property line boundary fence between Northwest and Michelsen's properties. CP 823. Further, there was at least 2 feet between any inventory stocked on Michelsen's side of the boundary fence and any equipment or pallets stocked on Northwest's side. *Id.* The equipment stored on Northwest's side of the boundary fence was largely comprised of heavy plastic drums and

totes in metal cages. *Id.* Any cardboard materials or inventory stocked on the Northwest side of the boundary line was located at least 300 to 400 feet further south of the boundary fence. *Id.*

Photographs taken on the night of June 28, 2015 and in the early morning hours of June 29, 2015, show the East/West chain-link fence running between the Michelsen and Northwest properties just behind a fertilizer tower which is on the Northwest side of the property line and is an easy reference point. CP 823-824, 826-843. These photographs show the burning of materials on Michelsen's side of the fence line and the large amount of dead space on Northwest's side of the fence line. *Id.* They also show that the local fire department was on the scene and fighting the fire while it was still contained to the Michelsen property. *Id.* The burned metal cages along the south east edge of the Northwest property are the remains of the heavy plastic drums and totes that were located on the Northwest property. *Id.*

### **3. Fire Marshall's Investigation**

The Wenatchee Fire Marshal, Mark Yapple, investigated the Sleepy Hollow Fire and prepared a report of his findings. CP 67-72. He noted the aggressive progression of the fire as a result of being driven by high temperatures, flashy fuels, and high winds. *Id.* When he turned his attention to the warehouse district, he noted that he found very large embers on the

Stemilt and Blue Bird properties and received reports of similar embers as far away as East Wenatchee. CP 70. He noted that these embers were found downwind from the Michelsen and Northwest properties. CP 71. Critically, Mr. Yapple also specifically noted that he “*could not determine what or where these embers were remnants from.*” *Id.*

In his conclusion, Mr. Yapple summarized his opinion that the wind-blown embers from the Broadview neighborhood traveled East/Southeast and started the fire on the Michelsen property and possibly the storage buildings and yard at Northwest. CP 72. Embers from this complex of fires was then believed to have been wind-driven further East/Southeast to the Stemilt warehouse across the railroad tracks and eventually further South to Blue Bird’s facility. *Id.*

Regarding Phoenix’s claims that Respondents negligently stored combustible materials in their exterior yards in a compact line creating a known fire hazard, Mr. Yapple declared that as Fire Marshall, he conducted annual fire safety inspections of the warehouses at Michelsen and Northwest. CP 180. He did these annual inspections from 2007 to 2015. *Id.* Over the years, Mr. Yapple observed and noted the methods used by Michelsen and Northwest to store fruit packing materials and cardboard recycling (limited to Michelsen) and found that they were in accordance with local fire safety standards and codes. CP 180, 824.

In addition, Northwest had an independent safety auditor, USI Insurance Services, conduct safety inspections of the premises and Northwest's safety procedures and protocols. CP 824. These inspections have never revealed any fire safety concerns with Northwest's inventory methods and procedures. *Id.*

#### **4. Phoenix's Complaint Allegations**

Phoenix alleged in its Complaint that a fire ignited in the outside yard of the Michelsen property and that the organization and configuration of the outside storage at the Michelsen property contributed to the ignition and spread of the fire to Blue Bird's property. CP 8.<sup>1</sup> The properties directly adjacent to Michelsen included the Northwest property to the south and the Stemilt Growers warehouse to the west. CP 74, 560. It is presumed that the fire spread from Michelsen to the adjacent properties of Northwest to the South and Stemilt to the East across the railroad tracks. At some point during the progression, the Blue Bird facility also became engaged in the fire.

Phoenix specifically claims that the fire originated at Michelsen, which created embers that were specifically carried by the wind from Michelsen to the Blue Bird facility approximately a half mile away. CP 8.

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<sup>1</sup> It is important to note that Phoenix's Complaint makes no factual allegations against Northwest for breach or causation. CP 5-11.

Consequently, the outside yard of the Blue Bird facility, which had stored upon it large tightly arranged stacks of fruit packing materials and boxes organized similarly to the Michelsen property, caught fire, spread, and damaged the Blue Bird facility, leading to the present suit. *Id.*

The lawsuit against Northwest is based exclusively on Phoenix's unsubstantiated allegation — that because of the embers created by the fire at the Michelsen facility (and specifically only the embers from the Michelsen facility and no other source of fire) — that Blue Bird experienced a property loss up to the policy limits of forty million dollars. These allegations cannot be supported by competent evidence and dismissal by the trial court was appropriate.

The factual allegations of the Complaint fail to allege any tortious conduct by Northwest. CP 5-11. Northwest is specifically mentioned only occasionally in the Complaint's Statement of Facts with regards to ownership of land, including the land leased to Michelsen. Also mentioned is that Northwest had adjoining boundaries with the Michelsen parcel and also "stored inventory" on its own parcel (like everyone else in the warehouse district, including Blue Bird). *Id.* The ultimate claim against Northwest, without any factual assertions to support it, is that fire on the Michelsen property spread to the Blue Bird property, for which Northwest is somehow liable. *Id.*

None of the allegations in the Complaint state that any act or failure to act by Northwest or its inventory caused the Blue Bird warehouse to erupt in fire, or that Northwest acted in any way to cause the fire to spread from Michelsen's property to Blue Bird's property. *Id.*

The Complaint also alleges causes of action for negligence, nuisance, and pre-judgment interest. *Id.* The negligence and nuisance claims are based on the same set of operable facts which are numbered in the same way in the Complaint and may be treated by this Court as identical claims for purposes of the motion for summary judgment. Regarding the pre-judgment interest "cause of action," Northwest has not identified that claim as being a legitimate cause of action in Washington. It is a remedy, not a cause of action, and therefore it should be dismissed as a cause of action that Northwest must defend. On its face, the Complaint fails to state a claim against Northwest upon which relief can be granted under 12(b)(6). Furthermore, Phoenix cannot meet its burden of establishing a *prima facie* case of negligence against Northwest since they have failed to present sufficient evidence that Northwest breached any duty to Blue Bird or caused the fire and related damages. Therefore, the case against Northwest should be dismissed with prejudice.

**5. Phoenix Discovery Answers Do Not Implicate Respondent Northwest.**

Phoenix provided supplemental discovery responses in relation to Respondent Michelsen's First Interrogatories on August 3, 2018. CP 23. In those supplemental responses, Phoenix repeated that its investigation of the Blue Bird fire event is continuing (after 3 years of investigation), without identifying any specific action that supports allegations of liability against Northwest. *See Id* **Supp. Answer to Interrogatory No. 15** ("Plaintiff is currently unaware whether Northwest violated any portion of the RCW's 91 Titles"); **Supp. Answer to Interrogatory No. 17** ("Plaintiff is currently unaware whether Northwest violated any portion of the WAC's 516 Titles"); **Supp. Answer to Interrogatory No. 23** (stating that the origin of fire on Michelsen property is a result of Michelsen business practices; Northwest is not mentioned); **Supp. Answer to Interrogatory No. 25** (stating the origin of fire on Blue Bird property is a result of embers drifting from Michelsen warehouse; Northwest is not mentioned); **Supp. Answer to Interrogatory No. 29** (stating the origin of fire on Michelsen property documented in various materials incl. photographs produced by Northwest; Northwest not mentioned as supporting claim that fire originated at Michelsen); **Supp. Answer to Interrogatory No. 35** (stating that allegedly negligent storage of materials on Defendants' (plural) properties

documented in various materials incl. photographs produced by Northwest; Northwest not mentioned specifically as having negligently stored materials which caught fire); **Supp. Answer to Interrogatory No. 36** (stating that alleged origin of fire on Michelsen property deprived Blue Bird of the use of its property; Northwest is not mentioned); **Supp. Answer to Interrogatory No. 37** (origin of fire on Michelsen property was “condition” that damaged Blue Bird property, stating various alleged reasons why fire occurred; Northwest not mentioned as causing fire that originated at Michelsen in original or supplemental responses); **Supp. Answer to Interrogatory No. 38** (identifying witnesses and evidence allegedly demonstrating damages caused by Defendants (plural), incl. photographs produced by Northwest; Northwest not mentioned as cause of fire that originated at Michelsen); **Response to Request for Production No. 25** (stating Plaintiff has not yet identified any testifying expert witnesses and has no expert opinions to produce).

**6. Trial Court Ruling Dismissed Appellant Phoenix’s Claims Against Respondents**

On August 14, 2018, Michelsen moved the trial court for dismissal of Phoenix’s claims against it for failure to satisfy the negligence elements of duty and breach. CP 150-174. Northwest joined in the motion. On the same date, Northwest moved the trial court for dismissal of Phoenix’s

claims against it for failure to satisfy the negligence element of causation. CP 32-49. In its Reply Brief, Northwest also moved the trial court to strike the unsupported expert opinions of Paul Way and Albert Simeoni based upon pure speculation. CP 607-635.

In a detailed letter of October 2, 2018, the trial court denied Michelsen's motion on duty and breach as to both Michelsen and Northwest. CP 889. However, the trial court conflated issues with the Michelsen property with that of Northwest, which reflects Phoenix's efforts to conflate the two. Specifically, the trial court held "it is the recycling center's nature which lends to an issue of fact whether the Michelsen property posed a hazard." CP 889. Respondents cross appealed on this issue.

Furthermore, the trial court denied Northwest's motion to strike the expert opinions of Mr. Way and Mr. Simeoni, despite holding that nothing but speculation had been offered by Phoenix on the issue of causation. CP 890-891. Northwest has cross appealed on this issue as well. Nevertheless, the trial court granted Northwest's motion on causation, dismissing Phoenix's claims as to both Northwest and Michelsen. CP 883-891. Phoenix filed a timely notice of appeal of the trial court's order. CP 892-903, 933-941. Respondents timely cross-appealed. CP 912-923, 942, 945.

## V. SUMMARY OF ARGUMENT

The trial court correctly held that Appellant Phoenix failed in its burden of establishing an issue of fact to take to a jury on the negligence element of causation and as a result the trial court dismissed all claims against Respondents. In doing so, the trial court correctly found that only speculation had been offered by Phoenix to argue that any embers from Michelsen or Northwest traveled to and landed on the Blue Bird property and started a fire there. This is particularly true where Phoenix's own expert, Paul Way, acknowledges that the fire that started on the Michelsen property could have been started by the Sleepy Hollow Fire or any of a number of other sources, so too could the Blue Bird fire have started from any number of other sources absent evidence, without speculation, that the source was specifically Michelsen or Northwest's property. The trial court correctly concluded that without the required factual evidence to establish a causal link to either of the Respondent's properties, Phoenix could not show negligence and their claims should be dismissed as a matter of law. *Id.*

However, the trial court erred when it denied Northwest's motion to strike the unsupported opinions of Phoenix experts Paul Way and Albert Simeoni, particularly when their opinions are not based upon personal knowledge and are unsupported by anything more than speculation and conjecture. Neither Mr. Way nor Mr. Simeoni can state without speculation,

what the burning embers were that landed on Blue Bird and started a fire there or where those burning embers emanated from. Since their opinions on this issue are nothing more than pure speculation, they are not appropriate evidence for consideration on summary judgment and should have been stricken and disregarded by the trial court. Based upon this evidence, this Court should reverse the trial court's denial of Northwest's motion to strike.

Finally, the trial court correctly found that there was a duty owed to Blue Bird by neighboring properties to maintain their premises in a reasonable manner so that if a fire should occur that it would not be reasonably probable that the fire would spread to an adjacent property. However, the trial court erred when it held that there was an issue of fact to take to a jury as to whether or not Northwest breached its duty to Blue Bird when there is no evidence or argument that any condition on the Northwest property allowed the fire to spread to neighboring properties, including Blue Bird. In addition, since the fire department was already on the premises and fighting the fire before it moved from the Michelsen property to Northwest's property, there can no failure to reasonably respond to the fire on its premises to prevent its spread.

Based upon the facts and evidence before it, this Court should affirm the trial court's order granting Northwest's motion for summary judgment

on causation and at least reverse in part the trial court's denial of Michelsen's summary judgment on breach as to Respondent Northwest and reverse the denial of Northwest's motion to strike Phoenix's expert opinions.

## VI. ARGUMENT

### A. STANDARD OF REVIEW ON SUMMARY JUDGMENT – DE NOVO

The function of summary judgment is to avoid a useless and unnecessary trial on issues which the plaintiff cannot support factually, or which cannot lead to a result favorable to the plaintiff. *Seven Gables v. MGM/UA Entertainment*, 106 Wn.2d 1, 12, 721 P.2d 1 (1986); *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Cox v. Malcolm*, 60 Wn. App. 894, 897, 808 P.2d 758, *rev. den.*, 117 Wn.2d 1014 (1991). Summary judgment is proper where, after considering the evidence and all reasonable inferences therefrom, reasonable persons could reach but one conclusion. *Turngren v. King County*, 104 Wn.2d 293, 705 P.2d 258 (1985).

A defendant may move for summary judgment on the grounds the plaintiff cannot prove an essential element of their case. *Young*, 112 Wn.2d at 226 (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). The moving party may simply challenge the sufficiency of the plaintiff's evidence, pointing to the lack of an element of

proof necessary to prevail at trial:

[A] defendant moving for summary judgment has a choice: A defendant can attempt to establish through affidavits that no material fact issue exists or, alternatively, the defendant can point out to the trial court that the plaintiff lacks competent evidence to support an essential element of his or her case. . . . If a defendant chooses the latter alternative, the requirement of setting forth specific facts does not apply. The reason for this result is that “a complete failure of proof concerning an essential element of a non-moving party’s case necessarily renders all other facts immaterial.” *Celotex*, 466 U.S. at 323.

*Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 23, 851 P.2d 689 (1993) (citing *Celotex*).

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

**B. ELEMENTS OF PROOF THAT PHOENIX MUST MEET.**

To succeed on a negligence claim, Phoenix carries the burden of proving (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Furthermore, to establish a nuisance claim, Phoenix must show that Northwest unlawfully did some act or failed to perform a duty that unreasonably interfered with Blue Bird’s use and enjoyment of its property. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998).

Phoenix either misunderstands or misconstrues what its burden of proof is in opposition to Respondents' motions for summary judgment. Phoenix suggests in its Brief of Appellant that as long as there is some confusion or disagreement over the facts at issue, then summary judgment must be denied. But that is not the legal standard governing this appeal. Northwest moved the trial court for dismissal on the grounds that Phoenix could not prove one or more of the essential elements of its case. *Young*, 112 Wn.2d at 226 (citing *Celotex Corp. v. Catrrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

In so doing, Respondents challenged the sufficiency of Phoenix's negligence evidence on the issues of duty, breach and causation, necessary to prevail at trial. In order to avoid dismissal, the burden shifted to Phoenix to establish a *prima facie* case of each element of negligence.

To establish a *prima facie* case, the nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain (as Phoenix has done and continues to do). *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (citing *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006)). The non-moving party must do more than simply show that there is some metaphysical doubt or belief as to the material facts by conclusory

allegations, unsubstantiated assertions, or by only a scintilla of evidence. *Las*, 66 Wn. App. at 198-99; see also *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (“When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.”).

**C. TRIAL COURT CORRECTLY DETERMINED DUTY OF CARE**

The trial court properly noted that 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 with in, children played in it at times during the day, 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.

In *Chicago, M., St. P. & P.R. v. Poarch*, 292 F.2d 449 (9th Cir. 1961), the Ninth Circuit affirmed the United State 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 icehouse 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 icehouse 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:

As we view the holding of the *Prince* case, once it is established that the owner of the 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. 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.

**D. TRIAL COURT IMPROPERLY FOUND ISSUE OF FACT ON NORTHWEST'S BREACH OF ANY DUTY OWED.**

After determining that a duty of care existed the trial court went on to find that there was an issue of fact sufficient to submit to a jury on the issue of whether Michelsen breached its duty of care to maintain its property in such a manner as to not present a fire hazard to adjoining properties. CP 889. In so finding, the trial court noted that Phoenix's expert, Albert Simeoni, stated 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." *Id.*

However, the trial court also noted that Phoenix did not cite any standards which were breached by Michelsen or Northwest. In contrast, Michelsen provided Fire Marshal Yaple's declaration wherein he states that Michelsen had never violated the fire code based upon the manner in which it stored materials in its yard. CP 182. Similarly, Northwest provided the declaration of Kenneth Knappert that demonstrated it too had undergone many safety inspections with no violation for fire safety. CP 824.

Ultimately, the trial court found that it was the nature of Respondent Michelsen's recycling center that lent itself to an issue of fact whether the

Michelsen property posed a hazard. CP 889. The trial court further noted that 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. *Id.* The trial court's ruling, like Phoenix's Complaint and answers to discovery, does not implicate Respondent Northwest. Nowhere does the trial court find an issue of fact as to whether Respondent Northwest breached any duty owed to Blue Bird. The recycling center is Michelsen's and it does not appear to be in dispute that the fire in the warehouse district first originated on Michelsen's property. There are no facts or claims from which a genuine issue of material fact can be derived as whether Northwest breached any duty to Blue Bird, and Phoenix's claims against Northwest on the issue of breach should have been dismissed by the trial court.

**1. Northwest Met Its Limited Duty as a Landlord**

Phoenix seems to argue that since Northwest owned the property that was leased to Respondent Michelsen at the time of the Sleepy Hollow Fire that it should have some liability for the loss. This is unsupported by Washington law. At the time of the fire, Michelsen had sole possession and use of the Michelsen property. Phoenix has the burden of establishing that as the mere landlord of the Michelsen property, Respondent Northwest owed to Blue Bird a separate duty with regards to Michelsen's possession

and use of its property. This, Phoenix has failed to do.

Phoenix has erroneously relied upon the Washington Supreme Court case of *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 802 P.2d 1360 (1991) for this proposition. However, the case supports Northwest's arguments and this Court's reversal of the trial court's decision to deny summary judgment dismissal of Northwest on Michelsen's motion on duty and breach.

In *Hutchins*, plaintiff was walking past the defendant's property when a stranger pushed him into defendant's motor vehicle bay where an accomplice was lying in wait and they assaulted and robbed plaintiff. Plaintiff brought suit against defendants, claiming that they breached the duty of persons who own or control buildings adjacent to a public way to maintain the buildings free of any conditions posing unreasonable dangers to passerby. The artificial conditions of the premises alleged by plaintiff to be dangerous or negligent regarded the design, color and adequacy of lighting of the motor vehicle bay that allowed for the assault to occur. Defendants moved for summary judgment, which the trial court granted, and the matter was accepted by the Supreme Court on the Court of Appeals' certification. *Id.*

In making its ruling, the *Hutchins* Court took into consideration several principles where premises liability to others outside the premises is

concerned. The first was the weight that should be given to the interest in the free use of property. *Id.* at 221. Secondly, the Court enumerated the following principles:

(1) a possessor of land should not be subject to unlimited liability, (2) a possessor of land is not an insurer as to all those who may be affected by activity involving the possessor's premises; and (3) a possessor of land has no duty as to all others under a generalized standard of reasonable care under all the circumstances.

*Id.*

The Court then analyzed the plaintiff's status vis-à-vis the property at issue and found that the plaintiff was neither an invitee nor a licensee. He was nothing more than a passerby. *Id.* at 222. Based on this status, the Court stated that a possessor of land owes a common law duty to "prevent artificial conditions on his land from being unreasonably dangerous to highway travelers." *Id.* The Court then noted that the duty of a land possessor to those outside the premises involves more than just seeing that parts of artificial structures do not impact passerby, "the occupier of land generally owes a duty of reasonable care to prevent *activities* and *conditions* on his land from injuring persons or property outside his land ...". *Id.* 223. (Italics in original) *quoting* 5 F. Harper, F. James & O. Gray, Torts § 27.19 at 307 (2d ed.1986); *see* Restatement (Second) of Torts § 371 (1965).

However, in analyzing several cases relied upon by the plaintiff in

*Hutchins*, the Court distinguished those cases finding that the artificial conditions alleged by the plaintiff in *Hutchins*, in and of themselves, did not create a risk of harm to a passerby. The Court further held that the defendants did not themselves engage in some activity or business on the premises which posed a direct danger to passerby or others off the premises. Instead, the Court held that the injury to plaintiff resulted from the intentional criminal conduct of third parties and absent the existence of a ‘special relationship,’ “the general rule common law is a private person does not have a duty to protect others from the criminal acts of third parties.” *Id.* at 223.

The same analysis and ruling are warranted in the present case. Based upon the facts set forth in Michelsen’s motion for summary judgment (Sub. 25) and Northwest’s response in joinder (Sub. 30), there was no *activity* or *condition*, or combination of the two, on Northwest’s property that in and of themselves created a dangerous condition or risk of harm of fire to those outside the property. It was the Sleepy Hollow Fire, which was caused by the admitted criminal conduct of Jeremy Kendall, that jumped to the warehouse district and in rapid succession set the neighboring properties of Michelsen, Northwest, Stimelt and Blue Bird ablaze. No act or condition of Northwest’ property caused these fires to erupt and spread. Simply put, Northwest had no duty to protect Blue Bird from the criminal acts of Jeremy

Kendall.

The case of *Charlton v. Toys R Us – Delaware Inc.*, 158 Wn. App. 906, 246 P.3d 199 (2010), cited in an effort to establish that Northwest violated the duty to use reasonable care in discovering and curing dangerous conditions, is likewise misplaced. In *Charlton*, the plaintiff slipped and fell in the wet entryway of a Toys “R” Us store. Plaintiff is clearly an invitee of the defendant and as such Toys “R” Us is subject to liability for injury caused to its invitees by a condition of its premises if, but only if, they (a) by the exercise of reasonable care would have discovered the condition, and should realize it involves an unreasonable risk of harm to such invitees, and (b) should have expected that they will not discover or realize the danger, or a fail to protect themselves against it and (c) fails to exercise reasonable care to protect them against the danger. *Id.* at 913.

However, the *Charlton* Court held that the plaintiff failed in her burden by failing to present any evidence that the floor in the entryway of the store presented an unreasonable risk of harm when wet. In addition, the plaintiff failed to establish that the store had actual or constructive notice of the water in which plaintiff slipped. Due to both of these failures, the summary judgment dismissal of plaintiff’s claims was affirmed. *Id.* See also *Lewis v. Krussel*, 101 Wn. App. 178, 2 P.3d 486 (2000) (also cited by Phoenix, case involved a pair of healthy hemlock trees that fell onto

plaintiff's neighboring house in a windstorm. The case was dismissed on summary judgment and upheld by the Court of Appeals, concluding there was no evidence that defendants were actually or constructively aware of any defects in the healthy trees that required remedial action to prevent them from falling and finding that no duty was breached.).

The present case does not involve an invitee, but Phoenix has nevertheless failed to provide any evidence or expert opinion that any conditions on Northwest's property that they allege were dangerous or hazardous were in fact so. Nor have they established that Northwest had any notice, actual or constructive, that any such conditions were hazardous or dangerous such that the fire at issue would have resulted. Absent such a showing, dismissal on summary judgment is appropriate as it was in *Charlton*. See also, *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 906 P.2d 336 (1995)<sup>2</sup> (really a product liability case involving a trampoline and dismissed for plaintiff's failure to establish either a premises liability claim or a product liability claim).

Lastly, Phoenix also cited to *Coleman v. Hoffman*, 115 Wn. App. 853, 64 P.3d 65 (2003), in an effort to establish that Northwest owed and

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<sup>2</sup> Cited by Phoenix for the proposition that Northwest violated the duty to use and keep the premises in a condition such that adjacent public spaces were not rendered unsafe for ordinary use. However, the *Anderson* decision has nothing to do with the concept the Plaintiff has cited it for.

violated the duty to use and keep the premises in a condition such that adjacent public spaces were not rendered unsafe for ordinary use. The case involved an infant who fell through a guardrail in a common area of an apartment complex and sustained injury. The *Coleman* Court reviewed whether the defendant qualified as a "mortgagee in possession." While Northwest was simply a landlord of the Michelsen property and not a mortgagee, the following analysis by the *Coleman* Court is on point:

Although the cases and treatises cited throughout our opinion refer to "mortgagee in possession" liability, the determinative issue is not whether each respondent is properly titled a "mortgagee in possession," but whether each respondent actually possessed the premises. This inquiry is proper because the common law duty of care existing in premises liability law is incumbent on the *possessor* of land. *See Strong v. Seattle Stevedore Co.*, 1 Wn. App. 898, 466 P.2d 545, *review denied*, 77 Wn.2d 963 (1970); *see also* 62 AM. JUR. 2D *Premises Liability* § 6, at 354 (1990) ("Anyone who assumes control over premises, no matter under what guise, assumes the duty to keep them in repair."); *Fitchett v. Buchanan*, 2 Wn. App. 965, 972, 472 P.2d 623 (1970) ("It is a general rule that one who assumes to be the owner of real property, and who, as such, assumes to control and manage it, cannot escape liability for injuries resulting from its defective condition by showing want of title in himself"), *review denied*, 78 Wn.2d 995 (1970). As such, whether someone is a mortgagee is not critical. The critical point is the possession itself. Nonetheless, as certain cited cases deal with "mortgagees in possession," and because the parties use the phrase, we employ the "mortgagee in possession" and "possession" language interchangeably.

"A possessor of land is (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)." *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 655, 869 P.2d 1014 (1994) (citing RESTATEMENT (SECOND) OF TORTS § 328E (1965)).

*Coleman v. Hoffman*, 115 Wn. App. 853, 859-60, 64 P.3d 65, 68 (2003).

Likewise, as a mere landlord, Northwest did not have possession of or exercise any control over the Michelsen property and its recycling activities that would impose any liability onto Northwest for any condition of the Michelsen property that was under the exclusive management and control of Michelsen.

**E. TRIAL COURT CORRECTLY RULED PHOENIX FAILED TO MEET ITS BURDEN ON CAUSATION**

While the trial court erred in finding an issue of fact as to Northwest's breach of any duty owed to Blue Bird, it correctly ruled that Phoenix and its experts offered nothing more than speculation and conjecture on causation. As a consequence, the trial court properly dismissed Phoenix's claims against Respondents. The trial court's decision should be affirmed by this Court since it was made on firm grounds:

What is lacking in this matter is evidence establishing that any hazardous condition existed on the defendants' properties caused the fire at Blue Bird. Large embers

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.

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 U 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 890-891.

**1. To Survive Dismissal on Summary Judgment, Phoenix Needs More Than Speculation and Conjecture.**

To justify submission of a negligence claim to the jury, Phoenix must offer evidence of the causal connection between their claimed damages and Northwest's alleged negligence. *See Kennett v. Yates*, 45 Wn.2d 35, 39, 272 P.2d 122 (1954) (explaining that "the causal connection between each of the claimed expenses and defendants' negligence must be shown to justify its submission to the jury").

Phoenix must establish that the harm suffered would not have occurred but for an act or omission of Northwest (cause in fact), and that

the cause in fact of the plaintiff's harm should be deemed the legal cause of that harm (legal causation). *Little v. Countrywood Homes, supra*, 132 Wn. App. at 778.

Proximate cause is "that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which it would not have occurred." *Conrad v. Cascade Timber Co.*, 166 Wash. 369, 372, 7 P.2d 19 (1932) (quoting *Hardy v. Hines Lumber Co.*, 160 N.C. 113, 75 S.E. 855 (1912)). Proximate cause is generally a matter to be decided by jury. *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 394, 58 P.2d 811 (1976).

Phoenix's burden of proving proximate cause is not met unless the proof is sufficiently strong to remove that issue from the realm of speculation by establishing facts affording a logical basis for all inferences necessary to support it. *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947); *see also Martini v. Post*, 178 Wn. App. 153, 165, 313 P.3d 473 (2013). 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).

Proximate cause may be determined as a matter of law where reasonable minds could not differ. *Briggs v. Pacificorp*, 120 Wn. App. 319,

323, 85 P.3d 369 (2003), *rev. den.*, 152 Wn.2d 1018 (2004); *See also Martini*, 178 Wn. App. at 164) (“Cause in fact may be decided as a matter of law, however, if the facts and inferences from them are plain and not subject to reasonable doubt or difference of opinion.”). The question should be decided as a matter of law only if there is no genuine issue of fact as to the question of proximate cause. *LaPlante v. State*, 85 Wn.2d 154, 159–60, 531 P.2d 299 (1975).

Here, as the trial court pointed out, Phoenix has failed in its burden on causation due to the speculative nature of its evidence, which is not sufficient to defeat dismissal on summary judgment. Under Washington law:

...no legitimate inference can be drawn that an accident happened in a certain way by simply showing that it *might* have happened in that way, and without further showing that it could not reasonably have happened in any other way.

*Gardner v. Seymour*, 27 Wn.2d 802, 810, 180 P.2d 564 (1947); *see also Browne v. McDonnell Douglas Corp.*, 698 F.2d 370, 371 (9th Cir. 1982).

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).

The mere fact that Blue Bird may have in fact suffered damages and property loss on June 28, 2015, does not alone entitle Plaintiff to put the Defendants and the court through the expense and rigors of a trial. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999) (an accident does not necessarily lead to an inference of negligence). Here, Phoenix has done nothing to establish the requisite showing on causation to force Northwest to undergo the expense of trial just to ask the jury to speculate as to the cause of the Blue Bird fire.

**2. Phoenix's Experts Offer Nothing More Than Speculation and Conjecture**

The Brief of Appellant Phoenix, and their expert's declarations and opinions submitted in opposition to the Respondents' motions for summary judgment, attempt to start from a premise that there was no fire before the fire ignited in the Michelsen yard.<sup>3</sup> That is a false premise. The truth and reality is that an arson set fire ignited in the hills above West Wenatchee in the Sleepy Hollow area. The Sleepy Hollow Fire was driven by fuels, temperatures and high winds to the South/Southeast to and through the Broadview neighborhood and on to the warehouse district and beyond. CP

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<sup>3</sup> Phoenix repeatedly refers to the "Michelsen Fire" when the entire fire complex event was a result of the arson set Sleepy Hollow Fire. There has never been a Michelsen Fire referenced by any news source or investigating body. It is a fabrication of Phoenix to try and distance its claims from the facts and reality of the Sleepy Hollow Fire complex.

67 - 72. Based upon these facts, it is cannot be disputed that as the Sleepy Hollow Fire moved South/Southeast it spotted a fire on the Michelsen property. From there, the Sleepy Hollow Fire continued to be driven by high winds to the South/Southeast it continued to spread to Northwest, Stemilt and Blue Bird properties. This progression is undisputed. What is in dispute is the lack of any facts or testimony to support a specific causal connection between Northwest and Blue Bird's fire loss.

Phoenix submitted the Declaration of Paul Way in opposition to Northwest's motion for summary judgment on causation.<sup>4</sup> CP 546-549. Mr. Way is a Certified Fire and Explosion Investigator with Jensen Hughes. It is notable that Mr. Way does not state when he was retained, when he began work on this case, what lab work he has done, if any, what tests he has performed, if any, or what scientific support there is for his opinions and conclusions. *Id.* It is also notable that Mr. Way admits that the cause of the fire on the Michelsen property is undetermined and could be from several potential causes, including progression of the Sleepy Hollow Fire. CP 547.<sup>5</sup>

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<sup>4</sup> While it is a technicality, Phoenix refers to the Declaration of Albert Simeoni in its Opposition to Northwest's Motion for Summary Judgment even though the Declaration of Albert Simeoni states on its face it is in response to Michelsen's Motion for Summary Judgment and is not actually submitted as support for Phoenix's Opposition to the Northwest motion. Nevertheless, Northwest will address the deficiencies of this declaration as well herein.

<sup>5</sup> Even though Fire Marshall Yapple concluded that the fire on the Michelsen property was caused by windblown embers from the Sleepy Hollow Fire. CP 199-204.

What is important about Mr. Way's admission is that Phoenix argues that the Blue Bird fire had to have been caused by the Michelsen fire and was unlikely to have been caused by the Sleepy Hollow fire because it was too far away. However, if as Fire Marshall Yaple concludes, and Mr. Way allows, that the Michelsen fire in the warehouse district was caused by embers from the Sleepy Hollow Fire, it is just as possible that the Blue Bird fire was started by one of many other sources as well, including but not limited to embers directly from the Sleepy Hollow Fire. Similarly, it is just as possible that the various other fires in the warehouse district were started by multiple sources. It is simply too speculative to say without concrete facts, evidence, and scientific support, what the causes of the various fires were and particularly the fire on the Blue Bird property, fourth in line in the warehouse district to catch fire.

Mr. Way broadly states that once fire on Michelsen's property was ignited, it caused large pieces of burning debris to be lifted into the air and carried by the wind toward other nearby commercial properties, including Stemilt and Blue Bird."<sup>6</sup> (emphasis added). CP 548. Mr. Way cites to a

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<sup>6</sup> It should be noted that Phoenix states at pg. 8 of Brief of Appellant that "Paul Way opined that the fire spread from the Michelsen/Northwest properties to Blue Bird's property." This is incorrect. Mr. Way's facts and opinions are only directed at Michelsen as the sole source of burning debris that proximately caused Blue Bird's damages. He offers no facts or opinion that would implicate Northwest.

photograph by freelance photographer Rob Spradlin as support. CP 556. However, the photograph of the freelance photographer only shows wind-driven debris being blown across the railroad tracks toward the Stemilt property directly to the East/Southeast of Michelsen. *Id.* Blue Bird is nearly ½ a mile away from where this photograph was taken. There are no photographs that show or from which it can be determined that any burning debris was carried to the Blue Bird property from Michelsen, or Northwest for that matter.

Mr. Way attempts to avoid these errors and flaws in his opinion and logic by relying on the hearsay statements of two Blue Bird employees: Larry Blakely and Roger Sommers. CP 548. Neither one of these individuals have submitted declarations in this response to the Respondents' respective motions for summary judgment. Furthermore, they have not declared that they have any special education, training or experience in fire causation, suppression or investigation. At the very best, Mr. Blakely stated that he saw a large piece of burning debris which he estimated was approximately 16 inches by 24 inches. CP 548. Mr. Blakely believed the burning debris was cardboard and saw it land on Blue Bird's roof. *Id.* Mr. Blakeley and Mr. Sommers attempted to extinguish the burning debris with a garden hose but were unable to reach it. *Id.* That is the full factual extent

of the basis for Mr. Way's opinions.<sup>7</sup>

There are no photographs of this alleged burning debris. There is no evidence that any remnants of this debris currently exists for analysis. Mr. Way has not declared that he has ever seen or examined this debris. Nevertheless, Mr. Way states that this specific burning debris was not material that would originate from a wildland fire, that it was consistent in size and shape to cardboard that one would expect to see from the Michelsen yard (and only the Michelsen yard), and based thereon concluded that it was more likely than not 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 549. Mr. Way specifically excluded Northwest from any expert opinion as to any conduct of Northwest as a proximate cause of Blue Bird's loss.

As a result, it is nothing more than pure speculation and conjecture to opine that the burning debris was "cardboard" or any other material, or that it was of any specific size or shape since it is claimed that this burning debris would have traveled thousands of feet through the air to land on the Blue Bird roof. Undoubtedly, Mr. Blakely and Mr, Sommers did not

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<sup>7</sup> Appellant Phoenix wrongfully states in its Brief of Appellant at page 25: "from their vantage point [Blakely and Summers] saw flaming debris drift southward on the wind away from the Michelsen/Northwest properties and ultimately land on Blue Bird's roof." Nowhere in the Phoenix declarations does anyone state this.

measure the debris as they were attempting to extinguish it with a garden hose that did not reach. Therefore, Mr. Way lacks any personal knowledge to declare anything other than what he was apparently told him by Mr. Blakely and Mr. Sommers, which is not enough.

The observations and opinions expressed by Phoenix's expert, Albert Simeoni, are just as speculative and conjectural in nature to those of Mr. Way, and equally lacks personal knowledge. Furthermore, the opinions expressed by Mr. Simeoni seem to address the legal issue of duty/breach and not causation, which was not the subject of Northwest's motion for summary judgment but will nevertheless be addressed since relied upon by Phoenix interchangeably.

Mr. Simeoni's opinions are largely, if not entirely, based upon Mr. Simeoni's unsupported claims that both Michelsen and Northwest store "large amount of inventory" in their exterior yards, the inventory on the two properties was stored "in a contiguous line", and that the inventory was stacked without space between them or "breaks in the stack." CP 540-543. As a result of the above assertions, Mr. Simeoni opines that the above practices resulted in a single "contiguous line of inventory" or a "large fuel load with no natural breaks," such that the fire "once started, would be very difficult if not impossible to be stopped from spreading and distributing flaming debris onto surrounding properties." *Id.*

Firstly, Mr. Simeoni does not declare, because he cannot, that he ever saw or examined the inventory of either Michelsen or Northwest before the fires of June 28, 2015. He cannot state how the inventory was stacked, how much space was allowed between stacks, how much space there was between the inventory of the Michelsen property and the inventory of Northwest on the other side of the East/West common property line that was delineated by a chain link fence. He cannot state what the inventory was comprised of that was stored by Northwest along its side of the property line, whether it was flammable or contributed to a fuel load. In short, Mr. Simeoni has no personal knowledge from which he can draw to make these statements and they are nothing more than speculation and conjecture made in an effort to support an ultimate conclusion and thus insufficient to defeat summary judgment on causation (or breach).

**F. THE OPINIONS OF PHOENIX’S EXPERTS SHOULD BE STRICKEN FROM COURT’S CONSIDERATION**

While it is the duty of the jury to decide what weight to give evidence in its deliberations, it is the function of the court to ensure that expert testimony is of sufficient validity to warrant its admission into evidence. *See Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The Court should act as a “gatekeeper” to ensure evidentiary reliability. *See generally Reese v. Stroh*, 74 Wn. App.

550, 559-60, 874 P.2d 200 (1994) (“In performing this gatekeeping responsibility, the judge should focus primarily on ER 702.”). ER 702 permits an expert witness to testify on “scientific, technical, or other specialized knowledge” subjects if the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” ER 702.

Although Appellant Phoenix mocks Respondent Northwest’s argument that the Way/Simeoni declarations are rife with speculation, Phoenix has failed to recognize that inherent in ER 702 is a crucial requirement that expert testimony must be based on more than mere speculation. *See Daubert*, 509 U.S. at 590 (“[T]he word ‘knowledge’ connotes more than subjective belief or unsupported speculation.”); *See also Davidson v. Mun. of Metro. Seattle*, 43 Wn. App. 569, 719 P.2d 569 (1986) (“The court should also consider whether the issue is of such a nature than an expert could express ‘a reasonable probability rather than mere conjecture or speculation.’”) (citing 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 291, at 36 (1982)).

In fact, courts must be especially careful when ruling on speculative expert testimony because of the “danger that the jury may be overly impressed with a witness possessing the aura of an expert.” *Moore v. Hagge*, 158 Wn. App. 137, 154, 241 P.3d 787 (2010) (citing *Davidson*, 43 Wn. App. 567 at 571-72). Speculative expert testimony must be excluded to ensure

the jury does not consider such information, since a verdict cannot rest upon conjecture or speculation. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 214 (1940). As such, “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) (citing *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 831 (1991), *rev. denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992)).

**1. Phoenix’s Experts’ Declarations Are Not Supported By Facts In The Record**

The Washington Supreme Court has held that expert testimony is of “no weight unless founded upon facts in the record.” *Prentice Packing & Storage Co.*, 5 Wn.2d 144, at 164. Here, Phoenix tries to avoid this hurdle by referring to ER 705, which indicates there are times when an expert need not disclose the facts on which his or opinion is based. However, ER 705 does not apply to summary judgment proceedings. *See Anderson Hay & Grain Co., Inc. v. United Dominion Industries, Inc.*, 119 Wn. App. 249, 259, 76 P.3d 1205 (2003). Instead, Washington Courts have consistently held “an expert’s testimony for summary judgment must be supported by the specific facts underlying the opinion.” *Id.* The requirements are simple: If an expert’s opinion is offered in the form of a declaration, the factual basis

for that opinion must also be explained in the same document. *Id.* If it is not, the expert's opinion should not be considered. *Id.*

In the present case, Phoenix's experts fail to support and or explain their opinions with specific facts in the record. Each experts' declaration simply states their opinions, "are based on [their] review of materials, [their] observations and interviews while examining the scene of the fire, and on [their] experience, skill and professional training." CP 540-545 and CP 546-556. These generic statements are entirely insufficient to determine the validity of these opinions. Phoenix's experts are required to support their opinions with *specific* facts in the record. It is impossible for this Court, let alone a jury, to follow the experts' logic without knowledge of the very facts upon which their opinions are based.

Furthermore, Phoenix argues that the *Frye* test is not even applicable here because there are no novel science issues lurking in the rendition of Phoenix's experts' opinions, and moreover, that Respondents failed to identify with any precision exactly how the Way/Simeoni opinions were not based on scientific theories and methods well-recognized in the scientific community. This is the age-old problem of proving a negative. Since Phoenix's experts have completely failed to identify any scientific support for their opinions within their own declarations, Respondents are unable to

identify any scientific issues since none have been articulated for *Frye* to address. Phoenix should not benefit from their experts' failures.

The following are examples of conclusory opinions contained in Mr. Simeoni's declaration, given without any explanation of their underlying factual support:

6. Michelsen and Northwest stored large amounts of inventory in their exterior yards . . . . 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 packing material along the eastern edge of its property . . . . Michelsen did not leave any space between the stacks of inventory, so that the inventory created one, large, stack.
8. 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 . . . .

CP 540-545. Mr. Simeoni provides these statements without any references to facts in the record, let alone *specific* facts. Nor does Mr. Simeoni make any specific factual findings or allegations against Respondent Northwest, focusing instead on Respondent Michelsen.

Likewise, Mr. Way's declaration fails to adequately derive support from specific facts in the record as required for admissibility and should not be considered. The following are examples of conclusory opinions contained

in Mr. Way's declaration, given without any explanation of their underlying factual support:

11. . . .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 fire burning in the commercial district originated from the Michelsen property.
13. It is more likely than not, 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 546-556. These opinions declared by Mr. Way are offered as evidence without any factual support or explanation. In addition, they too are focused on Michelsen's potential liability and not Northwest.

It is evident that both of Phoenix's experts' factual assertions are not developed from facts in the record. Instead, they are nothing more than conclusory factual assertions that favor Phoenix's theory of causation specifically against Michelsen. The Court cannot simply take Phoenix's "word for it." Phoenix must show their experts' opinions are adequately supported by the record and are therefore valid and reliable. Otherwise, they have no adequate foundation and should not be considered by the Court.

## 2. Phoenix's Experts Provide Presumptions Piled Upon Presumptions

Additionally, while the facts or data in a case upon which an expert may base an opinion or inference can be somewhat broad, “[p]resumptions may not be pyramided upon presumptions nor inference upon inference.” *Prentice Packing & Storage Co.*, 5 Wn.2d 144 at 164. An expert’s opinion must include all necessary factual links to be considered. *Moore v. Hagge*, 158 Wn. App. 137, 156, 241 P.3d 787 (2010). In order to prove a fact by circumstantial evidence, “there should be positive proof of the facts from which the inference or conclusion is drawn.” *Prentice Packing and Storage Co.*, 5 Wn.2d at 163. Otherwise, the conclusion is baseless and therefore, speculative. *Id.* “Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.” *Id.* It is simply improper to infer a circumstance from mere possibility. *Id.*

In *Prentice*, a case surrounding recovery under an insurance policy from a busted pipe, the Washington Supreme Court articulated the very reasons speculative expert testimony is inadmissible as to causation. *Id.* 162-65. There, in order to recover under the insurance policy the burden was upon the respondent to prove the break in the pipe was caused by the

pressure of the refrigerant. *Id.* at 164. While the respondent presented testimony of three experts in support of its position, the Court took issue with the respondent's experts' flawed reasoning, stating:

In the final analysis, respondent's case hangs upon the evidence of its expert witnesses. The logic of their testimony is simply this: The pressure of the refrigerant could have caused the rupture if the pipe were worn to a thinness of approximately one ten-thousandth of an inch; the rupture did occur; therefore the pipe must have been worn to the required point. This, however, is but reasoning in a circle. It assumes a fact necessary to establish a cause of action, but concerning which assumed fact there is no evidence, and then employs the supposititious fact as the basis for a conjecture as to the possible cause of a particular physical result.

*Id.* at 162-63. The Court held these speculative opinions were weightless and thus, not appropriate to submit to a jury. *Id.* at 164.

Like *Prentice Packing & Storage Co.*, in this case Phoenix's experts lack the necessary facts to support and connect their theories on causation. Phoenix's burden is to prove the Blue Bird fire was caused by embers from either Michelsen's property or Northwest's property, but all Phoenix has shown is that embers from Michelsen's property *could* have traveled from the Michelsen property to the Blue Bird property not that they in fact did and if they did, that they were the cause of the fire at Blue Bird's facility. Furthermore, they haven't even attempted to support a causal claim against Northwest, abandoning such argument in an effort to at least preserve a

claim against Michelsen. However, both experts' opinions here are just as circular as those in *Prentice* and assume facts necessary to establish their conclusions.

For instance, Mr. Way's opinion is essentially the following: Two witnesses saw burning debris that *might* have been cardboard; Michelsen stores cardboard boxes; therefore the fire *must* have originated on the Michelsen property. Mr. Way assumes a fact for which there is no evidence. Specifically, Mr. Way's reasoning assumes without any concrete evidence, that the burning debris, that may or may not have been cardboard, had to come from the Michelsen property. Mr. Way has attempted to close this gap in his analysis by referring to a single photograph, which shows nothing more than burning debris in between two buildings. CP 556. This photograph does not and cannot establish the direction the burning debris traveled and or its point of origin or where it landed. This is a case of indulging in a presumption in order to support a conjecture, which is impermissible. For Mr. Way to be able to opine that on a more probable than not basis Michelsen caused the Blue Bird fire, he would require at a minimum concrete evidence as to what the burning debris was, where it came from and where it landed and whether or not it in fact started a fire.

Mr. Simeoni's reasoning is just as flawed. Mr. Simeoni was retained specifically to opine on the status of the Michelsen storage area and its effect

on the fire. Although he has no evidence or knowledge of the state of the yard at the time of the fire, he opines the Michelsen's yard created an unsafe fire hazard. The issue with this conclusion, is that it assumes a fact necessary to reach the conclusion. Mr. Simeoni cannot opine on a more probable than not basis that the Michelsen's yard created an unsafe fire hazard without knowing the condition of the yard at the time of the fire.

Because these causation opinions are completely without foundation, these opinions are unreliable. Without a reliable basis, these opinions cannot satisfy even the minimum standards for admissibility under Washington Rules of Evidence and thus should be stricken.

**3. Court Should Strike Phoenix's Expert Opinions Since Washington Law Holds That Speculative Expert Opinions Should Not Be Admitted**

The trial court has wide discretion in ruling on admissibility of expert testimony. However, this Court has the authority to disturb the trial court's ruling if the reasons for admitting or excluding opinion evidence are not fairly debatable. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). This includes when the trial court's "discretionary decision is contrary to state law." *State v. Nation*, 110 Wn. App. 651, 661-62, 41 P.3d 1204 (2002).

Here, the trial court denied Respondent Northwest's Motion to Strike the declarations of Phoenix's experts, Paul Way and Albert Simeoni.

CP 909. However, in the trial court's Letter Ruling, the court clearly articulated the very reason it was granting Respondent Northwest's Motion for Summary Judgment on Causation was because all Phoenix had offered in support of its argument that the embers from Michelsen and/or Northwest traveled and landed on the Blue Bird property was pure speculation. CP 901-02. Thus, the trial court properly held Phoenix had not met its burden of proof by sufficient evidence to take the case to a jury. CP 902. The trial court's reasoning for granting summary judgment is entirely supported by Washington law. However, admitting Phoenix's experts' speculative opinions is entirely contrary to Washington law.

As discussed above in more detail, speculation and conjecture are not evidence. Expert testimony should not be admitted if it is of such a nature that an expert cannot express a reasonable probability rather than mere conjecture or speculation. *See* 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 291, at 36 (2d Ed. 1982). Plaintiffs' experts' declarations fail to be supported by specific facts in the record and their conclusions lack the necessary factual links and scientific support from the community to be admissible. Therefore, the trial court's ruling denying Northwest's motion to strike should be reversed and the unsupported opinions of Mr. Way and Mr. Simeoni stricken as inadmissible on summary judgment consideration.

**G. CASE RISKS SLIPPERY SLOPE OF NEIGHBOR SUING NEIGHBOR**

Allowing Phoenix to pursue its claims for negligence against Respondents based on nothing more than conjecture and speculation risks opening a flood gate of lawsuits in a geographic area prone to wildfires. If nothing more is needed to support a negligence claim for spread of a fire is that the two properties were in the proximity of each other and the fire spread from one property to an adjacent property, then the flood gates of litigation will be opened to neighbor suing neighbor suing neighbor, along the entire length and progression of a fire such as the Sleepy Hollow Fire. In reality, the "cause" of the fire is the initial ignition and not the progression of the fire after the initial igniting incident, in this case, arson. The law in Washington does not, and should not, allow for this type of claim absent something more than Phoenix has shown here.

**H. PHOENIX'S NUISANCE CLAIMS ARE SUBSUMED BY ITS NEGLIGENCE CLAIM AND SHOULD SUFFER SAME FATE**

The case of *Lewis v. Krussel*, 101 Wn. App. 178, is also instructive on the issue, or non-issue, of nuisance:

In Washington, 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 Dirs. 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)). "In those situations where the alleged nuisance is the result of the defendant's alleged

negligent conduct, rules of negligence are applied." *Atherton*, 115 Wn.2d at 527 (citing *Hostetler*, 41 Wn. App. at 360).

Here, Lewis and Teitzel ground their nuisance claim on the Krussels' inaction with regard to the fallen trees. In other words, the nuisance is the result of negligence. *Atherton*, 115 Wn.2d at 528. Accordingly, we do not consider the nuisance claim apart from the negligence claim. *Atherton*, 115 Wn.2d at 528.

*Lewis v. Krussel*, 101 Wn. App. 178, 183, 2 P.3d 486, 489 (2000).

Phoenix alleged a negligence claim which encompassed its claim for nuisance. As such, the trial court properly dismissed the nuisance claim when it dismissed Phoenix's negligence claim for failing to show that the conduct of either Respondent proximately caused the fire at Blue Bird's facility.

## **VII. CONCLUSION**

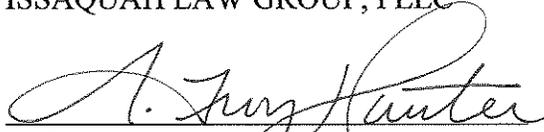
Northwest respectfully requests that this Court affirm the trial court's dismissal of Phoenix's cause of action against Respondent Northwest due to its failure to satisfy its burden of proof on the issue of causation by offering nothing more than speculation and conjecture to support its claims. Furthermore, Northwest requests that this Court reverse the trial court's denial of Northwest's motion to strike Phoenix's expert's unfounded and inadmissible opinions offered against dismissal on summary judgment. Finally, Northwest also supports this Court's reversal of the trial

court's denial of Michelsen's motion on duty and breach, particularly as it pertains to Northwest, since Phoenix has failed to bring forth any evidence or expert opinion sufficient to raise a genuine issue of material fact specific to Northwest separate and apart from Phoenix's allegations against Michelsen. Michelsen and Northwest are not "one and the same" and Phoenix must support claims against Northwest specifically in order to survive dismissal. This they have not done and cannot do.

DATED this 4<sup>th</sup> day of April, 2019.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on the 5<sup>th</sup> day of April, 2019, I caused to be served a true and correct copy of the foregoing via Court of Appeals E-Service, and courtesy copy via email addressed to the following:

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