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COURT OF APPEALS No. 47778-5 - II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CEDAR COURT APARTMENTS, LLC,
a Washington Limited Liability Company

Respondent/Plaintiff

v.

GUSTAVO & MARIA COLORADO,
husband & wife, and the marital community composed thereof,

Petitioner/Defendant

PETITION FOR REVIEW

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Regulations and Rules

I. IDENTITY OF PETITIONER

Petitioners Gustavo and Maria Colorado were defendants and counter-claimants in the trial court and the appellants in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Colorados seek discretionary review of the Court of Appeals' unpublished decision of January 18, 2017. A copy of the Court of Appeals decision is attached as Addendum A.

III. ISSUE PRESENTED FOR REVIEW

A. Assignment of Error

The trial court erred by overturning a unanimous Pierce County jury verdict that found Plaintiff Cedar Court probably started the fire based upon substantial circumstantial evidence, which included testimony that Cedar Court employees entered the apartment shortly before the fire, destroyed evidence after the fire, and lied about conversations that never occurred involving various witnesses at trial.

IV. STATEMENT OF THE CASE

A. Factual Background

Appellants Gustavo and Maria Colorado, and their three daughters, began living at the Cedar Court Apartments on September 29, 2008. (RP

172, 180-81). Cedar Court consists of 136 apartments. (RP 226).

On November 18, 2011, the Colorados complained to Cedar Court that their stove was malfunctioning. (RP 172, 183). Cedar Court asked the Colorados to fill out a maintenance request form, and the Colorados complied.

On February 13, 2013, the Colorados signed a new lease to renew their tenancy. (RP 337). In conjunction with this lease renewal, Cedar Court promised to clean the Colorados' carpets as a renewal bonus. (Id.).

The Colorados made a second complaint about the defective stove on February 21, 2013. (RP 207). On this day, Mr. Colorado went to the Cedar Court management office around 10:00 A.M. (Id.). Mr. Colorado filled out two separate maintenance request forms to have Cedar Court fix the Colorados' stove and bathroom sink, and to grant Cedar Court permission to access the apartment. (RP 173, 182-83, RP 207).

On the maintenance request form, Mr. Colorado stated that the large burners were not working and the bathroom sink was clogged. (Id.; Ex 7). On the second maintenance request form, Mr. Colorado formally requested that Cedar Court perform the agreed upon carpet cleaning. (Ex 6). By signing the maintenance request forms, Mr. Colorado gave Cedar Court express written permission to enter their home. Id.

At trial, Maria Colorado testified that she did not use the stove on the day of the fire. (RP 183). Mrs. Colorado testified that no cooking

occurred on the day of the fire "because it was not working." (RP 184). In fact, no one within the Colorado household did any cooking on the day of the fire. (RP 184). Further, Mr. and Mrs. Colorado both denied that they placed anything on top of the stove before they left their apartment to allow the carpet cleaning to occur. (RP 190-91, RP 212)

At approximately 11:00 A.M, the Colorados left their apartment to give Cedar Court time to perform the maintenance requested. RP 208. At approximately 1:30 P.M., the Colorados went back to the apartment to see if the carpet cleaning had been completed. (Id.). Mr. Colorado testified that he was checking to see if the maintenance had been completed because "[m]y daughter had some homework to do" and because he worked the graveyard shift and "need[ed] to rest." (RP 209). Mr. Colorado testified that he went upstairs, opened the door, and left immediately thereafter once he realized the carpets had not been cleaned. (RP 209).

Next, the Colorados travelled to Subway Sandwiches to eat. (RP 188, 210). Mr. Colorado testified that he would not normally eat at Subway, but did so because the stove was not working. (RP 188).

At approximately 4:00 p.m., Mr. Colorado drove his wife and daughter back to Cedar Court to see if the carpet cleaning had been completed. (RP 188-89, 210). Mr. Colorado explained that he, once again, determined that the carpets had not been cleaned and immediately left. (RP 210). Mr. Colorado did not smell any smoke. (RP 219).

On his way back to his vehicle, Mr. Colorado encountered a carpet cleaning worker. (RP 212-13). Given that Mr. Colorado had returned to his apartment for a second time and the carpets still had not yet been cleaned, Mr. Colorado testified as follows: "I asked him if he can hurry to clean up our carpet so we can get in our apartment." (RP 203, 213; RP 189). On cross-examination, Mr. Colorado was asked why he told the carpet cleaning worker to hurry:

> "Because, well, first of all, I'm tired. I was tired at the moment. My daughter has something to do with her school, and I need to rearrange all of the furniture and back in its place."

(RP 213-14).

After returning to his vehicle where his wife and daughter waited, Mr. Colorado drove to the Tacoma library because his daughter had homework she needed to complete. (RP 189). Approximately 30 minutes later, at 4:30 P.M., the Colorados were notified that their home was ablaze. (Id.). Extensive damage resulted from the fire.[1]

Shortly after the fire was extinguished, the Tacoma Fire Department launched an investigation that was led by Lieutenant Ken Hansen. As a result of his investigation, Lt. Hansen determined that the fire was ignited by the same stove that the Colorados previously made two

[1] The parties stipulated to the amount of damages during the trial. Consequently, the jury did not hear about the parties' monetary damages and only heard testimony regarding the parties' competing liability theories.

complaints about and requested Cedar Court to fix.

At trial, Lt. Hansen testified that the fire must have ignited within a relatively short time prior to it being reported. (RP 148). Lt. Hansen further testified as follows:

> Q. You were asked about – the question about whether or not something could have been smoldering since 11:00. If you understand that somebody was in the apartment at 4:00 and did not smell smoke, is then your conclusion that something happened – something to cause that ignition happened between 4:00 and 4:30?
>
> A. Correct.

(RP 162).

B. Additional Background Facts.

At trial, Cedar Court called Tammy Wheat to testify. (RP 295). Ms. Wheat was the property manager in charge of the Cedar Court complex on the day of the fire. (RP 316). Ms. Wheat testified that after the fire was extinguished there was a meeting in the Cedar Court office. Attending this meeting were the following persons: Lt. Hansen, Deanna Hanshew, Maria Colorado, Gustavo Colorado, Maria Colorado's sister, and Ms. Wheat. At trial, Ms. Wheat testified as follows in regards to this meeting:

> Q. You described there were things going on.
> A. A lot of things, correct.
> Q. Did the fire investigator – did Lieutenant Hansen ever indicate where he believed the fire originated?
> A. Yes.
> Q. Where did he believe it originated?
> A. Top of the stove, back burner.
> Q. Did either of the Colorados say anything in response?

A. Yes.
Q. What did –
A. I believe they asked the question of Lieutenant Hansen.
Q. Did you hear – did they say anything following his answer?
A. Yes.
Q. What did you hear?
A. "I put something down."
Q. Who said that?
A. Maria.

(RP 332-33).

On cross-examination, Ms. Wheat was asked to clarify her testimony regarding Mrs. Colorado's purported admission. (RP 362). Specifically, Ms. Wheat was asked who Mrs. Colorado directed this statement towards and what language she used. In response, Ms. Wheat testified that these statements were made to Mr. Colorado ***in English***. (RP 363). Further, Ms. Wheat acknowledged that she failed to note Mrs. Colorado's purported admission in any documents that Cedar Court used to memorialize its investigation, including its own Serious Incident Report. On cross-examination, Ms. Wheat admitted that she does not speak or understand the Spanish language. (RP 378).

After Ms. Wheat testified regarding Mrs. Colorado's purported admission, Mrs. Colorado was re-called as a witness to rebut Ms. Wheat's ***stunning testimony***. (RP 397). During her testimony, Mrs. Colorado testified only through a certified Spanish speaking court interpreter, which was consistent with how she previously testified at trial and deposition. (RP 396). In contrast, Mr. Colorado testified without an interpreter.

Substantively, ***Mrs. Colorado testified that she does not speak English.*** (RP 397). Mrs. Colorado was asked whether she spoke English to anyone after the fire and responded as follows: "No. I only wait for the translation because I don't understand." (RP 397). Mrs. Colorado also denied placing any items on the stove on the day of the fire. (RP 398).

After Mrs. Colorado testified in rebuttal, Mr. Colorado was re-called as a witness. (RP 405). Mr. Colorado specifically denied that he spoke with his wife in English on the night of the fire. (Id.). During the meeting with the fire investigator, Mr. Colorado testified that his wife was speaking Spanish "[a]ll of the time." (RP 405).

C. Background Facts Regarding Cedar Court's Disposal of the Stove that Caused the Fire.

During trial, Ms. Wheat acknowledged that the Colorados made two complaints about their stove malfunctioning. Further, Ms. Wheat admitted that she failed to tell her boss, Deanna Hanshew, about the Colorados' most recent complaint about the malfunctioning stove ***until weeks after the fire***. (RP 266).

Ms. Wheat also admitted that Cedar Court ***deliberately disposed of the Colorados' stove the next day after the fire***. (RP 363-65). Ms. Wheat testified that her boss, Deanna Hanshew, was aware of the disposal of the stove. (RP 365). Ms. Wheat admitted that no one was able to inspect the stove for defects before it was hauled away.

Lieutenant Hansen testified at trial that he did not analyze or assess

the internal electrical wiring system within the stove because he was not qualified and was not an "electrical engineer." (RP 145). Lt. Hansen explained that he did not want to "monkey around" with the stove and was concerned about "***spoliation of evidence***." (Id.).

D. Cedar Court's Maintenance Man, "Alex", was MIA after the Fire and MIA at Trial.

Ms. Wheat acknowledged that the Colorados had submitted a work order on the morning of the fire due to their malfunctioning stove and for a clogged bathroom sink. Ms. Wheat testified that Cedar Court's maintenance technician, Alex, would come into the office throughout the day to check with her about ongoing maintenance needs. (Id.). Further, Ms. Wheat admitted that Alex had been given the Colorados' work request forms earlier in the day before the fire started. (RP 357). Ms. Wheat testified that she considered the Colorados' maintenance requests to require resolution within 72 hours. (RP 308). Further, Ms. Wheat admitted that she gave the keys to the Colorados' apartment to the carpet cleaners in the afternoon before the fire started. (RP 347-48).

At trial (and deposition), Cedar Court Apartments, LLC, designated Deanna Hanshew as its official corporate representative. Ms. Hanshew supervised all Cedar Court employees, including Tammy Wheat. (RP 226). Ms. Hanshew testified that it was her understanding that the Landlord Tennant Act requires malfunctioning appliances to be fixed within 72 hours and serious plumbing problems to be fixed within 24 hours.

(RP 231-32). Consequently, Cedar Court had legal responsibility to fix these maintenance problems immediately.

It is undisputed that Cedar Court and all of its employees had keys available at their disposal to access the Colorado's apartment at any time. (RP 232). This was verified by both Deanna Hanshew and Tammy Wheat. (RP 345).

Both Tammy Wheat and Deanna Hanshew testified that "Alex" was the maintenance technician who was employed by Cedar Court on the day of the fire. (RP 263). Ms. Hanshew testified: "Alex is responsible for all of the normal maintenance for the property outside of what would be considered above his, you know, skill level, so it is usually general maintenance." RP 264.

Ms. Wheat testified that she possessed the key to the room where the master keys were kept but that her assistant, Tiara, also had access to the keys whenever Ms. Wheat left. (RP 345). Ms. Wheat's assistant, Tiara, also never testified at trial. (RP 345).

Cedar Court hired the carpet cleaning service known as New Life Carpet Cleaning. (RP 303). Ms. Wheat testified that she hired and worked with New Life approximately 8 days per month on average. (Id.).

Cedar Court did not call "Alex," the Cedar Court maintenance employee, as a witness at trial. Similarly, Cedar Court did not call any employees or agents of New Life Carpet Cleaning to testify at trial.

During cross-examination, Ms. Hanshew was questioned about her deposition testimony in this case, which occurred on August 24, 2014. Ms. Hanshew could not recall her prior testimony where she testified: "On behalf of Cedar Court there was clearly someone in the apartment [prior to the fire]." (RP 273). At trial, Ms. Hanshew confirmed that the following deposition testimony was truthful and accurate:

> **Q. So someone had completed some repairs in this apartment on February 21.**
> **A. That's what it appears.**
> **Q. The same day of the fire.**
> **A. That's what it appears.**
> **Q. Who was that?**
> **A. That would have been the maintenance technician but that wouldn't have been Jose at that time. I'm going to apologize because I don't recall his name.**
> **Q. Kind of important that we identify who was in this apartment on the date of the fire.**
> **A. Sure.**
> **Q. So I'm not trying to put words in your mouth. I just want clarification. Does this entry indicate that someone on behalf of Dobler or Cedar Court was in the apartment doing repairs that were done by 11:00 on the morning of February 21, 2013?**
> **A. *On behalf of Cedar Court there was clearly someone in the apartment*.**

(CP 271-273; Hanshew Deposition at p. 53; Ex. 49) (emphasis added).

At the end of Ms. Hanshew's trial testimony, there were several questions from the jury asking who had access to the keys to the Colorados' apartment. For example, the jury asked:

> Q. "Who has access to the room that has the keys, the locked

room?

A. "Employees of Cedar Court Apartments can access that room." (RP 293).

Q. "Does the apartment manager open the door for the carpet cleaner or maintenance technician or does she give them the keys to enter the apartment?"

A. "The maintenance technician would be responsible for checking the keys out, and the manager would check them out on behalf of the carpet cleaner." (RP 294).

Similarly, at the end of Ms. Wheat's trial testimony, there were several questions from the jury in regards to which employees of Cedar Court had access to the keys to the Colorados' apartment. For example, the jury asked:

Q. "Why would you give the keys to the cleaners at 2:00 p.m. If you thought the Colorados were home?

A. They put in an order to have their carpet renewal clean. I wanted to be sure that that happened for them that day. I wanted the carpets to be cleaned for that day. (CP 389).

The jury posed the most questions in the entire case to Tammy Wheat. Most of these questions were directed towards Ms. Wheat's credibility. (RP 389-393). Further, the jury's sharp questioning of Ms. Wheat's is quite illustrative of their skeptical view of Ms. Wheat's truthfulness. (Id.). The following is a concise example of Ms. Wheat's testimony on this subject:

Q. Is it your policy to allow licensed and bonded contractors into tenants' units typically without consent?

A. Yes. (RP 394).

At the conclusion of trial, counsel for Plaintiff and counsel for Defendants expressly agreed that the only issue for the jury to determine

was who negligently caused the fire. Plaintiff and Defendants expressly agreed that neither party was required to prove causation. (RP 14). On February 26, 2015, the jury returned a verdict in favor of the Colorados on liability.

F. Procedural Background

On October 9, 2014, Cedar Court filed a motion for partial summary judgment seeking to dismiss all of the Colorados' counterclaims and seeking affirmative relieve on their own claims. On December 5, 2015, the Honorable Jerry T. Costello dismissed all of the Colorados' counterclaims but specifically refused to dismiss their negligence claim. At oral argument, Judge Costello ruled that questions of fact precluded summary judgment on the Colorados' negligence counterclaim.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals should accept review because the Court of Appeals' decision directly conflicts with over 100 years of Washington appellate case law. See RAP 13.4(b)(1) and (2).

A. The Trial Court Erred by Granting JNOV Despite Substantial Circumstantial Evidence Supporting the Verdict.

"Courts will sparingly overturn a jury verdict." Valente v. Bailey, 74 Wn.2d 857, 447 P.2d 589 (1968). Appellate courts will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. Phelps v.

Wescott, 68 Wn.2d 11, 410 P.2d 611 (1966). The credibility of witnesses and the weight to be given the evidence are matters within the province of the jury and if an appellate court is convinced that a wrong verdict has been rendered, the reviewing court "will not substitute its judgment for that of the jury", so long as there was evidence which, if believed, would support the verdict rendered. Burke v. Pepsi-Cola Bottling Co., 64 Wn.2d 244, 391 P.2d 194 (1964). "A jury is free to believe or disbelieve a witness, since credibility determinations are solely for the trier of fact." Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125, 126 (2003). "Credibility determinations cannot be reviewed on appeal." Id. (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

"In reviewing a JNOV, this court applies the same standard as the trial court." Goodman v. Goodman, 128 Wn.2d 366, 371, 907 P.2d 290, 293 (1995). A JNOV is proper only when the court can find, "as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict." Brashear v. Puget Sound Power & Light Co., 100 Wn.2d 204, 208-09, 667 P.2d 78 (1983) (quoting Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)). "A motion for a JNOV admits the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the moving party and in the light most favorable to the opponent." Goodman, 128 Wn.2d at 371. "No element of discretion is

involved." Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 529, 998 P.2d 856, 865 (2000).

In this case, the trial court abused its discretion by weighing the credibility of the witnesses and the evidence overall. There is abundant, ample and substantial circumstantial evidence to support the jury's verdict. First, it is undisputed that Gustavo Colorado filled out two maintenance request forms on the day of the fire. Second, it is undisputed that Cedar Court employees had keys to access the Colorados' apartment. Third, it is undisputed that Cedar Court gave the keys to the Colorados' apartment to employees of New Life Carpet Cleaning before the fire. Fourth, it is undisputed that Gustavo Colorado requested that New Life Carpet "hurry up" and complete the carpet cleaning prior to the fire. Fifth, Deanna Hanshew admitted that someone on behalf of Cedar Court was in the Colorado's apartment shortly before the fire. Sixth, it is undisputed that Cedar Court destroyed the stove less than one day after the fire – after knowing that it was the cause of the fire and reported as defective twice. And seventh, the record is replete with conflicting testimony of Tammy Wheat and other Cedar Court witnesses that defy any semblance of credibility.

In Washington, it is extremely well settled that "[c]ircumstantial evidence and direct evidence are equally reliable." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); see also Washington Pattern Jury

Instruction § 1.03. Further, "[a] claim of insufficiency admits the truth of the [non-moving party's] evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); see also State v. Turner, 103 Wn. App. 515, 520, 13 P.3d 234, 237 (2000).

In this case, Cedar Court and its agents had the motive, means and opportunity to enter the Colorados' apartment before the fire started. In fact, Cedar Court's own corporate representative, Deanna Hanshew, testified under oath that she believed that a Cedar Court employee entered the Colorado's apartment before the fire occurred on February 21, 2013. Further, Cedar Court and its agents had the motive and means to turn on the stove shortly before the fire. And Cedar Court and its agents had the opportunity to put flammable items on the stove shortly before the fire.

It is also important to note that the individuals most likely to have entered the Colorados' apartment on behalf of Cedar Court were not called as witnesses. Cedar Court employees Alex and Tiara were crucial witnesses but Cedar Court and deliberately chose not to call them at trial. (RP 263, 345). As Ms. Hanshew testified at trial: "Alex is responsible for all of the normal maintenance for the property outside of what would be considered above his, you know, skill level, so it is usually general maintenance." (RP 264). Similarly, Ms. Wheat testified that Tiara would have full access to keys to the Colorados' apartment. (RP 345). The jury

is permitted to draw a negative inference that Cedar Court failed to call either of these employees to testify at trial. Wright v. Safeway Stores, 7 Wn.2d 341, 347, 109 P.2d 542, 544 (1941); Cook v. Tarbert Logging, Inc., 190 Wn. App. 448, 472-73, 360 P.3d 855, 868 (2015).

In addition, Cedar Court also elected not to call any witnesses who were employed with New Life Carpet Cleaning. At trial, Ms. Wheat testified that Cedar Court has had a long-standing business relationship with New Life. On average, New Life conducts carpet cleaning at Cedar Court approximately 8 days per months. (RP 303). Once again, the jury is permitted to draw a negative inference in regards to Cedar Court failure to call any New Life employees to testify at trial. Wright v. Safeway Stores, 7 Wn.2d 341, 347, 109 P.2d 542, 544 (1941); Cook v. Tarbert Logging, Inc., 190 Wn. App. 448, 472-73, 360 P.3d 855, 868 (2015).

Further, it is undisputed that Cedar Court destroyed the stove shortly after the fire was extinguished. Cedar Court had actual knowledge of two past complaints involving the stove, and were told by the Tacoma Fire Department it was the origin of the fire. This is powerful and damning circumstantial evidence against Cedar Court. "A party's actions are 'improper' and constitute spoliation where the party has a duty to preserve the evidence in the first place." Homeworks Const., Inc. v. Wells, 133 Wn. App. 892, 900, 138 P.3d 654 (2006).

Thus, the question really boiled down to whether the jury believed the Colorados' testimony that they did not place any items on the stove before the fire started. Assuming that the jury obviously believed the Colorados, the jury then had to determine whether anyone from Cedar Court or New Life went into the apartment immediately prior to the fire. There was abundant, substantial, compelling and even direct evidence that someone entered the Colorado's apartment before the fire other than the Colorados.

VI. CONCLUSION

The trial court overturned a jury verdict and the Court of Appeals would not even grant oral argument. Both courts erred by ignoring over one-hundred years of precedent, which has repeatedly held that circumstantial evidence is more than sufficient to uphold both criminal and civil jury verdicts. "[V]erdicts in either civil or criminal cases, however, may be based entirely upon circumstantial evidence." State v. Long, 44 Wn.2d 255, 259, 266 P.2d 797, 799 (1954). A concise explanation of this basic jurisprudential principle was supplied by the Washington Supreme Court many years ago:

> A verdict will not be set aside unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from the evidence to support the verdict. The evidence must be viewed in the light most favorable to the party against whom the motion is made. All competent evidence favorable to the party who obtained the verdict must be taken as true, **and that party must be given the benefit of every favorable inference which reasonably may**

> **be drawn from the evidence.** If there is substantial evidence to support the verdict, it must stand. **Substantial evidence is that character of evidence which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.**

Arnold v. Sanstol, 43 Wn.2d 94, 98, 260 P.2d 327, 329 (1953) (emphasis added). Here, the record is awash with circumstantial evidence to support the jury's verdict. While the legal issue in this case is not sexy or cutting edge, the Supreme Court should have the courage to accept review to provide justice to the Colorados, who have done nothing wrong and only seek a fair hearing before this Honorable Court.

Respectfully submitted this 16th day of February 2017.

DEARIE LAW GROUP, P.S.

By: _____
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Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 17th day of February 2017 a true and correct copy of the foregoing *Petition for Review*, was served upon the following parties and their counsel of record in the manner indicated below:

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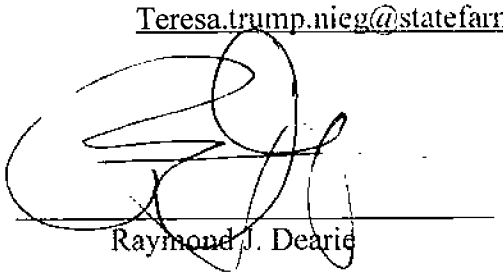

Raymond J. Dearie

Addendum A

Filed
Washington State
Court of Appeals
Division Two

January 18, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CEDAR COURT APARTMENTS, LLS, a Washington Limited Liability Company, Respondent, v. GUSTAVO and MARIA COLORADO, husband and wife, and the marital community composed thereof, Appellants.	No. 47778-5-II UNPUBLISHED OPINION

SUTTON, J. — Gustavo and Maria Colorado appeal the trial court's judgment as a matter of law that set aside the jury's verdict against Cedar Court Apartments, LLC (Cedar Court) for the Colorados's failure to prove Cedar Court caused a fire in the Colorados's apartment. Viewing the evidence in a light most favorable to the Colorados, we hold that there is neither substantial evidence nor a reasonable inference to support the jury's verdict, and we affirm the trial court's order setting aside the jury's verdict.

FACTS

I. BACKGROUND AND TRIAL

On February 21, 2013, around 4:30 p.m., a fire ignited and destroyed the apartment the Colorados leased from Cedar Court. Cedar Court sued the Colorados for negligence. The

Colorados counter sued for negligence. The parties stipulated that the sole question for the jury was which party negligently caused the fire.[1] The jury heard the following testimony and evidence.

On the morning of the fire, the Colorados prepared for a scheduled carpet cleaning and moved all of their belongings into the kitchen and bathroom. Gustavo testified that he placed items in boxes, but was careful to place the boxes "on the floor away from the stove." III Verbatim Report of Proceedings (VRP) at 219. After moving their belongings, Gustavo said that he "couldn't reach the stove" because the "stove was blocked with some mattress (sic), some furniture." III VRP at 211-12. He denied placing anything on the stove when they left the apartment for the day. On cross-examination, counsel asked Gustavo if he placed anything on top of the stove to prepare for the carpet cleaners and he answered, "I don't remember to do something like that." II VRP at 212. The jury later submitted questions asking whether Gustavo had placed a mattress against the stove or placed anything on top of the stove. Gustavo replied, "No, I didn't," and "No, nothing," respectively. III VRP at 219.

Gustavo also testified that, on the morning of the fire, he went to Cedar Court's management office around 10:00 to 10:30 a.m. to request a maintenance work order to have the stove repaired because the large burners were not working. Maria testified that she noticed a problem with the stove about two weeks before Gustavo requested the repair and that she had reminded Gustavo of the problem the day before the fire and again the morning of the fire. The Colorados did not use the stove at all on the day of the fire "because it was not working." III VRP

[1] Neither party requested a jury instruction on comparative negligence.

at 184, 212. The Colorados left the apartment at around 10:30 to 11:00 a.m. to allow the carpet to be cleaned.

More than a year before, the Colorados first reported to Cedar Court that the stove was malfunctioning and that the large burners were "shorting." Clerk's Papers (CP) at 94, 457. After receiving that stove repair request, Cedar Court repaired the stove that same day.

Tammy Wheat, Cedar Court's property manager, testified. Wheat said that on the day of the fire, she filled out the stove repair work order. Wheat wrote in "11 AM" as the time the work order was requested, and under "Permission to Enter Unit" she placed an "X" next to "Anytime," and Gustavo signed the work order. CP at 92. Wheat said that her assistant wrote down in a resident communication log that "Gustavo Colorado filed a work order for two large burners on stove not working" "around 11:00 a.m." on the day of the fire. IV VRP at 374.

Wheat met with the property's maintenance technician, Alex, at 9:00 a.m. on the day of the fire to discuss his work assignments for that day. Wheat stated that because the Colorados had not made their stove repair request until around 11:00 a.m., Alex was not assigned the stove repair. Wheat also contradicted her prior testimony and testified that although Gustavo had requested the work order around 11:00 a.m. the morning of the fire, he did not come into the maintenance office to sign the work order until 4:00 p.m. She later said that she did not recall when Gustavo came into the maintenance office. Gustavo confirmed that he signed the work order that morning.

Wheat explained that a Cedar Court employee is not allowed to enter an apartment until the tenant has provided a signed written permission. Wheat testified that Alex did not have permission to enter the Colorados's apartment until after 4:00 p.m. when Gustavo gave her written permission, that Alex was never given the key to the Colorados's apartment, and, that to her

knowledge, Alex never accessed the apartment that day.[2] She also said that she gave Alex the stove repair work order for the Colorados's apartment prior to the start of the fire because "he had time that day to look at the stove." IV VRP at 391.

Wheat testified that the carpet cleaning company (Cleaners) arrived at Cedar Court between 2:15 and 2:30 p.m. and met her at the management office. Three units were scheduled for carpet cleaning that day; two vacant units were scheduled to be cleaned before the Colorados's unit. Wheat said that the Cleaners were given master keys to all three units to be cleaned, including the Colorados. Based on Cedar Court's policies, Wheat testified that she would send the Cleaners into an apartment even if she did not have signed permission from the tenant, and here, the Colorados had specifically requested that their carpet be cleaned that day.

The Colorados returned to their apartment at 4:00 p.m. to check if the carpet had been cleaned. Gustavo testified that while his wife and daughter waited in the car, he opened the door of the apartment, looked inside for a couple of seconds until he realized the carpet had not been cleaned, and then he returned to the car. He stated that he did not smell smoke and that he did not touch anything but the apartment door. As Gustavo returned to his car, he saw a man he believed was a Cleaners employee in the parking lot near the company van. Gustavo "asked him if he can hurry to clean up our carpet so we can get in our apartment." III VRP at 203, 213. Gustavo testified that the man had something in his hands and responded that he had another apartment to clean first. The Colorados then left the apartment complex and went to the library.

[2] Wheat testified that there is only one front door key (master key) for each apartment.

A tenant reported the fire to the Cedar Court management office at 4:30 p.m. Wheat testified that when a firefighter requested the key to the apartment, she ran to the unit where the Cleaners were working and retrieved the master key for the Colorados's apartment; by the time she returned, the firefighters had kicked in the door. After the fire was extinguished, firefighter Lieutenant Kenneth Hansen, the arson investigator, was called to the scene. Lt. Hansen's initial site investigation revealed that the firefighters had extinguished and removed all objects that were on fire in the kitchen. The firefighters had also broken through the ceiling above the stove, leaving drywall pieces covering the top of the stove. Lt. Hansen testified that his initial inspection did not reveal a fire source. After his initial site investigation, Lt. Hansen interviewed Wheat and she told him that the Colorados had requested a work order to repair the stove because it was malfunctioning. The Colorados returned to the apartment around 6:30 p.m.

Lt. Hansen concluded that the most likely cause of the fire was that something was left on top of the stove between 4:00 and 4:30 p.m., the stove was accidently turned on, and a fire started.[3] Hansen determined that the heat of the fire was produced in a short amount of time, guessing that the fuel source was a paper product, like "a binder or a cardboard box with some items inside." II VRP at 149. He was unable to determine whether the stove was a glass-top or coil-top burner stove or whether the stove's knobs were turned on because the fire had melted the knobs and their

[3] Wheat testified that on the night of the fire, during a meeting with Lt. Hansen and the Colorados, she heard Maria state to Gustavo, in English, "I put something down" in response to Lt. Hansen's conclusion as to the cause of the fire. IV VRP at 333. Maria testified in Spanish at trial through an interpreter, and stated that she does not speak in English because she needs to wait for the translation to understand what has been said. Gustavo testified that his wife only speaks Spanish to family members. At trial, Maria denied that she placed anything on the stove that day.

posts. He did not believe the mattress was the fire's ignition source, and there were no tripped breakers that would indicate a short or arcing in any wiring.

Lt. Hansen did not analyze or assess the wiring of the stove because that was outside his area of expertise. Cedar Court disposed of the stove the day after the fire. During his investigation, Lt. Hansen said that Wheat told him that the Cleaners had been given a master key to the Colorados's apartment that day, but only the Colorados had entered the apartment that day. Lt. Hansen did not interview the Cleaners or Alex.

Deanna Hanshew, an off-site asset manager for Cedar Court, testified that she had no personal knowledge as to who entered the Colorados's unit that day. Hanshew also testified that Wheat did not tell her about the Colorados's stove repair request until weeks after the fire. Hanshew explained that standard maintenance procedure requires that whenever a maintenance person enters an apartment to make a repair, the maintenance person must sign or initial the work order and note "work done" and "materials used" and record the date that the work was completed. III VRP at 276. She reviewed the work orders for the day of the fire. Nothing on the work orders for either the stove repair or the carpet cleaning for the Colorados's apartment indicated that either work order had been completed and given to the maintenance office. For the Cleaners to be paid, a carbon copy of the work order was required to be affixed to the Cleaners's invoice, and Hanshew discovered that the work order still contained all carbon copies at the time of the fire. Thus, Hanshew testified that she had concluded that the stove had not been repaired nor had the Colorados's carpet been cleaned that day, and she stated that when she testified to the contrary at her earlier deposition, she had simply been mistaken.

At the close of the testimony, Cedar Court moved for a directed verdict and argued that (1) the Cleaners acted as an independent contractor, not as an agent of Cedar Court and (2) Cedar Court was not negligent. The trial court denied the motion. The trial court then instructed the jury on the ordinary standard of care for negligence,[4] instructed the jury to decide whether the Cleaners were an agent of Cedar Court or whether the Cleaners were an independent contractor, and instructed the jury that equal weight is to be given to direct and circumstantial evidence.

II. VERDICT AND TRIAL COURT'S RULING

The jury returned a verdict in favor of the Colorados and a verdict against Cedar Court. The verdict stated that the jury answered "No" to the question: "Was there negligence by the [Colorados] that was a proximate cause of the fire at" the apartment, and "Yes" to the question: "Was there negligence by [Cedar Court] that was a proximate cause of the fire at" the apartment. CP at 705-06.

After the jury's verdict, Cedar Court filed a CR 50 motion for a judgment as a matter of law requesting that the trial court set aside the jury's verdict and enter a judgment in its favor. The Colorados argued that they had circumstantial evidence of Cedar Court's negligence. The trial court stated,

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[4] Jury Instruction No. 9:

> Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

CP at 694. Jury Instruction No. 10: "Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances." CP at 695.

> All you are really arguing is that there is some possibility that somebody else did it. . . . I don't see how you can prove that by a preponderance of the evidence that they did anything because you can't even show that they were there.

IV VRP at 431. The trial court also stated,

> You have a mere possibility. It is not impossible that they did it. That's all you've got. . . . [T]here is no way in the world that [Cedar Court] had anything to do with the fire, and certainly not the carpet cleaners.
>
> The problem with [Alex] is that there is no evidence that [Alex] ever had a key.

IV VRP at 433-34.

The trial court ruled that, as a matter of law, neither party had provided sufficient evidence that the other party was negligent. The trial court granted Cedar Court's motion for judgment as a matter of law, set aside the jury's verdict, denied Cedar Court's motion to enter judgment in its favor, and denied both parties' request for an award of attorney fees stating that neither party was a prevailing party. The Colorados appeal.

ANALYSIS

The Colorados argue that the trial court erred in entering a judgment as a matter of law because there is substantial circumstantial evidence or a reasonable inference to sustain the jury's verdict that Cedar Court's negligence proximately caused the fire. The Colorados assert that the trial was a "credibility contest" between Cedar Court and the Colorados, and that the jury found the Colorados's testimony more credible. Br. of Appellant at 2. Cedar Court argues that the Colorados have failed to provide any evidence to support the jury's verdict. We agree with the trial court that the verdict finding Cedar Court negligent cannot be sustained.

I. STANDARD OF REVIEW

When reviewing a judgment as a matter of law under CR 50, we apply the same standard as the trial court and review the motion de novo. *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 143, 341 P.3d 261 (2014). A CR 50(b) motion is properly granted only when, after viewing the evidence in the light most favorable to the nonmoving party, it can be held as a matter of law that there is not substantial evidence or reasonable inference from the evidence to sustain the verdict. *Grove*, 182 Wn.2d at 143. "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the premise is true." *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177 P.3d 180 (2008). Circumstantial evidence and direct evidence carry equal weight. *See Smith v. Dep't of Corr.*, 189 Wn. App. 839, 847, 359 P.3d 867 (2015), *review denied*, 185 Wn.2d 1004 (2016).

We defer to the fact-finder on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Faust v. Albertson*, 167 Wn.2d 531, 543, 222 P.3d 1208 (2009). The jury decides the inferences to be drawn from the evidence. *Grove*, 182 Wn.2d at 143 n.8. Inferences drawn from evidence must be reasonable and not be based on speculation. *Ayers v. Johnson & Johnson Baby Prod. Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991). A verdict cannot be founded on mere theory or speculation. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999). If there is nothing more tangible than two or more conjectural theories, each asserting opposite ends of liability, a jury will not be permitted to conjecture how the event occurred. *Marshall*, 94 Wn. App. at 379.

The non-moving party must be given the benefit of every favorable inference which reasonably may be drawn from the evidence. *See Grove*, 182 Wn.2d at 143. "'[T]he reviewing

court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.'" *Grove*, 182 Wn.2d at 143 n.8 (emphasis omitted) (quoting *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994)).

Negligence is the failure to exercise ordinary care. *Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431 (1996). It is the doing of some act that a reasonably prudent person would not do, or the failure to do some act that a reasonably prudent person would do, under the same or similar circumstances. *Mathis*, 84 Wn. App. at 416.

II. ANALYSIS

The sole question considered by the jury was whether the Colorados's or Cedar Court's negligence proximately caused the fire. Viewing the evidence in the light most favorable to the Colorados, the evidence shows that the Colorados were out of the apartment at the time of the fire, and that the fire was likely caused by a type of paper product that was placed on top of the stove and produced a fire in a short amount of time after Gustavo last checked the apartment at 4:00 p.m.

However, the jury did not hear any other evidence that someone else entered the Colorados's unit that day. The testimony confirmed only that Cedar Court had scheduled the Colorados's carpet to be cleaned at their request. As of 4:00 p.m. when Gustavo last checked his apartment, the carpet had not been cleaned because Gustavo went to find the Cleaners employee to ask him to clean the carpet in his apartment, and the employee responded that he had another apartment to clean first. The fire was reported thirty minutes later, after the Colorados left to go to the library. Wheat verified that when the fire broke out, the Cleaners had the master key to the Colorados's front door and the Cleaners were at another apartment when Wheat retrieved the key at the firefighters' request.

As to the stove repair request, although Wheat testified inconsistently that Alex was and was not assigned to repair the stove that day, she also testified that it was not possible for Alex to enter the Colorados's apartment because he did not have the master key at the time the fire started. There is no evidence to the contrary.

Viewing the evidence in a light most favorable to the Colorados, as the nonmoving party on Cedar Court's CR 50 motion, there was no proof as to what was on or near the stove to start the fire, or how long the stove was on before the fire started. Neither party proved how the stove turned on, which was material because the Colorados's prior complaints related to the stove not turning on at all. The circumstantial evidence argued by the Colorados that someone else, either Alex or the Cleaners, entered the apartment and started the fire, was speculative. And a jury's verdict cannot be based on speculation. *Ayers*, 117 Wn.2d at 753. We agree with the trial court that there is neither substantial evidence nor a reasonable inference from the evidence to sustain the jury verdict that Cedar Court's negligence caused the fire. Thus, we affirm the trial court's order setting aside the jury's verdict.

ATTORNEY FEES

Both parties request attorney fees and costs as the prevailing party on appeal under paragraph eight of the lease and under RCW 4.84.330. Because we affirm the trial court's order, we deny both parties' request for an award of attorney fees on appeal.

The lease states as follows,

> 8. DEFAULT/ATTORNEY FEES: In the event Resident fails to comply with any of the terms of this Rental Contract, the Resident shall be in default. If Resident is in default, this Rental Contract shall terminate and upon such termination Resident shall quit and surrender the premises, but shall remain liable for the performance of all obligations and conditions contained in this Rental Contract. Resident agrees to pay all expenses and attorney's fees expended or incurred by the property owner and/or his/her agent by any reason of any default or breach by Resident(s) of any terms of this Rental Contract. The venue for any suit pertaining to any claims arising out this Rental Contract, including any suit pertaining to the collection of any sums owed pursuant to this Agreement, shall be Pierce County Washington.

CP at 103.

RCW 4.84.330 provides that

> [i]n any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.
>
> Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.
>
> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RCW 4.84.330.

Cedar Court is not entitled to attorney fees under the lease because the evidence did not prove that the Colorados were in default, and the issue tried to the jury was based on a negligence claim, not based on the Colorados's default on the lease. The Colorados are not entitled to attorney fees under

the lease as they are not the prevailing party on appeal.[5] For similar reasons, neither party is entitled to attorney fees under RCW 4.84.330.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

We concur:

WORSWICK, P.J.

LEE, J.

[5] Cedar Court asserts that if this court affirms the trial court, then Cedar Court should be awarded attorney fees as the prevailing party on appeal. We agree with the trial court that neither party is the prevailing party. *See* RCW 4.84.330; *see also* RAP 14.2.