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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE PHOENIX INSURANCE COMPANY,
a foreign corporation,

Appellant,

v.

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

Respondents.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The responsive briefs of Michelsen Packaging Company (“Michelsen”) and Northwest Wholesale, Inc. (“Northwest”) gloss over the undisputed, critical fact that the June 28, 2015 fire in the Wenatchee business district spread from their properties to the property of Blue Bird, Inc. (“Blue Bird”),¹ burning its warehouse to the ground and causing \$48 million in damage. Their negligence permitted the fire to spread to their neighbor’s property.

Rather than dealing with that fact, they disagree on the proper legal duty they owed, with Michelsen claiming erroneously that the trial court applied the wrong duty analysis. On the appropriate standard of review, they fail to acknowledge that facts can be proven by circumstantial evidence and that on *summary judgment*, all facts and reasonable inferences from those facts must be treated by this Court in a light most favorable to Blue Bird. Rather than squarely confronting the opinions of Blue Bird’s well-qualified experts, corroborated by Michelsen’s own expert, they ignore Washington’s liberal policy on the admission of expert testimony and claim

¹ As noted in Blue Bird’s opening brief at 1 n.1 and 10 n.5, Phoenix Insurance Co. brought this action as a subrogee on behalf of Blue Bird, its subrogor. Both respondents insist upon referencing Phoenix. Phoenix lived up to its contractual obligations by paying for Blue Bird’s loss that respondents caused. It is noteworthy that Michelsen and/or Northwest are likely represented by defense counsel appointed by their respective insurance liability carriers.

this Court should simply disregard those expert opinions that undercut the trial court's rationale for ruling on proximate cause as a matter of law.

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

B. RESPONSE TO STATEMENTS OF THE CASE²

The statements of the case proffered in the Northwest and Michelsen briefs focus upon irrelevant concerns; both respondents fasten onto the Sleepy Hollow Fire and its origin, a matter unrelated to their legal duty to Blue Bird under Washington law, as will be noted *infra*. Northwest insists upon re-fighting discovery issues that are entirely irrelevant to the issues before the Court. *E.g.*, Northwest Br. at 14-15. Northwest even discusses a nuisance issue mentioned only in passing in Blue Bird's opening brief. Northwest Br. at 53-54.

Both respondents unabashedly invite this Court to make witness credibility assessments and treat the evidence in a light most favorable to

² Apart from a very short mention of the standard of review by Michelsen in which it miscites *Leahy v. State Farm Mut. Auto. Ins. Co.*, 3 Wn. App. 2d 613, 418 P.3d 175 (2018), a case that *supports* Blue Bird's position, Michelsen Br. at 16, and a more general discussion of the standard of review on summary judgment in which Northwest acknowledges, albeit briefly, that all facts and reasonable inferences from the facts must be reviewed by this Court in a light most favorable to *Blue Bird*, Northwest Br. at 19-20, the respondents do not take serious issue with Blue Bird's recitation of the standard of review in its brief at 12-13. As will be noted *infra*, this is very important to this Court's review here.

them as the moving parties, rather than Blue Bird as the non-moving party, or to resolve issues like breach or proximate cause that are reserved for the trier of fact.

Michelsen argues that this Court should give the testimony of its expert, Mark Yapple, greater credence than the testimony of Blue Bird's experts because Yapple is Wenatchee's "home town boy." The *repeated* references to Yapple's status as Wenatchee's Fire Marshall are intended to elicit a local bias. *See also*, RP 8 (Michelsen's counsel's blatant appeal to trial court to adopt the opinion of "the local fire marshal wearing the badge" over a Massachusetts expert). But such a weighing of competing expert testimony is improper on summary judgment. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 119-20, 11 P.3d 726 (2000). Michelsen even stoops so low as to contend that Albert Simeoni's declaration was "incompetent," and that "someone from Massachusetts" cannot understand its fire storage practices, Northwest Br. at 37, as if the origins of fires or fire prevention practices are somehow different in Washington than in other states.³

³ Our law rejects such blatant appeals to local bias. *See Pederson v. Dumouchel*, 72 Wn.2d 73, 83-84, 431 P.2d 973 (1967).

What *is* important, and what is largely overlooked in both briefs is that the fire that burned Blue Bird's warehouse spread from the Northwest/Michelsen property. *All* the experts agreed. Mark Yapple's report stated the fire spread from the Northwest/Michelsen property to Blue Bird's premises:

All the fires in the Broadview area are consistent with ignition by a wildland fire originating in the Sleepy Hollow area, or from homes burning from this exposure to the next home, spread through unseasonal hot, dry weather, and extreme wind conditions; then embers from these fires igniting combustibles in the warehouse district, probably in Michelsen Packaging and/or Northwest Wholesale, which in turn sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.

CP 204 (emphasis added). He also concluded that embers found near Blue Bird's property originated from paper products:⁴

...I traveled the short distance to the Stemilt warehouse and then on to the Bluebird warehouse. Both of these warehouses were in line with the wind direction of the evening and lay approximately S to SE from the recycling center. At Stemilt and at Blue Bird there were very large embers, looking like giant cow pies, lying on the aprons and areas around these warehouses. These were different in nature from embers attributed to the shakes and pine needle debris found around Save-Mart, and appeared to be embers from a synthetic product or material. They measured up to 15-16 inches across, and 3-4 inches thick, and were very light. One I was given by the owner of McGinn's Public Ale House that was collected from the alley behind 111 Orondo

⁴ The trial court characterized Yapple's testimony as "undisputed evidence." CP 895-97.

Ave. of the same type. There were reports of embers of similar description reported to me by citizens of East Wenatchee.

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.

There was an employee of Blue Bird warehouse that I informally interviewed who reported he was on that roof when embers fell and he attempted to put out these embers. He stated he was unable to reach all the spots with a hose.

There were two large holes I photographed on the roof area between the loading dock and the old packing line that represented a small bump out in the corner of the two. These had large burn through marks on the roof that had been extinguished and the damage could be seen above. These holes would require large embers to ignite this roof membrane, similar to those found on the Miller side of this complex. Both these indications of ignition and reports from the BlueBird employee on the roof were consistent with the fire at Blue Bird Warehouse initiated on the roof from wind driven embers.

CP 202-03 (photos omitted).

Blue Bird's expert, Paul Way, testified similarly:⁵

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

⁵ The trial court characterized this testimony as "disputed." CP 897.

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

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

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

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 548-49.

C. ARGUMENT⁶

⁶ As noted *supra* at n.2, neither respondent has contested a critical point attendant upon this Court's *de novo* review here. As explained in Blue Bird's opening brief at 12-13, credibility questions, as well as differing expert opinions on key factual points *defeat summary judgment*. In failing to respond to Blue Bird's argument, Michelsen/Northwest

(1) The Trial Court Correctly Addressed Duty Here, as Northwest Agrees

Both respondents here address the trial court's ruling on duty, but reach differing conclusions about it. Michelsen claims it owes no duty to prevent the spread of a fire on its premises to that of the neighboring property owner like Blue Bird. Michelsen Br. at 19-29. It makes the strange assertion that such a duty is not "recognized" in Washington law. *Id.* at 19. But then it asserts that any duty is limited to existing fires, as opposed to preventing the occurrence and spread of fires. *Id.* at 24-27.

On the other hand, Northwest *concedes* that the trial court got the duty analysis right. Northwest Br. at 22-23. However, Northwest attempts to undercut its admission by offering the argument that it had only a "limited" duty as a landlord. *Id.* at 25-32. It also ominously warns this Court of the prospect of a "slippery slope" of one neighbor suing neighbor, *id.* at 53, as if the duty it *admitted* was present here – a property owner must take steps to prevent the spread of fire from its property to that of its

seemingly agree.

But additionally, as noted in Blue Bird's opening brief, summary judgment is improper if there are genuine issues of material fact. Br. of Appellant at 12. Contrary to respondents' implied belief that only *direct* proof of a fact suffices to create such a genuine issue, it has long been Washington law that *circumstantial evidence* may create a genuine issue on a material factual point. For example, in toxic exposure cases Washington courts have liberally allowed circumstantial evidence to prove exposure. *See, e.g., Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 729-30, 248 P.3d 1052, *review denied*, 172 Wn.2d 1015 (2011); *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 248, 744 P.2d 605 (1987).

neighbors – does not inherently contemplate that neighbors engage in litigation if that duty was breached.

(a) Michelsen/Northwest Owed Blue Bird a Duty of Care, as the Trial Court Correctly Ruled

Here, for the reasons set forth in the trial court’s letter ruling, CP 883-91, and in Blue Bird’s opening brief at 14-21, the trial court correctly discerned that Michelsen/Northwest owed Blue Bird a duty of care predicated on both common law and statutory principles.

Northwest *concedes* that at least since 1936, the common law duty of a premises owner to prevent the spread of fire from its property has been clear, citing *Prince v. Chehalis Sav. & Loan Ass’n*, 186 Wash. 372, 58 P.2d 290 (1936) and *Chicago Milwaukee, St. Paul & Pac. R.R. Co. v. Poarch*, 292 F.2d 449 (9th Cir. 1961), cases also analyzed by the trial court below. CP 887-89. It is only Michelsen that obstinately asserts that it owed no duty to Blue Bird.⁷

First, it asserts in its brief at 19 that no “recognized” duty exists here. That assertion is belied by *Prince* and *Poarch*, and the statutory duty cases that will be discussed *infra*.

⁷ Neither respondent addresses their common law duty under the *Restatement (Second) of Torts* § 302B. See Brief of Appellant at 20-21. They have no answer to the duty analysis under that section, in particular comment c and illustrations 1. and 2., thereby effectively conceding the applicability of that duty analysis.

Next, Michelsen argues that the duty of a premises owner as a so-called “last line of defense” is somehow not the law in Washington or is otherwise bad public policy. Michelsen is flatly wrong. It essentially argues for a public policy in which a property owners are free to be flagrantly negligent in the maintenance of their premises, thereby allowing fire to spread to properties of their neighbors accordingly. *That* is a nonsensical, anti-social public policy that is unjustified under Washington law.

The duty articulated in *Prince* and *Poarch*, and applied by the trial court, is a sensible one. By its nature, fire spreads. In the face of a fire on one property, all neighboring property owners are at risk. A premises owner must take steps to avert the spread of fire to the premises of neighboring owners.

Michelsen asserts that *Prince* is distinguishable. Michelsen Br. at 27-29. It is wrong, as *Northwest* concedes. Northwest Br. at 22-23. *Prince* fully supports the existence of a duty here. Whether Blue Bird’s property adjoined Michelsen’s, *id.* at 28, is irrelevant to Northwest’s duty to stop a fire from spreading. In *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 P. 200 (1917), the plaintiff’s farm was *two miles away* from the start of the fire. *Id.* at 557. Michelsen’s argument at 28-29 on the foreseeability of the fire’s spread in *Prince* actually supports Blue Bird’s argument.

Northwest cardboard storage practices foreseeably *enhanced* the risk of any fire's spread to Blue Bird's property. CP 542-43. Those practices were a "perfect catastrophe waiting to happen." CP 542. Additionally, Michelsen's contention that its duty under Washington law is limited to extinguishing an already existing fire is equally baseless. Of course, the Sleepy Hollow fire already existed. But the duty owed by a premises owner, as defined by the *Prince* court, was not to act or fail to act on its premises so as to clearly contribute to a fire's spread. In *Prince*, a defendant's maintenance of a garage in a disastrous state of disrepair with combustibles in close proximity enhanced the risk of a fire's spread. It was no different where Northwest/Michelsen maintained a yard full of loosely packed combustible materials.

Finally, Michelsen's argument that its common law duty is limited to its obligations under what it describes as ordinances, regulations, and "customs" is simply wrong. Michelsen Br. at 21-23. The Legislature has eliminated negligence *per se*. RCW 5.40.050 ("A breach of duty imposed by statute, ordinance, or administrative rule shall not be considered negligence *per se*, but may be by the trier of fact as evidence or negligence..."). Michelsen would have this Court adopt a "reverse negligence *per se*," affording it a complete defense to negligence. That is not the law in Washington. In *Hurley v. Port Blakely Tree Farms L.P.*, 182

Wn. App. 753, 332 P.3d 469 (2014), *review denied*, 182 Wn.2d 1008 (2015), the plaintiff homeowners sued various logging companies for logging practices that resulted in landslides, damaging their property. Division I upheld a summary judgment in favor of one logging company that contended it satisfied its legal duty by complying with Department of Natural Resources forest practices. The court, however, noted that “compliance with applicable regulations, industry customs, permits, and contracts does not *per se* excuse a defendant from a claim of negligence and entitle the defendant to summary judgment as a matter of law,” particularly where the defendant possessed specialized knowledge, skills, or expertise to assess a situation and take reasonable additional action. *Id.* at 773.

The *Restatement (Second) of Torts* § 288C provides:⁸

Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.

⁸ The illustration for § 288C is apt:

A statute provides that all railroad crossings shall be marked with crossing signs lighted at night with red lights. The A Railroad complies with the statute by installing such signs at two crossings, but takes no additional precautions. One of the crossings is on a country road little used at night. As to this crossing A’s compliance is sufficient care. The other crossing is in the midst of a city, where there is much traffic after dark and there are other red lights which might distract the attention of an automobile driver. As to this crossing, A’s compliance with the statute does not preclude a finding that it should have taken additional precautions, such as the installation of crossing gates.

As our Supreme Court observed in *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 553, 192 P.3d 886 (2008), a case relating to the question of whether the county clerk negligently disbursed a surety's funds:

[A] simple statement indicating an individual acted according to the customs of the industry is not always determinative. In the words of Justice Oliver Wendell Holmes, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Helling v. Carey*, Wash.2d 514, 518-19, 519 P.2d 981 (1974) (quoting *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470, 23 S.Ct. 622, 47 L.Ed. 905 (1903)). Likewise Judge Learned Hand opined a defendant "never may set its own tests ... Courts must in the end say what is required..." *Id.* at 519, 519 P.2d 981 (quoting *T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.1932)). McAllister's declaration, asserting the Pierce County clerk acted according to the custom in its industry, does not establish the applicable standard of care as a matter of law.

Id. at 553-54.

A graphic example of this point is found in *Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974). There, our Supreme Court held that a plaintiff stated a medical negligence cause of action in a case where the recognized standard of practice was to test patients for glaucoma only after age 40. Nevertheless, the Court held that an ophthalmologist should have given a glaucoma test to a 32-year old plaintiff displaying glaucoma symptoms where testimony indicated that proper professional standards

dictated that a test should be given, and the glaucoma test was simple and harmless.

Here, the unsettling factor is the presence of Central Washington Recycling on the Michelsen property. As part of that business, Michelsen allowed the public to drop off large quantities of loose cardboard, later baled, stacked, and stored on its premises. CP 566. It was open to the public twenty-four hours a day, seven days a week. CP 201. This activity was not monitored or secured; any person was permitted to enter and exit at any time, day or night, and for whatever purpose. CP 596. Despite his discussion of the Wenatchee Fire Department's alleged regulation of the Michelsen premises, in his declaration, CP 181-82, Yapple is largely silent on Michelsen's recycling business practices. In his previous report (when he was not Michelsen's paid expert), Yapple described the recycling storage "as a natural collection point for an ember as the walls and dumpster orientation ran north and south roughly perpendicular to the wind direction that evening." CP 202.

Northwest/Michelsen were not excused from liability by mere minimal compliance with Wenatchee storage regulations when the summers in that community were increasingly hot and dry, and the risk of fire borne on high winds in central Washington were an escalating reality.

With regard to its duty under RCW 76.04.730, Michelsen Br. at 23-24, there is a certain irony that Michelsen would have this Court ignore the plain language of that statute and case law imposing a clear-cut duty on Michelsen as a premises owner, while at the same time asserting that any common law duty should be limited by local ordinances, regulations, and “customs.”

Despite Michelsen’s argument that RCW 76.04.730 applies *only* to forest lands, *nothing* in the statute so limits its reach. RCW 76.04.730 clearly states: “It is unlawful for any person to negligently allow fire originating on the person’s own property to spread to the property of another.”⁹ *Nothing* in *Oberg v. Dep’t of Natural Resources*, 114 Wn.2d 278, 787 P.2d 918 (1990), holds that the statute is so limited in scope. No Washington court has recognized such a limitation. This Court is constrained to apply the plain language of the Legislature as it is written.

Because Washington law does not support its narrow and erroneous conception of duty and breach, Michelsen resorts to reliance on inapplicable foreign authority. Michelsen Br. at 31-34. Michelsen makes much of a

⁹ In the chapter of the RCW in which RCW 76.04.730 is found, the Legislature determined to limit the reach of those statutes to forest lands and their owners. *See, e.g.*, RCW 76.04.700-.770. However, by its plain language, the Legislature *chose* not to do so in RCW 76.04.730. This Court must defer to the Legislature’s intent. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (The goal of statutory interpretation is to carry out legislative intent).

forty-year-old Oregon case that is an outlier. *Comfort v. Stadelman Fruit, Inc.* 592 P.2d 213 (Or. 1979). It is noteworthy that the court there distinguished its facts from those in at least four other Oregon cases, all of which would have supported the finding of a relevant legal duty. Consequently, the decision is fact specific. In any event, the Oregon court did not precisely articulate the legal duty owed by a premises owner in that state as to fires. *Comfort* has subsequently been distinguished. It did not provide the basis for summary judgment when there were genuine issues of material fact regarding a fire's cause. *See Auto. Ins. Co. of Hartford, Conn. v. Abel*, 2010 WL 2643412 (D. Or. 2010).

If Michelsen believes that *Comfort* represents the majority rule in the United States, it is wrong. As noted in *Liability of Property Owner for Damages from Spread of Accidental Fire Originating on its Premises*, 17 A.L.R. 5th 547 at § 2[a], the majority rule is set forth in *Prince*:

Liability for damages for the spread of fire may be based on an owner's negligence in maintaining his premises in such a condition that fire is likely to occur. Therefore, when an owner negligently stores combustible or inflammable material on property so that it is reasonably foreseeable that fires will start and spread to the premises of another, he may be liable for damage caused when this occurs, although the fire starts accidentally.

See also, 35A Am. Jur. 2d *Fires* § 27.

In sum, the trial court was correct in determining that Northwest/Michelsen owed a duty of care to Blue Bird.

(b) Northwest's Duty of Care to Blue Bird Is Not Diminished under Premises/Landlord Liability Principles

Although Blue Bird was a third party to the Northwest/Michelsen lease, that in no way diminishes Northwest's duty to it under well-settled principles of Washington premises liability law. To an extent, Northwest "throws Michelsen under the bus" by arguing that it conveyed "sole possession" of the premises Michelsen rented to it, and, therefore, it was absolved of any liability to Blue Bird. Northwest Br. at 25-32. But Northwest mischaracterizes Washington premises liability law in its effort to limit its duty to Blue Bird to prevent the spread of fire from its premises.

First, as noted *supra*, the fire spread from both the premises Northwest retained in its possession *and* those it leased to Michelsen. Northwest does not get to walk away from its duty to Blue Bird so readily. The fire spread from premises under its control.

Second, our Supreme Court recently confirmed that Washington premises liability law does not allow a landlord to avoid liability for hazards on its premises merely by leasing them. In *Adamson v. Port of Bellingham*, ___ Wn.2d ___, 438 P.3d 522 (2019), an employee of the Alaska Marine Highway System was injured when the passenger ramp at the Port's

Bellingham Cruise Terminal collapsed. The Port tried to argue that it had no liability for that employee's injuries because it had leased a portion of the Terminal to the AMHS. The Supreme Court unanimously rejected that argument. The Court confirmed that the overarching principle in Washington premises liability law is founded on the *Restatement (Second) of Torts* §§ 343/343A, and that a premises owner has a duty "to exercise reasonable care to protect an invitee against a condition that creates an unreasonable risk of harm, including inspecting for said conditions," and remedying them. *Id.* at 527. *See also, Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (adopting § 343A); *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 49-50, 914 P.2d 728 (1996) (adopting § 343).

Under the *Restatement* § 343, "[r]easonable care requires the landowner to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [a tenant's] protection under the circumstances.'" *Tincani*, 124 Wn.2d at 139. Under § 343A, the landowner even has an obligation to specifically apprise invitees of known or obvious hazards on the premises, if that landowner should have anticipated that the invitee or its guest/employee would use the premises despite the hazard. *Id.* at 139-40 (distraction, forgetfulness, or foreseeable

reasonable advantages from encountering the danger are factors supporting the § 343A duty).

Indeed, a premises owner who happens to lease out those premises has an *anticipatory* duty to address possible harm-causing conditions on the premises where there is a latent defect on the premises,¹⁰ or the owner retains control over a portion of them by covenant,¹¹ or there is a common area.¹²

Thus, here, Northwest could not escape its duty to neighbors like Blue Bird merely because it leased property to Michelsen, particularly

¹⁰ A landlord has a duty to its tenants in connection with latent hazards on the premises of which it is aware or should have been aware. The landlord has an antecedent duty to make a reasonable inspection of the premises for latent defects affecting the premises' safety for ordinary use, and to correct such a hazard. *Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969); *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994).

¹¹ A landlord owes a duty to a tenant and/or the tenant's employee/guest to repair the premises where the landlord covenanted to do so, and the landlord may be liable for injuries to tenants or tenant's guests resulting from the improper performance of the covenanted obligations. *Mesher v. Osborne*, 75 Wash. 439, 134 P. 1092 (1913); *Estep v. Security Savings & Loan Soc.*, 192 Wash. 432, 73 P.2d 740 (1937); *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962); *Teglo v. Porter*, 65 Wn.2d 772, 399 P.2d 519 (1965); *Adamson*, 438 P.3d at 526-27. See *Restatement (Second) of Torts* § 357; *Restatement (Second) of Property, Landlord & Tenant* § 17.5. Of course, Northwest has not made its lease agreement with Michelsen part of this record so the Court cannot know if it retained an obligation as to the premises it leased to Michelsen.

¹² A landlord owes a duty with regard to hazards in common areas that result in harm to others. *E.g.*, *Andrews v. McCutcheon*, 17 Wn.2d 340, 345, 135 P.2d 459 (1943) (when landlord reserves control over stairway, a question of fact, landlord must maintain it in safe condition and is liable to tenant's invitee for failure to do so); *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975); *Degel*, 129 Wn.2d at 49. See *Restatement (Second) of Torts* § 360.

where its storage practices alone could be deemed a latent defect on the premises.

(2) The Trial Court Did Not Address Breach of Duty as a Matter of Law, Nor Should It Have Done So, as Breach Is a Question of Fact for the Jury

The trial court determined that Michelsen/Northwest owed Blue Bird a duty of care, but that any breach of that duty did not proximately cause Blue Bird's harm as a matter of law. CP 883-91. The trial court did not determine breach of duty anywhere in its decision as a matter of law. *Id.* Now, however, both Michelsen and Northwest assert that the trial court should have ruled on breach as a matter of law. Michelsen Br. at 29-35; Northwest Br. at 24-32. They are wrong.

As Division II observed in *Bowers v. Marzano*, 170 Wn. App. 498, 505, 290 P.3d 134 (2012), the elements of a negligence action are well-established in Washington law. Duty is a question of law, while breach and causation are generally questions of fact. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *McCarthy v. County of Clark*, 193 Wn. App. 314, 330, 376 P.3d 1127, *review denied*, 186 Wn.2d 1018 (2016) ("Whether an officer has fulfilled the duty to investigate is a question of fact."); *Butler v. Thomsen*, 7 Wn. App. 2d 1001, 2018 WL 6918832 (2018) (Division I reverses summary judgment where expert testimony raised question of fact as to breach). Ample evidence supported

Blue Bird's position that both respondents breached their duty to it. The threshold question is whether the expert testimony of Albert Simeoni and Paul Way was admissible, and the trial court did not err in concluding that it was.

(a) The Way/Simeoni Declarations Were Admissible as the Trial Court Ruled, and Created a Genuine Issue of Material Fact on Breach and Causation

Both Northwest and Michelsen are content to ignore the authorities set forth in Blue Bird's opening brief at 33-36 that document the liberal policy in Washington supporting the admission of expert testimony under ER 702-05.¹³ That policy sustains the trial court's decision to treat those declarations as admissible. Rather, both respondents carp about the alleged "speculative" nature of the expert testimony, even though the basis for their opinions on the fire's origin on the Northwest/Michelsen properties was largely no different than employed by their expert, Mark Yapple.¹⁴ Michelsen Br. at 35-42; Northwest Br. at 37-53. Eschewing consistency, they do not explain how Yapple's opinion was "valid," but the corresponding views of Simeoni or Way were "incompetent" or "speculative," other than

¹³ The reasons for admissibility of the Simeoni/Way testimony on breach apply with equal rigor to proximate cause.

¹⁴ Northwest misleads the Court when it claims, erroneously, that Blue Bird or its experts "attempt to start from a premise that there was no fire before the fire ignited in the Michelsen yard." Northwest Br. at 36. An even superficial reading of Blue Bird's brief at 7-8 or the Way declaration, CP 548, belie that assertion.

they wish it to be true. Yaple's opinions, as evidenced in his report and declaration, were based on precisely the *same facts* as those relied upon by Way and Simeoni.

Applying the modern authorities on the admission of expert testimony under ER 702-705, discussed in Blue Bird's opening brief at 33-36, and the protocol for admission they establish, the Simeoni/Way declarations are clearly admissible, as the trial court properly found.

First, Michelsen misstates the *three-part* test under Washington law since *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), for the admission of expert testimony, focusing instead on only the third element. Michelsen Br. at 35-36. All *three* elements are met with respect to the Way/Simeoni testimony.

Neither respondent effectively contends that either Way or Simeoni was unqualified to testify, apart from Michelsen's slam in its brief at 37 that Simeoni was somehow "incompetent" to testify on storage practices because he lives in Massachusetts, and Northwest's passing complaint in its brief at 37 regarding the date Way was retained and the nature of his work. The respondents' quibbles about the qualifications of Way and Simeoni are baseless. Both experts have impressive academic and practical credentials on fires and their origins. *See* Br. of Appellants at 37-38.

As for the second element of the admissibility test, whether the experts relied on a novel scientific theory, apart from a passing reference in Northwest's brief at 45-46, the respondents do not even address it, essentially *conceding* its inapplicability. This case does not have *Frye* implications for the Way/Simeoni testimony any more than Yaple's testimony does.

Both respondents reserve the bulk of their scornful argument regarding the Way/Simeoni declarations for the third element of the test, the helpfulness of the expert's opinion for the trier of fact. On this element, they misrepresent the law on the predicate and scope of an expert's opinion, and, as they did in the trial court, they make a blatant plea to this Court to inappropriately *weigh* the experts' testimony.

That expert testimony is generally helpful in this case on the origins of the Michelsen fire and whether practices at the Northwest/Michelsen premises contributed to the fire's spread to Blue Bird's property is *conceded* by Northwest/Michelsen – *they offered Yaple's expert testimony on those very issues*.

Both respondents complain that Way relied on allegedly hearsay observations from Blue Bird employees, Larry Blakely and Roger Sommers specifically (Northwest Br. at 39-41; Michelsen Br. at 38 n.3, 39 n.4), and

that their opinions were not grounded in fact generally. These assertions are meritless.

First, ER 703 makes clear that an expert may rely on otherwise inadmissible testimony in arriving at her/his opinion. *In re Detention of Marshall*, 156 Wn.2d 150, 162, 125 P.3d 111 (2005) (“... the rule allows expert opinion testimony based on hearsay data that would otherwise be inadmissible in evidence.”). Consequently, if the Blakely/Sommers information was hearsay, that has no bearing on the experts’ use of it in arriving at their opinions. It was reasonable for Way to have relied on such testimony. Yapple did so as well. CP 203 (“There was an employee of Blue Bird warehouse that I informally interviewed...”).

Second, the materials upon which Way relied in rendering his opinion are specified in his declaration and included his review of Yapple’s report (CP 549), a review of materials, and personal observation (CP 547). That is a more than adequate basis for an expert’s opinion.¹⁵

Further, ER 704 fully permitted Way and Simeoni to opine upon an ultimate fact like breach or causation. Neither respondent has any answer to *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007) (expert opined on ultimate facts in negligence case).

¹⁵ Of course, both respondents have the right to explore the basis for Way’s opinion in deposition, and upon cross-examination at trial.

Finally, as to the allegedly “speculative” nature of the Way/Simeoni testimony, the authority Northwest cites emanates from an era in which courts were less generous in admitting expert testimony, like the 79-year old case of *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 106 P.2d 314 (1940), a case predating the adoption of our modern Rules of Evidence. Even *Prentice* ultimately does not support their argument. There, the Supreme Court concluded that certain expert testimony on causation was too conjectural to sustain a judgment. However, that decision has been repeatedly distinguished in more modern cases involving expert testimony. For example, in *Helman v. Sacred Heart Hospital*, 62 Wn.2d 136, 381 P.2d 605 (1963), the Court sustained a judgment in a medical negligence case pertaining to whether the plaintiff had sustained a staph infection while in the defendant hospital. Distinguishing *Prentice*, the Court made clear that circumstantial evidence supported the jury’s conclusion that the plaintiff was infected by his hospital roommate:

We do not think that the facts as shown at bar fall within the orbit of *Prentice Packing and Storage Co. v. United Pac. Ins. Co.*, supra, nor is the final conclusion of the jury based upon an unsupported inference. A determination that respondent was cross infected from his roommate by staphylococcus aureus coagulase positive does not require the court or jury to reason in a circle or to pile inference upon inference.

It follows, then, that the doctrine of the *Prentice* case, *supra*, is not applicable here. We do not have an inference founded upon another inference or conjecture, but rather strong circumstances pointing one way or the other from which the jury could and did find the ultimate facts...

If, as we have shown, there was sufficient evidence of believable qualities arising from the direct and cross examination of all witnesses, the courts ought not to weigh the quantum of evidence to determine if it balances on one side or the other. Weighing the evidence lies exclusively within the province of the jury.

Id. at 147-48.

Likewise, in *In re the Involuntary Treatment of A.J.*, 196 Wn. App. 79, 383 P.3d 536 (2016), this Court distinguished *Prentice* as well in an ITA case, concluding that the State's expert testimony sustained the conclusion that A.J. was "gravely disabled" within the meaning of RCW 71.05. The Court noted that this was not a case where the expert testimony lacked *any* factual foundation. Rather, the experts' testimony complied with ER 702, 703, and was admissible:

If specialized knowledge will help the jury to determine a fact in issue, an expert may testify to his or her opinion so long as he or she bases that opinion on facts or data that are of the type reasonably relied on by experts in that field. ER 702, ER 703. Those facts or data do not need to be admissible in evidence. ER 703; *see LaBelle*, 107 Wash.2d at 209-11, 728 P.2d 138 (finding substantial evidence for an involuntary commitment order where the only evidence was expert testimony from one doctor); *In re Det. Of Marshall*, 122 Wash.App. 132, 90 P.3d 1081 (2004), *aff'd*, 156 Wash.2d 150, 125 P.3d 111 (2005).

In this case, each witness testified to A.J.'s mental state, which required specialized knowledge and experience. Both Dr. Gunderson and Dr. Seymour testified the records they relied on in forming their opinions were the type reasonably relied on by experts in their particular field. Furthermore, Ms. Wendt, who had direct weekly contact with A.J., testified her opinion was based on her own personal observation of A.J. The testimony complied with ER 702 and 703 and was sufficient to allow the jury to find A.J. gravely disabled.

Id. at ¶¶ 30-31 (unpublished portion of opinion).

Ultimately, the respondents' carping about the allegedly "speculative" nature of the Way/Simeoni testimony is baseless. It is nothing more than an undisguised plea on their part for courts to accept the testimony of their expert over that of Way/Simeoni. While the expert opinions were helpful to the trier of fact, and were based on *identical facts*, the experts came to differing conclusions. That did not make them "speculative," "incompetent," or "inadmissible." Instead, the differing expert opinions should have been for the jury to assess in making its decision.

The trial court did not err in ruling that the Way/Simeoni declarations were admissible. It erred in failing to see that those experts created a question of fact on breach and causation, foreclosing summary judgment.

(b) A Question of Fact Is Present on Breach

The expert opinions of Simeoni and Way create a question of fact on breach. Simeoni could not have been clearer in opining that Northwest/Michelsen breached their duty to Blue Bird by creating “a perfect catastrophe waiting to happen:”

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

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

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

9. By creating such a large fuel load with no natural breaks, Michelsen contributed to the creation of a large and intense fire in its yard. As a direct result of Michelsen’s storage practices, the fire very quickly became uncontrollable. Despite the best efforts of the firefighters, the high intensity of the fire resulted in a large fire plume that entrained flaming debris to be lofted high in the air and carried away from the Michelsen property and toward other commercial properties located downwind of the fire. As a result, firefighters could not contain the flaming debris from leaving the site of the fire.

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

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

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

CP 541-43.

(3) The Trial Court Erred in Intruding Upon the Jury's Function by Deciding Proximate Cause as a Matter of Law

Neither Michelsen nor Northwest disputes the law on proximate cause, as described in Blue Bird's opening brief at 23-24. Michelsen did not address the issue at all in its briefs; Northwest addressed the issue in its brief at 32-42. Neither respondent disputes the unambiguous principle in Washington law that "but for" causation is ordinarily a question of fact for the jury. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011).¹⁶

Northwest, however, hopes to persuade this Court that this case constitutes one of those *rare* circumstances in which courts may resolve

¹⁶ As noted in Blue Bird's opening brief at 23 n.14, the issue of legal causation is not before this Court, as it was not seriously argued below. In any event, neither respondent has argued it in their brief.

causation as a matter of law, citing *Briggs v. PacifiCorp*, 120 Wn. App. 319, 85 P.3d 369 (2003), *review denied*, 152 Wn.2d 1018 (2004) and *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013). Northwest Br. at 34-35. Neither case actually helps it. In *Briggs*, this Court affirmed a trial court decision on summary judgment as to *breach*. There, the plaintiff electrician was injured when his boom came into contact with an uninsulated high voltage electrical distribution line. He claimed that the line's owner breached a duty to insulate, bury, or relocate the line, but failed to offer any evidence that such a duty was breached under the circumstances of the case.¹⁷ In *Martini*, Division II *reversed* a trial court summary judgment finding no proximate cause as a matter of law. That court specifically stated that cause in fact is a question for the jury, and generally not susceptible to summary judgment. The issue may only be decided as a matter of law if "the facts and inferences from them are plain and not subject to reasonable doubt or differences in opinion." 178 Wn. App. at 164-65. Clearly, that is far from true here.

¹⁷ By direct contrast, in *Smith v. Clark Public Utilities*, 177 Wn. App. 1026, 2013 WL 5947760 (2013), Division II readily distinguished *Briggs*, finding fact questions as to both breach and causation in a very similar electrocution case.

Moreover, summary judgment on causation is particularly inappropriate in light of the proper treatment of the causation evidence articulated by the *Martini* court:

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

Id. at 165.

Just as there was a question of fact on breach, as noted *supra*, the expert opinion of Paul Way created a question of fact as to causation:

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

12. I reviewed the report authored by Mark Yapple. I agree with his conclusion that the fire at Michelsen

Packaging and/or Northwest Wholesale, “sent embers to Stemilt warehouse and Blue Bird Fruit warehouses.”

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 548-49. The jury was entitled to evaluate the competing expert opinions on this question. In granting summary judgment, the trial court improperly intruded upon the jury’s function, weighing those competing opinions. It erred.

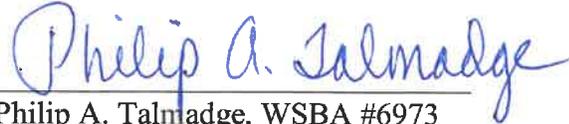
D. CONCLUSION

Nothing in the Michelsen/Northwest briefs should dissuade this Court from reversing the trial court’s decision on summary judgment. While the trial court was correct in concluding that Michelsen/Northwest owed a duty of care to Blue Bird, it erred by concluding as a matter of law that Blue Bird failed to prove causation as to its damages from Michelsen/Northwest’s improper maintenance of their premises, when fact issues abounded on causation. Proximate cause was an issue for a jury.

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

DATED this 7th day of May, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

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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: May 7, 2019, at Seattle, Washington.


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