SUPREME COURT NO. 99561-3

COURT OF APPEALS NO. 79427-2-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JENNA J. WHEELER, on behalf of herself and her minor daughter, CHASTITY YOUNGBLOOD, and as the Personal Representative of the Estates of NIKOLAS W. WEISENBACH and OMEN W. WEISENBACH,

Petitioners,

and

MARVIN G. BOCK and NADINE EVANS, husband and wife, and the marital community composed thereof; and MACPHERSON'S PROPERTY MANAGEMENT, INC., a Washington corporation;

Respondents.

PETITION FOR REVIEW

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INTRODUCTION

This case raises important questions only this Court can resolve regarding when and how the so-called Marshall rule should be used, if at all, to exclude evidence in a summary judgment proceeding.

The so-called Marshall rule is derived from the holding in *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989). In *Marshall,* the plaintiff stated in his deposition testimony that he learned he had asbestosis in 1982. But in a later affidavit, he stated that the asbestosis was not diagnosed until 1983. The record reflected that Marshall had been diagnosed with asbestosis in 1982. Because of the clear contradiction between the plaintiff's deposition and his later self-serving affidavit, the court ruled that the deposition controlled, *Marshall v. AC & S Inc.*, 56 Wn. App. at 185:

> When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

1. *IDENTITY OF PETITIONER.*

Jenna Wheeler, on behalf of herself, her daughter, and the decedents' estates (collectively "Wheelers") asks for the relief designated in Part 2.

2. *CITATION TO COURT OF APPEALS DECISION.*

The Petitioner seeks review of the Court of Appeals' decision, filed herein on December 20, 2020, and of the Order Denying Amended Motion for Reconsideration, entered herein on February 9, 2021. Copies are attached hereto.

3. *ISSUES PRESENTED FOR REVIEW.*

A. Did Kenneth Rice give "clear answers to "unambiguous [deposition] questions which negate the existence of any genuine issue of material fact"?

B. For purposes of the Marshall rule, what constitutes a contradiction?

C. In a summary judgment, is the court required to consider a party's explanation of inconsistent testimony in the light most favorable to the non-moving party, to determine whether it creates a genuine issue of material fact, which must be resolved by the trier-of-fact resolve that issue?

D. How much evidence is sufficient to create a genuine issue of material fact on causation?

4. STATEMENT OF THE CASE.

Jenna Wheeler petitions this Court to accept review of the Court of Appeals' decisions (identified in #2), affirming the summary judgment dismissing her claims for the wrongful deaths of her 28 year old husband, Nikolas Weisenbach, who died while trying to rescue their four year old son, Omen, from a fire in their apartment. Both perished.

Before this fire two inspection reports had identified the broken self-closing device on the garage-dwelling door in their apartment as a building code violation, and described it as "a safety problem which posed a risk of injury or death", CP 358-359, even after Wheeler and her family began using the garage as a family room, CP 427.

The Respondents did nothing in response to the safety hazards identified in those reports. MacPherson's Property Management never repaired this self-closing device. Marvin Bock testified that when he purchased the property, he knew that the auto close mechanism for the garage access door was not closing automatically and needed adjustment, CP

445, but that he assumed the risk of not having the mechanism repaired. CP 68-70, 229, 446-450.

Bock's and Evans' purchase of this property closed on July 19, 2017. CP 138. On that very evening, after putting nine year old Chastity and four year old Omen to bed around 9 p.m., CP 18, Jenna and Nikolas hung out in their garage, which they used as a family room. CP 47-48, 50.

A fire began in the kitchen around 11:30 p.m. CP 9. After getting Jenna and Chastity safely outside, Nickolas raced back inside to the upstairs bedroom to rescue Omen.

The Sodorffs, who lived next door, were alerted to the fire by the smell of smoke. CP 18. Robert Sodorff, and another neighbor, Matthew Ditmar, forced the garage door open. CP 19, 246-250. Sodorff and Ditmar felt a hot blast of air. There was no fire in the garage. But they did see fire from the floor to the ceiling in the kitchen area. As air from the garage rushed passed the unrepaired self-closing and self-latching garage access door into the kitchen fire, the fire quickly progressed towards them. They heard an explosion.

Sodorff then saw flames on the east side coming out of the second floor. CP 19; also CP 14.

Wheeler retained Kenneth Rice to determine the origins of this fire. Rice concluded that the fire was caused by unattended cooking. CP 13-16, 23, 44, 162, 171, 174, 184, 270. According to Rice, CP 465-466, when:

> ...the garage door was opened and the air was sucked from the garage into the fire past the broken self-closing and self-latching mechanism on the door between the garage and the remaining living area of the home, the fire exploded into an inferno. Once that happened, neither Nikolas nor Omen had a chance to survive.

5. *STATEMENT OF PROCEEDINGS*

Jenna Wheeler brought suit to recover for the wrongful deaths of her husband, Nikolas W. Weisenbach("Nikolas") and her four year old son, Omen W. Weisenbach ("Omen") (the "Petitioners") alleging that Marvin G. Bock and Nadine Evans ("Bock"), and MacPherson's, (the "Respondents") had been negligent by failing to repair the self-closing and self-latching mechanism on the garage access door, as required by the building code, and that their negligence was a

proximate cause of the deaths of Nikolas and Omen.

On April 25, 2018, before he had reviewed any other evidence, apart from what he had gathered solely from his own investigation into the origins of this fire, CP 43-44,46, the Respondents deposed Kenneth Rice, CP 185:

> Q Can you testify whether Nik and Omen were still alive or not when the exterior garage door was opened?
>
> A No.

In response to a hypothetical question, he also testified that he did not "have any opinions on how long someone can survive without protective gear in smoke and heat". CP 185.

On October 25, 2018, after Rice had reviewed the additional evidence gathered in this case, the Respondents moved for summary judgment to dismiss the Petitioners' claims on two grounds. CP 1-329.

First, the Respondents argued that since the Petitioners' expert, Kenneth Rice, could not testify whether Nikolas and Omen were still alive when the garage door opened, the Petitioners had no admissible evidence that they

were alive when the exterior garage door was opened, and thus could not establish that the unrepaired self-closing mechanism was a proximate cause of their deaths.

Second, the Respondents argued that their failure to comply with the building code requiring that the auto-close mechanism for the garage access door be operable was not evidence of negligence, as a matter of law, because the Petitioners used the garage as a living space.

In response to the motions for summary judgment, the Petitioners submitted the declaration of Kenneth Rice, CP 458-515, who opined that Nikolas and Omen were alive when the exterior garage door was opened. CP 467-468.

Relying upon *Marshall v. AC & S Inc., supra,* the Respondents moved to strike Rice's declaration on the grounds that it was contrary to his deposition testimony and speculative. The court struck Rice's opinion "anywhere that he opines that the victims of the fire were alive at the time the garage door was opened", and granted summary judgment on both grounds, RP 53-54, CP 522-528.

The Court of Appeals affirmed.[1]

6. *ARGUMENT*

In *Keck v. Collins*, 184 Wash.2d 358, 357 P.3d 1080 (En Banc. 2015), this Court held:

> We review summary judgment orders de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. [citations omitted].

A genuine issue of fact exists when reasonable minds could disagree on the facts controlling the outcome of the case. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wash. App. 859, 864-65, 324 P.3d 763 (2014).

Since the Court of Appeals did not adhere to these basic legal principles, this Court should accept review.

A. Rice's Deposition Testimony Did Not Negate Any Issue of Material Fact.

While Rice's testimony that he was unable to testify (or render an opinion) as to whether Nikolas and Omen were

[1] Since the Court of Appeals did not address the issue of whether the building code requirement was applicable. it will not be addressed here. That said, the Petitioner has **no** objection to this Court accepting and considering that issue on review.

alive when the garage door was opened, may have been probative of his ability to address that issue at the time his deposition was taken, it did **not** negate that issue of material fact, or any other.

Accordingly, the "Marshall rule" does not apply here.

B. Rice's Deposition Testimony Did Not Clearly Contradict His Declaration Opinion Which Was Formed After He Reviewed Additional Admissible Evidence.

In *Berry v. Crown Cork & Seal Co., Inc.,* 103 Wn.App. 312, 321-323, 14 P.3d 789 (2000), the Court held that for the *Marshall* rule to apply, the two statements must be "clearly contradictory", as opposed to merely inconsistent.

The Court of Appeals reliance upon *McCormick v. Lake Wash. Sch. Dist.*, 99 Wash.App. 107, 999 P.2d 511(1999), to conclude that "Rice's declaration statements were in flat contradiction to his deposition," (Op.p. 10), is misplaced.

In *McCormick*, 99 Wash.App. at 111-112, Laurie McCormick did **not** even try to explain the contradiction between her deposition testimony that she did not know whether a District Representative, Becky Anderson, had the

apparent authority to offer her a position of employment, and her later declaration that Anderson "unequivocally" did have such authority. Accord: *Davis v. Fred's Appliance, Inc.*, 171 Wn.App. 348, 357, 287 P.3d 51 (2012)(no explanation).

But here, Rice did explain. When he was deposed, Rice had not seen any evidence, apart from his own investigation into the origins of this fire. After he reviewed the additional evidence gathered by others, he was able to render his opinion that Nikolas and Omen were alive when the garage door was forced open. CP 602-603. Thus, his declaration did not "flatly contradict" his deposition.

The Court of Appeals' decision also conflicts with *Berry v. Crown Cork & Seal Co., Inc.,supra; Duckworth v. Langland,* 95 Wash.App. 1, 8, 988 P.2d 967 (1998), *review denied,* 138 Wash.2d 1002, 984 P.2d 1033 (1999); and *Safeco Ins. v. McGrath,* 63 Wash.App. 170, 174–175, 817 P.2d 861 (1991).

C. The Jury, Not The Court, Should Determine The Credibility Of A Party's Explanation For Changing His Or Her Testimony, If It Creates A Genuine Issue Of Material Fact.

Rice explained that when his deposition was taken he

could not "testify whether Nik and Omen were still alive or not when the exterior garage door was opened". He had no personal knowledge. He had not seen the evidence of others.

But after he reviewed that additional evidence, including the eyewitness testimony of Megan Chaney and Trevor Smith, and the report of Deputy Fire Marshall John Monsebroten, who identified where Omen and Nikolas were found, CP 9, he was able to opine that both were alive when the exterior garage door was opened. CP 602-603.

But the Court found his explanation "unpersuasive and disingenuous", and that "Rice's contention that his deposition testimony was only with regard to his personal knowledge, does not ring true". (Op. p. 11-12).

Given the fact that the Court conceded that the same additional evidence created a genuine issue of fact regarding Nickolas, Op. pp.14-15, its disdain was unwarranted.

The Court of Appeals' reasoning, including weighing the evidence and determining credibility, is in conflict with *Berry v. Crown Cork & Seal Co., Inc.,* 103 Wash.App. at 322;

Duckworth v. Langland, 95 Wash.App. at 8; *Safeco Ins. v. McGrath,* 63 Wash.App. at 174–175, where the Courts recognized that a party's explanation must be viewed in the light most favorable to the non-moving party. If that view creates an issue of material fact, then that issue must be resolved by the trier-of- fact---not the court.

This Court should accept review and hold it is the province of the jury---not the court ---in a summary judgment proceeding to determine whether someone's explanation as to why their testimony changed "rings true".

D. The Court Disregarded The Eyewitness Testimony And Other Admitted Evidence Rice Considered To Form His Opinion.

The trial judge ruled that Rice was entitled to "factor in additional information as it becomes available". RP 52-53, and the Court of Appeals acknowledged that Rice "gave his deposition before reading the declarations of Cheney or Smith', Opinion p, 11). Yet both courts disregarded Rice's explanation of how this evidence informed his opinion.

Megan Chaney declared, CP 517:

> Moments after we got to the slider door of the Wheeler/ Weisenbach residence, the fire seemed to just explode. What had been a relatively small fire confined primarily to the kitchen area had suddenly and unexpectedly turned into a massive fire enveloping the entire unit.
>
> When I looked up I could again see Nik in the children's upstairs bedroom. He was standing at the upstairs window. The window was open. He looked scared. Now there was some fire in that upstairs bedroom. Trevor, and other people who had gathered below that window, yelled repeatedly for Nik to jump. But, after standing there for a few seconds, Nik turned and went back into the bedroom. I heard him scream...

Similarly, Trevor Smith declared, CP 520:

> What I do remember is that just when I got to the slider door of the Weisenbach/Wheeler residence, the fire suddenly erupted from being nothing much at all to an inferno. The heat forced me to back up. When I looked up I saw Nik in the second floor children's bedroom window. I was surprised that the fire had reached the second floor so quickly. It was engulfed in flames.
>
> I then saw Nik extend his arms out of the upstairs bedroom window. I started yelling for him to jump. Nik stood there for a few moments, and then turned around and went back in.

The eyewitness testimony of Chaney and Smith coupled with Monsebroten's findings that:

(1) Nikolas opened the second floor bedroom window <u>before</u>

the exterior garage door was opened, CP 14, and that (2) the fire did not reach the second floor before the exterior garage door was opened, CP 480, establish beyond any doubt that Nikolas was alive when the exterior garage door was opened.

Omen was found face down in his bedroom doorway. CP 125, 274. Even the trial court judge found that this admitted evidence created a reasonable inference that Omen was alive after Nicolas entered his bedroom, RP 52:

> And then we have the position of the child's body. I'm going to speak to that. I don't think that we can know what happened there, but I don't adopt the analysis or the certainty that the child was lying there when the father entered the room. And – any other possibility could've happened, but I think the idea that he didn't see him because the smoke was there – in the, again, looking at the inferences for the plaintiff – doesn't make sense that he wouldn't trip over the child or fall into the child.

E. The Medical Examiner's Declaration Was Before The Court.

The Court of Appeals, like the trial court, RP 52, took the position that Wheeler could not prove that Nikolas and Omen were alive before the exterior garage door was opened because the medical examiner had opined that both had died

from toxic asphyxia due to smoke inhalation, (Op. p.13).

Even MacPherson agrees this was error, Brief, p. 25:

> On this point, MacPherson agrees: death by toxic asphyxiation does not eliminate the possibility that death occurred after the exterior garage door was opened.

But as the trial judge stated, evidence that the decedents died from "burning" would have changed her analysis, RP 51, since the fire did not reach the second floor until after the garage door was forced opened, CP 480.

The Medical Examiner declared he could "not rule out that thermal injury [i.e. burning] may have also been a contributing cause of their deaths---particularly in the case of Omen Weisenbach", CP 566.

Contrary to the Court's Opinion (Op. p. 13 fn.6), the Medical Examiner's declaration was before the court. The court denied the motion for reconsideration without ruling on its admissibility. CP 618. The declaration could not be rejected, without the court first considering the factors set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997)on the record, which it did not do. *Keck v.*

Collins, 184 Wash.2d at 374.

But even without this declaration, Monsebroten found that "[b]oth victims had extensive burns incompatible with life...". CP 9. It is also reasonable to infer from Chaney and Smith, CP 517, 520, that Nikolas' screams were more likely caused by burning, than smoke inhalation. CP 599-600.

But once again, the Court disregarded this evidence.

F. Sufficient Evidence Created A Genuine Issue of Material Fact That The Broken Self-Closing Access Door Was A Cause-In-Fact Of Nikolas' And Omen's Deaths.

The Court conceded that "taking the circumstantial evidence in the light most favorable to the Wheelers, a reasonable juror could conclude that Nikolas was still alive when the neighbors forced open the exterior garage door", Op. pp.14-15, but then ruled that Wheeler could not show that the broken mechanism on the garage access door was a cause-in-fact of Nikolas' and Omen's deaths (Op. p. 14):

> Specifically, there was not sufficient evidence that: (1) Omen was alive before the exterior garage door was open and (2) had the self-closing door functioned properly, either Nicolas or Omen would have been able to safely exit the property and more likely than not

would have survived.

But yet again, the Court disregarded the evidence. (1) Even the trial judge concluded that, based on the position of the bodies, CP 9, there was a reasonable inference that Omen was alive when his father entered his bedroom. RP 52.

And (2) just as in *Martini v. Post,* 178 Wash.App. 153, 159, 166, 313 P.3d 473 (2013), there is ample evidence from which a reasonable juror could infer that Nikolas and Omen would probably have survived had the self-closing door functioned properly. Ken Rice declared (CP 606-607):

> At the risk of being repetitive, it is my professional opinion, on a more probable than not basis, that Nikolas and Omen would be alive today, but for the broken and unrepaired self-closing and self-latching mechanism on the garage access door. This is the reason it was called out as a safety hazard in both inspection reports even after the Wheeler/Weisenbach family began using the garage as a living space.
>
> If it had been functioning properly, no air would have come into this kitchen fire when the garage door opened.[2] What happened here when the garage door opened was a completely predictable and foreseeable consequence of not having this mechanism repaired

[2] The Court disregarded the undisputed evidence that *if* the self-closing and self-latching mechanism on the garage access door had been repaired, i.e. "up to code", the fire would have been unaffected by the opening of the exterior garage door. The garage access door would have been closed. No additional air could have come into the kitchen.

and functioning properly.

> .... That broken mechanism allowed a tremendous influx of air to rush into this kitchen fire when the garage door was opened, which in turn substantially increased its size and intensity, its smoke and toxic gases, which in turn reduced oxygen levels on the second floor, and was thus a proximate cause of their deaths. In my professional opinion, this broken mechanism was a proximate cause of their deaths.

Rice opined it would have taken 3-4 minutes for this fire to become fatal to anyone on the second floor if this mechanism had worked properly, CP 595. Coupled with Richard Carmen's expert opinion that it would have taken Nikolas "probably ten seconds" to get from the slider door to the upstairs bedroom, CP 511-512, Rice opined (CP 468):

> In my professional opinion, if this mechanism had been working properly, Nikolas would have had ample time to rescue Omen. Both would have survived....
>
> Unfortunately, that 3-4 minute window was cut short when the garage door was opened because the self-closing mechanism on the garage access door had not been repaired.

But once again, the Court disregarded this evidence.

CONCLUSION

This Court has never previously addressed what the

appropriate application of the so-called Marshall rule is in summary judgment proceedings. Accordingly, this Court should accept review and hold:

1. The Marshall rule does **not** apply unless the party gave "clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact". Rice's deposition testimony did **not** "negate the existence of any genuine issue of material fact".

2. For the Marshall rule to apply, the statements must be "clearly contradictory". Rice's statements are not.

3. If a party's explanation of seemingly inconsistent testimony is viewed in the light most favorable to the non-moving party creates a genuine issue of material fact, then that issue of fact must be resolved by the trier-of-fact.

4. Rice's opinion that Nickolas and Omen were alive when the garage door was opened should not have been stricken. But his opinion was not the only evidence. Both courts below found that there is a genuine issue of material fact on this issue, but then disregarded their own findings.

5. Since the lower court denied the motion for reconsideration, without ruling on the admissibility of the Medical Examiner's declaration, or engaging in a *Burnet* analysis on the record, as required by *Keck v. Collins*, 184 Wash.2d at 374, it was before the court.

6. This Court should find that there is a genuine issue of material fact as to whether either Nicolas or Omen would have been able to safely exit the property and survive if the self-closing door had functioned properly---an issue which must be resolved by the trier-of-fact---not the court.

This Court should accept review to address the questions raised here, which only this Court can resolve, regarding when and how the so-called Marshall rule should be used, if at all, to exclude evidence in a summary judgment proceeding.

It should then reverse and remand this case for trial.

Respectfully submitted this 9th day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that on March 9, 2021 I served the Petition for Review on the following person via the method stated:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JENNA J. WHEELER, on behalf of herself and her minor daughter, CHASTITY YOUNGBLOOD, and as the Personal Representative of the Estates of NIKOLAS W. WEISENBACH and OMEN W. WEISENBACH, Appellants, v. MARVIN G. BOCK and NADINE EVANS, husband and wife, and the marital community composed thereof; MACPHERSON'S PROPERTY MANAGEMENT, INC., a Washington corporation, Respondents, SUBARNA KAKSHAPATI, a single person; PEAK IMPROVEMENTS, LLC, a Washington limited liability corporation, Defendants.	No. 79427-2-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — This case concerns the tragic death of a young man and his son. Nikolas Weisenbach and his son, Omen, died from smoke inhalation caused by a fire in the apartment where they lived with Jenna Wheeler and her daughter, Chastity Youngblood.[1] After their deaths, Jenna, on behalf of herself,

[1] We refer to individuals by their first names where it provides a distinction between family members.

her daughter, and the decedents' estates (collectively Wheelers), sued MacPherson's Property Management (MPM) and Marvin Bock and Nadine Evans (collectively respondents) for wrongful death. The Wheelers alleged that the respondents acted negligently by violating the municipal code, which required property owners to have a self-closing and self-latching door between private garages and dwelling units.

After the Wheelers' fire dynamics expert, Kenneth Rice, contradicted his deposition testimony and opined that Nikolas and Omen were alive before neighbors forced open the apartment's exterior garage door, MPM moved to strike Rice's declaration. The trial court granted MPM's motion but only with regard to Rice's statements that Nikolas and Omen were alive prior to the garage door being opened. Because the statements were in clear contradiction to his prior testimony, we affirm the trial court's order striking Rice's statements. We further conclude that the admissible evidence failed to present any genuine issues of material fact as to whether the broken self-closing mechanism was the cause in fact of Nikolas's and Omen's deaths. Therefore, we affirm the trial court's orders granting summary judgment in favor of the respondents.

FACTS

Beginning in 2015, Nikolas and Jenna, along with their children Chastity, age nine, and Omen, age four, leased unit A at 2307 O St. NE in Auburn, Washington. Unit A was a part of "a two story, multi-family" structure with four single family units and "four single car garage spaces on the south side of the structure" (property). Throughout their lease, Jenna and Nikolas used their

attached garage as a "living space" and did not park an automobile therein.

In 2017, Bock and Evans sought to purchase the property, which MPM managed. Prior to their purchase, Bock and Evans received two inspection reports, one report from the previous owner's inspection, and a second report, which they had completed. Both inspection reports found that unit A's self-closing door between the garage and the kitchen was broken. The first inspection report noted that the self-closing door was "intended to prevent vehicle fumes from entering living spaces and to slow the spread of fire from the garage to living spaces." The second inspection report recommended that the property owners repair the self-closing door. Bock later testified that he was aware of the issue but did not "want to jeopardize the sale of the property by asking for too much," so he did not request that the previous owner repair the door.

On July 9, 2017, Bock and Evans finalized their purchase of the property. That same day, Jenna and Nikolas were in their garage, drinking, smoking marijuana, and listening to music with their friend and neighbor, Ashley Sodorff. Ashley and her father, Robert Sodorff lived at the property in the unit adjacent to Nikolas and Jenna. Shortly after Ashley returned to her home, at around 11:30 p.m., a fire started in unit A's kitchen. A pot of vegetable oil was left unattended and caught fire after overheating. In his report, Valley Regional Fire Authority (VRFA) Deputy Fire Marshall John Monsebroten found that "[t]he activation of the stove element appears accidental based on interviews and the area of origin exam."

When the fire started, Chastity and Omen were sleeping in their bedroom on the second floor. When she smelled smoke, Chastity told Omen to stay there and went downstairs. She "saw fog everywhere" and "described the smoke level to be at about 4 feet, just low enough to have to stoop but not so low as to crawl." However, Chastity did not see any flames until she reached the kitchen. When Chastity entered the kitchen, Jenna entered from the garage, and they exited through the slider door on the side of the house. They left the slider door open. Nikolas, who was originally outside as well, entered the home through the slider door and went upstairs to get Omen.

The Sodorffs heard a commotion and exited their unit through their garage. At some point, Matthew Ditmar, another individual living at the property, and Robert forced open the exterior garage door to unit A. At the time, "[t]here was no fire in the garage," but the kitchen was a "[a] wall of fire," from "[f]loor to ceiling." "[W]ithin two to three seconds," the fire spread towards the exterior garage door, "rolling up along the ceiling" of the garage space. Various witnesses stated that at one point, they "thought they heard" an explosion and that, thereafter, the fire grew significantly in size and intensity.

At some point, Nikolas opened the children's bedroom window. Deputy Fire Marshall Monsebroten testified that based on a video exhibit, while he did not have a "defined timeframe" for when Nikolas opened the window, "it changed the [fire's] vent path," accelerating the fire. He testified that with "'the fire behavior that occurred on floor 2," it is unlikely that anyone "would have survived [even] in PPE.'" His report also stated that "[t]he garage door being opened

effected ventilation of the fire" and "increased fire growth in the garage and kitchen." The fire then intensified and spread "to adjacent areas."

In her declaration, Megan Chaney, another witness, recalled that when she and Trevor Smith heard screaming and saw the fire, they ran to the Wheelers' home to assist them. At the time, she remembered seeing "Nickolas [sic] moving around in the children's upstairs bedroom through the window in that bedroom." She stated that there was no fire in the bedroom at that time, but that shortly after she and Smith arrived, "[w]hat had been a relatively small fire confined primarily to the kitchen area had suddenly and unexpectedly turned into a massive fire enveloping the entire unit."

In his declaration, Smith stated that he could not remember "whether the garage door was opened or closed" when he approached the house. When he reached the slider door, Smith alleged that "the fire suddenly erupted" and engulfed the second floor. After the fire enveloped the rest of the apartment, Chaney "could again see Nik in the children's upstairs bedroom," standing at the open window. Instead of jumping, as onlookers suggested, "Nik turned and went back into the bedroom." Chaney testified that, thereafter, she heard him scream.

The respondents' expert fire investigator, Richard Carman, testified that the fire "expanded out very quickly," creating a "tremendous amount of" smoke, or what he referred to as "unburned fire gases." According to Carman, unburned fire gases are "molecules of toxic chemicals" that are "extremely dangerous and deadly." He alleged that the fire gases "immediately . . . extended to the stairway[and] . . . filled up the second floor," and that Omen "was obviously

affected very quickly." Carman testified that based on Omen's autopsy, Omen had a 52 percent saturation of the harmful chemical, carbon hemoglobin, and that such a percentage "is certainly more than enough to kill someone." Carman stated that an individual begins to lose consciousness at 40 percent saturation of carbon hemoglobin. Carman further asserted that Nikolas "probably died within one to two minutes after he reached the second floor because his saturation level was 72 percent," but that Nikolas became disoriented immediately upon entering the second floor to look for Omen.

After the fire was extinguished, Nikolas and Omen were found deceased in the children's second story bedroom: Nikolas "at the foot of the children's bunk-bed," and Omen "face down in the doorway." Autopsies indicated that both Nikolas and Omen died from "toxic asphyxia due to smoke inhalation." Nikolas had prominent thermal charring of his body, and Omen had "near total charring of the body surface."

PROCEDURE

In September 2017, the Wheelers sued the respondents for the wrongful death of Nikolas and Omen.[2] The Wheelers alleged that the respondents were negligent in failing to repair the self-closing door between the garage space and the kitchen and that when the neighbors forced open the exterior garage door, air from the outside accelerated the fire, causing Nikolas's and Omen's deaths. Specifically, the Wheelers argued that had the interior garage door automatically

[2] Other listed defendants, including the previous property owner, are not parties to this appeal.

closed as required by the city of Auburn's (City) municipal code, oxygen would not have been able to enter the home and accelerate the fire.

During discovery, the respondents deposed the Wheelers' "fire science" expert, Rice. During the deposition, the respondents asked Rice, "Can you testify whether Nik and Omen were still alive or not when the exterior garage door was opened?" He responded, "No." Rice also said that he did not have an opinion on how long someone could survive in smoke or heat without protective gear.

In October 2018, MPM and Bock and Evans separately moved for summary judgment dismissal of all of the Wheelers' claims. MPM asserted that the Wheelers failed to present a genuine issue of material fact with regard to causation. MPM also argued that Jenna's expert, Rice, did not and could not testify that Nikolas and Omen were alive when the neighbors forced open the garage door.

In their opposition, the Wheelers submitted Rice's declaration, where he opined that Nikolas and Omen were alive when the neighbors forced the exterior garage door open. He explained the contradiction to his deposition: "When I stated in my deposition that I could not 'testify whether Nik and Omen were still alive or not when the exterior garage door was opened', I meant that I could not testify to such a fact from my own personal knowledge or observation."

In their reply to the Wheelers' opposition, MPM moved to strike Rice's declaration, in particular, his statements that Nikolas and Omen were alive before the neighbors opened the exterior garage door. MPM argued that these opinions

were contrary to Rice's own deposition testimony, were speculative, and were "beyond the scope of his expertise." The court granted the motion to strike with regard to Rice's statements that Nikolas and Omen were alive when the garage door was opened. It concluded that the statements were "conclusory, unsupported and directly contradictory to very clear, significant questions that were asked of him at [his] deposition."

Thereafter, the court granted the respondents' summary judgment motions but "not without tremendous consideration and care." Specifically, the court concluded that the Wheelers failed to present evidence from which reasonable inferences could be drawn without speculation and that "[t]here simply [was] an absence of . . . [the] causation element." The Wheelers moved for reconsideration, which the trial court denied.[3] The Wheelers appeal both orders granting summary judgment.

ANALYSIS

Rice's Opinion Testimony

The Wheelers contend that the trial court erred when it struck Rice's

[3] In their assignment of errors, the Wheelers contend that the trial court erred when it denied their motion for reconsideration. However, the Wheelers did not discuss the standards applicable for the court's review of a motion for reconsideration, namely, CR 59, they provided no legal argument on that basis, and even following MPM's assertion that they failed to adequately present the issue for our review, they did not discuss the motion for reconsideration. Because "[w]e will not consider arguments that a party fails to brief," Sprague v. Spokane Valley Fire Dep't, 189 Wn.2d 858, 876, 409 P.3d 160 (2018), we do not address this claim and do not consider evidence that the Wheelers attached to their motion for reconsideration. See Sprague, 189 Wn.2d at 876 (refusing to address petitioner's claims, where he did not brief the claims and cited no law establishing them).

opinion testimony that Nikolas and Omen were alive before the garage door was forced open. Because the statements contradicted his deposition testimony, we disagree.

Although we usually review a trial court's ruling on a motion to strike for abuse of discretion, when a motion to strike a statement from an affidavit or declaration "is made in conjunction with a motion for summary judgment, we review de novo." Southwick v. Seattle Police Officer John Doe No. 1, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008). "[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e). "[A]n affidavit cannot be used to create an issue of material fact by contradicting prior deposition testimony." Davis v. Fred's Appliance, Inc., 171 Wn. App. 348, 357, 287 P.3d 51 (2012). Specifically, "'[w]hen a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.'" McCormick v. Lake Wash. Sch. Dist., 99 Wn. App. 107, 111, 992 P.2d 511 (1999) (second alteration in original) (internal quotation marks omitted) (quoting Klontz v. Puget Sound Power & Light Co., 90 Wn. App. 186, 192, 951 P.2d 280 (1998)). Such testimony will be considered inadmissible, and a court cannot consider it "when ruling on a motion for summary judgment." Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

McCormick is instructive. There, Laurie McCormick appealed a summary judgment order dismissing her claims based on her alleged employment with Lake Washington School District. McCormick, 99 Wn. App. at 109. McCormick asserted that although she received neither board approval nor a written contract as required for employment, a District representative, Becky Anderson, had apparent authority to hire her and made a verbal offer of employment, inducing employment by estoppel. McCormick, 99 Wn. App. at 109. To this end, in her deposition, McCormick stated that she did not know whether Anderson had the authority to offer her a position. McCormick, 99 Wn. App. at 111-12. However, in a later declaration, she "unequivocally" stated that Anderson had such authority. McCormick, 99 Wn. App. at 112. The court concluded that McCormick's declaration was inadmissible because it was "in 'flat contradiction' to her deposition and therefore [could] not be used to determine whether issues of material fact exist[ed]." McCormick, 99 Wn. App. at 112.

Here, like McCormick's statements, Rice's subsequent opinion in his affidavit contradicted his deposition testimony. In his deposition, Rice testified that he did not know—or could not testify as to—whether or not Nikolas or Omen were alive when the neighbors forced open the exterior garage door. But in his affidavit, relying on the declarations of Chaney and Smith, and the VRFA report, he stated unequivocally that "Nikolas was alive before the garage door opened, and died shortly after it was opened" and that the "evidence establishes that Omen was alive before the garage door opened." Thus, like in McCormick, Rice's declaration statements were in flat contradiction to his deposition and

were inadmissible to determine whether an issue of material fact existed.

In an attempt to explain the contradictory nature of his testimony, Rice alleged that his opinion had changed because, in his deposition, he only had meant that he "could not 'testify'" to whether Nikolas or Omen were alive "from [his] own personal knowledge or observation" and that he gave his deposition before reading the declarations of Chaney or Smith. His explanation is unpersuasive and disingenuous for at least two reasons. First, while a statement that explains a previous statement may be admissible, a statement that contradicts a previous statement is not. See McCormick, 99 Wn. App. at 112. And like in McCormick, Rice's statement does not "merely explain" his deposition testimony. 99 Wn. App. at 112. Second, Rice's contention that his deposition testimony was only with regard to his personal knowledge, does not ring true. He was an expert witness, not a fact witness. And "expert witnesses are not required to have personal, firsthand knowledge of the evidence on which they rely." State v. Lui, 153 Wn. App. 304, 321, 221 P.3d 948 (2009), aff'd, 179 Wn.2d 457, 315 P.3d 493 (2014). Therefore, the trial court did not err when it struck Rice's statements pertaining to the timing of Nikolas's and Omen's deaths.

The Wheelers disagree and attempt to distinguish testimony from an opinion, stating that "Rice was never asked whether he had an opinion as to whether Nikolas and Omen were alive when the exterior garage door was open." Contrary to the Wheelers' assertion, opinion and testimony are distinguishable

only in that testimony can be, but is not always, an opinion.[4] Thus, when asked if he could testify as to whether Nikolas and Omen were alive, Rice was asked if he could opine as to the issue. Accordingly, there is no relevant distinction between opinion and testimony, and we are not persuaded by the Wheelers' attempt to manufacture one.

Summary Judgment

The Wheelers contend that the trial court erred when it granted the respondents' motions for summary judgment. Because there were no genuine issues of material fact with regard to cause in fact, we disagree.[5]

"We review summary judgment orders de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party." Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." Green v. Normandy Park, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007). "Summary judgment is proper on a factual issue only if reasonable minds could reach but one conclusion on it." Bohn v. Cody, 119 Wn.2d 357, 363,

[4] Under "opinion testimony," *Black's Law Dictionary* states, "See TESTIMONY." BLACK'S LAW DICTIONARY 1318 (11th ed. 2019).

[5] Because we conclude that the Wheelers failed to present evidence of cause in fact, we do not reach the issues of duty and breach based on the City's building code. See, e.g., Lynn v. Labor Ready, Inc., 136 Wn. App. 295, 309-313, 151 P.3d 201 (2006) (dismissing plaintiff's negligence claim and refraining from deciding the issue of duty and breach where the plaintiff failed to present evidence of proximate cause).

832 P.2d 71 (1992).

To prevail on their negligence claim, the Wheelers were required "to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." Behla v. R.J. Jung, LLC, 11 Wn. App. 2d 329, 334, 453 P.3d 729 (2019), review denied, 460 P.3d 180 (2020). "Proximate cause consists of two elements: cause in fact and legal causation." Sluman v. State, 3 Wn. App. 2d 656, 701, 418 P.3d 125, review denied, 192 Wn.2d 1005 (2018).

To prevail on the issue of cause in fact, the Wheelers were required to "supply proof for a reasonable person to, 'without speculation,' infer that" the non-closing interior garage door "*more probably than not* caused" Nikolas's and Omen's deaths. Behla, 11 Wn. App. 2d at 335 (emphasis added) (quoting Little v. Countrywood Homes, Inc., 132 Wn. App. 777, 781, 133 P.3d 944 (2006)). "As a determination of what actually occurred, cause in fact is generally left to the jury." Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). But "[c]ause-in-fact may be determined as a matter of law if the causal connection is so speculative and indirect that reasonable minds could not differ." Doherty v. Mun. of Metro. Seattle, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996).

Here, we clearly have a tragic injury: the deaths of Nikolas and Omen, and it is undisputed that Nikolas and Omen died from asphyxia due to smoke inhalation.[6] However, the evidence is not sufficient for a reasonable juror to

[6] For some of their propositions, the Wheelers rely on declarations attached to their motion for reconsideration. As discussed above, those declarations were not before the court on the respondents' motions for summary

conclude or infer that the respondents' alleged breach—i.e., their failure to repair the self-closing door—more probably than not caused Nikolas's and Omen's deaths. Specifically, there was not sufficient evidence that (1) Omen was alive before the exterior garage door was open and (2) had the self-closing door functioned properly, either Nikolas or Omen would have been able to safely exit the property and more likely than not would have survived.

No one testified that they saw Omen alive before the garage door was open. Thus, there is no evidence—direct or circumstantial—which supplied proof that had the interior garage door properly functioned, Omen more likely than not would be alive. To allow the jury to conclude that he was alive when the garage door was opened would invite unreasonable speculation. Accordingly, there was no genuine issue of material fact as to the proximate cause of Omen's death, and the trial court did not err in granting summary judgment in favor of respondents on that issue.

Similarly, there was no direct evidence to support the conclusion that Nikolas was alive when the neighbors opened the exterior garage door. No witness could have observed the bedroom window and the garage door at the same time because the bedroom window, located above the sliding glass door, was on a different side of the unit and out of the line of sight from the bedroom window. However, taking the circumstantial evidence in the light most favorable to the Wheelers, a reasonable juror could conclude that Nikolas was still alive

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judgment, and accordingly, we do not rely on them in completing our review. See Green, 137 Wn. App. at 678 (The appellate court reviews a motion for summary judgment "based solely on the record before the trial court.").

when the neighbors forced open the exterior garage door

Nonetheless, the Wheelers provided no evidence below and point to none on appeal that supports an inference that either Nikolas or Omen would have been able to exit the home safely had the self-closing door functioned properly and oxygen not entered the home when the exterior garage door was forced open. Before the garage door was opened, Nikolas was upstairs, and the fire had grown into a "wall of fire" in the kitchen. There is no evidence that Nikolas would have been capable of surviving the toxic smoke in the home or avoiding the fire in the kitchen before it expanded to the second floor. Because we do not deny summary judgment based on "an unreasonable inference," Marshall v. AC & S Inc., 56 Wn. App. 181, 184, 782 P.2d 1107 (1989), we conclude that summary judgment was proper based on the proximate cause element.

The Wheelers disagree and assert that if fire or "thermal injury" contributed to their death, it is dispositive proof that both Omen and Nikolas were alive prior to the garage door being opened. This contention fails for a number of reasons. First, while there is evidence in this case that Nikolas and Omen were burned, there is no evidence that burns caused their deaths. Second, the Wheelers do not provide evidence that the thermal injury could have occurred *only after* the neighbors opened the exterior garage door. Indeed, Nikolas and Omen could have been burned prior to the garage door being opened. Thus, we are not persuaded.

The Wheelers also contend that "[s]ince John Monsebroten could not assume that the fire had reached the second floor before the garage door was

opened, . . . it is reasonable to infer that Omen [or Nikolas] died after the garage door was opened when the fire reached the second floor." But Deputy Fire Marshall Monsebroten's inability to draw a conclusion as to whether the fire had reached the second floor does not allow for a reasonable inference that Omen and Nikolas were still alive when it did. This is particularly true because Nikolas's and Omen's autopsies concluded that they died from smoke inhalation.

Finally, the Wheelers rely on Martini v. Post, 178 Wn. App. 153, 313 P.3d 473 (2013), for various propositions. There, Thomas Martini and his wife, Judith Abson, leased a house from Paul Post. Martini, 178 Wn. App. at 157. The second story bedroom windows were broken and would not open, and Post failed to repair them. Martini, 178 Wn. App. at 156-57, 159. Abson died from smoke inhalation after she was trapped in the second floor bedroom by a fire that began in the home's basement. Martini, 178 Wn. App. at 157-58. Martini sued Post under multiple theories of liability. Martini, 178 Wn. App. at 170-71. After the trial court granted summary judgment in favor of Post on the issue of proximate cause, Martini moved for reconsideration and introduced new evidence of handprints around the bedroom window and a declaration from a medical expert that Abson would have survived had the bedroom window functioned properly. Martini, 178 Wn. App. at 159.

On appeal, the court held that the newly introduced evidence presented a genuine issue of material fact with regard to whether the broken windows were the proximate cause of Abson's death. Martini, 178 Wn. App. at 159, 166. It therefore concluded that the trial court erred in granting summary judgment.

Martini, 178 Wn. App. at 171-72. Here, unlike in Martini, there is no evidence from which a reasonable juror could infer that Nikolas and Omen more likely than not would have survived had the door been repaired. Thus, Martini is not persuasive.

For the foregoing reasons, we affirm.

WE CONCUR:

BERRY & BECKETT, PLLP

March 09, 2021 - 1:43 PM

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