

62778-3

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NO. 62778-3-1

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

MARY FUNG KOEHLER,

Appellant,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation;
HILLYARD INDUSTRIES, aka HILLYARD, INC., a Missouri
corporation; PROFESSIONAL CLEANING AND RESTORATION
SERVICES, LLC, dba SERVPRO, a Washington corporation;
BRENT YOUNG and JANE DOE YOUNG, husband and wife
and the marital community

Respondents.

**REPLY BRIEF OF RESPONDENTS PROFESSIONAL
CLEANING AND RESTORATION SERVICES, LLC, DBA
SERVPRO AND YOUNGS**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF ISSUES 3

III. STATEMENT OF THE CASE 4

 A. Procedural History 4

 B. Background Facts 5

IV. LEGAL ARGUMENT AND AUTHORITY 6

 A. The Trial Court Properly Granted Servpro’s
 Motion for Summary Judgment 6

 B. The Undisputed Facts Before The Trial Court
 Was That The Re-Juv-Nal Was Properly
 Diluted When It Was Applied To Koehler’s
 Residence 9

 C. Koehler Has Failed To Provide Any Evidence
 Of Two Essential Elements Of Her Claim 11

 D. Koehler Has Failed To Establish That Servpro
 Breached Its Standard Of Care 12

 E. Res Ipsa Loquitur Doctrine Does Not Apply 12

 F. The Trial Court Properly Exercised Its
 Discretion In Denying Plaintiff’s Oral Request
 to Continue The Motion For Summary
 Judgment 18

 G. Koehler Claim That She Was Deprived of
 Due Process Of Law Is Frivolous 20

H. The Trial Court Properly Granted Allstate’s Motion to Strike Portions Of The Declarations Of Timothy Ronald Fung, Jerry Bedlington, Mark Keltner and Nicholas Chariton As Containing Hearsay, Speculation And Unfounded “Expert Opinion” 21

V. CONCLUSION 23

TABLE OF CASES AND AUTHORITIES

Washington Cases:

<i>Bloomster v. Nordstroms, Inc.</i> , 103 Wn.App. 252, 11 P.3d 883 (2000)	22
<i>Charbonneau v. Wilbur Ellis Company</i> , 9 Wn.App. 474, 512 P.2d 1126 (1963)	15, 16, 17
<i>Fabrique v. Choice Hotels, Int'l</i> , 144 Wn.App. 675, 183 P.3d 1118 (2008)	24, 25
<i>Howell v. Spokane and Inland Empire Blood Bank</i> , 114 Wn.2d 42, 785 P.2d 815 (1990)	13, 14, 15, 16, 17
<i>International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 122 Wn.App. 736, 87 P.3d 774 (2004)	21, 22
<i>Marshall v. Bally's Pac West, Inc.</i> , 94 Wn.App. 372, 972 P.2d 475 (1999)	8, 9, 12,
<i>Seybold v. Neu</i> , 105 Wn.App. 666, 19 P.3d 1086 (2001)	24, 25
<i>Snohomish County v. Rugg</i> , 115 Wn.App. 218, 61 P.2d 1184 (1983)	21
<i>State v. Evans Campaign Committee</i> , 86 Wn.2d 503, 564 P.2d 75 (1976)	22
<i>State v. Faar-Lenzini</i> , 93 Wn.App. 453, 970 P.2d 313 (1969)	23

<i>State v. Greene</i> , 139 Wn.2d 64, 984 P.2d 1024 (1999)	23
<i>State v. Phillips</i> , 123 Wn.App. 761, 98 P.2d 838 (2006)	23
<i>Tinder v. Nordstrom</i> , 84 Wn.App. 787, 929 P.2d 1209 (1999)	13
<i>Young v. Key Pharmaceutical</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)	7

Rules:

KCLR 56(c)(1).	20
CR 56(e)	21, 22
CR 56(f)	3, 18, 19
ER 602	22
ER 701	22, 23,
ER 702	23
ER 801(c)	22
ER 802	22

I. INTRODUCTION

Respondent Professional Cleaning and Restoration Services, LLC, d/b/a Servpro, a Washington corporation, Brent Young and Jane Doe Young, husband and wife and the marital community composed thereof and James Young and Jane Doe Young, husband and wife and the marital community composed thereof (hereinafter "Servpro"), request this Court affirm the trial court's order dismissing Koehler's personal injury claims against Servpro. The trial court properly ruled that the doctrine of *res ipsa loquitur* does not apply to the claims against Servpro. The court also properly ruled that Koehler cannot establish all the necessary elements of her claim and it must be dismissed.

Servpro also requests this Court affirm the trial court's order striking portions of the Declarations of Timothy Ronald Fung, Jerry Bedlington, Mark Keltner, Nicholas Chariton and Maria Roberts that contain inadmissible hearsay, speculation and unfounded expert opinion.

Koehler's negligence claim against Servpro arises out of Servpro's efforts to remediate Koehler's house following a water

damage event in June of 2004. On June 21, 2004, Koehler reported to Allstate that she had discovered a water leak in her basement that was causing damage. (CP 432). Allstate contacted Servpro and requested that Servpro contact Koehler to remediate the damage. (CP 432, 974). Servpro contacted Koehler and immediately began remediating the damage. Part of the remediation efforts involved applying a disinfectant/detergent spray known as Re-Juv-Nal. (CP 690). Re-Juv-Nal is manufactured by defendant Hillyard Industries. Re-Juv-Nal is a hospital grade disinfectant/detergent cleaner, mildestat and deodorizer. It is used in schools and hospitals throughout the country. (CP 697). It is frequently used in cases involving water remediation and mold control. (CP 690).

Koehler asserted that she developed physical symptoms and illness after the Re-Juv-Nal was sprayed in her basement. She brought a personal injury claim against Servpro.

On October 24, 2008, the trial court granted Servpro's motion for summary judgment. The trial court correctly held that this was not a *res ipsa liquitur* claim and Koehler failed to prove necessary elements of her negligence claim against Servpro.

II. STATEMENT OF ISSUES

Koehler seeks review of two of the trial court's rulings in Servpro's favor. (1) the summary judgment order dismissing Koehler's claim against Servpro and (2) striking inadmissible portions of the declarations submitted in Koehler's response to Servpro's motion for summary judgment. Servpro submits that these motions were properly decided by the trial court in accordance with well founded Washington law and must be affirmed.

Koehler also seeks review of the trial court's denial of her oral request to continue the summary judgment hearing to allow her to conduct additional discovery. The trial court properly denied this request. Koehler had never filed any motion to compel discovery responses prior to the summary judgment hearing. She failed to make any showing that additional discovery was necessary or unavailable to justify a continuance under CR 56(f). Additionally, the trial court had previously continued the motion for summary judgment and indicated that there would be no further continuances of the motion for summary judgment unless supported by medical documentation. (CP 87).

Koehler has failed to present any evidence to support her claim that she was denied due process by the trial court's granting of the motion for summary judgment. Koehler alleges that she was denied due process when the trial court struck inadmissible portions of the declarations submitted by Koehler in opposition to the motions for summary judgment. These allegations are unsupported by either law or evidence.

III. STATEMENT OF THE CASE

A. Procedural History.

On October 24, 2008, all three defendants in this case, Servpro, Hillyard and Allstate argued motions for summary judgment of dismissal. The trial court granted all three motions. (CP 106, 111, 114). Also granted on October 24, 2008 were the defendants' motions to strike inadmissible portions of declarations submitted by Koehler in opposition to defendants' motions for summary judgment. (CP 108).

Koehler filed a motion for reconsideration of the trial court's order granting Servpro's motion for summary judgment. On November 18, 2008 the trial court denied Koehler's motion for

reconsideration. (CP 117, 120, 122). No motion for reconsideration of the trial court's order regarding the motion to strike portions of the declarations was ever filed by Koehler. On December 19, 2008, Koehler filed her notice of appeal. (CP 124).

B. Background Facts.

The lawsuit against Servpro arises out of Servpro's efforts to remediate water damage that occurred in Koehler's basement on June 21, 2004. After discovering the water leak, Koehler contacted her insurance company, Allstate. Allstate contacted Servpro and requested that Servpro contact Koehler to remediate the damage. (CP 432, 794). Servpro followed the standard protocol in its industry for remediating residential water damage claims. (CP 690, 694). As part of its remediation, Servpro employees sprayed Re-Juv-Nal to the affected areas in Koehler's basement. Re-Juv-Nal is a disinfectant anti-microbial product manufactured by defendant Hillyard Industries. It is a hospital grade anti-microbial product that is used in schools and hospitals throughout the country and has been expressly approved by the EPA. Re-Juv-Nal is sold a concentrated form. Before it was used in Koehler's basement, it was diluted to the proper concentration as

required by the manufacturer. (CP 691, 694).

After application of the Re-Juv-Nal, Koehler advised Allstate that her home was contaminated and she refused to move back into it. (CP 957). Allstate hired Indoor Air Environmental Services (IAES) to inspect Koehler's residence to determine whether or not the home was contaminated by the Re-Juv-Nal. (CP 976). IAES reported that the Re-Juv-Nal was a mild disinfectant recommended for mild cases of contamination related to mold. (CP 964). The active ingredients in Re-Juv-Nal are water soluble and no long term health effects are linked to its use. (CP 964).

Koehler was unable to produce any testimony that the Re-Juv-Nal applied by Servpro was not properly diluted according to the manufacturer's recommendations. (CP 673). Koehler also was unable to produce any expert or medical testimony linking any of her alleged symptoms to exposure to Re-Juv-Nal. (CP 674).

IV. LEGAL ARGUMENT AND AUTHORITY

A. The Trial Court Properly Granted Servpro's Motion for Summary Judgment.

To survive a motion for summary judgment, Koehler must come

forward with specific proof as opposed to mere generalizations or speculations to defeat a motion for summary judgment. She was unable to do so. The trial court properly granted the motion.

In *Young v. Key Pharmaceutical*, 112 Wn.2d 216, 770 P.2d 182 (1989), the court made it clear that the plaintiff cannot rely on assertions, generalizations or mere speculations to resist a motion for summary judgment. The plaintiff has the burden of coming forward with specific proof in order to defeat a motion for summary judgment.

In *Young, supra*, the court stated as follows:

If the moving party is a defendant and meets the initial showing, the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at that point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that parties case, and on which that party will bear the burden of proof at trial', then the trial court should grant the motion. In such a situation, there can be no 'genuine issue as to any material fact' since a complete failure of proof concerning an essential element of a non-moving party's case necessarily renders all other facts immaterial. . . . In making this responsive showing, the non-moving party cannot rely upon the allegations made in its pleadings. CR 56e states that the response, 'by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'

112 Wn.2d 216 at 226.

In the case of *Marshall v. Bally's Pac West, Inc.*, 94 Wn.App. 372, 972 P.2d 475 (1999), the court also held that the plaintiff needed specific proof of facts to resist a motion for summary judgment. In *Marshall, supra*, the plaintiff was injured while using a treadmill at a health club. She brought a negligence claim against the health club, the treadmill repairer and a product liability claim against the treadmill manufacturer. All the defendants moved for summary judgment. The basis of their argument was that the plaintiff could not show that the alleged fault of the defendants was a proximate cause her injuries. The trial court granted the defendants' motions. The court held that to defeat the motion for summary judgment, the plaintiff must set forth specific facts rebutting the moving party's contentions and disclosing the existence of issues of material fact. The non-moving party may not rely upon "speculation or argumentative assertions that unresolved factual issues remain". *Marshall v. Bally's Pac West, Inc., supra*.

The court stated that the mere existence of an accident or injury does not necessarily lead to an inference of negligence. In order to prove actionable negligence, the plaintiff must establish the existence of a duty, a breach of this duty and resulting injury. A failure to

establish any of these elements is fatal to the plaintiff's claim. The plaintiff was unable to prove any evidence of "how" the accident occurred. Because she could not produce evidence of causation, the summary judgment was properly granted. On this point the court stated as follows:

Even assuming the treadmill was defective, Marshall has offered no evidence as to how she fell or what caused her to be thrown from the machine. It follows that she cannot show that her injuries were caused by any defect in the machine. Thus, a jury would be required to speculate that a defect in the treadmill caused Marshall's accident. A claim of liability resting only on a speculative theory will not survive summary judgment.

94 Wn.App. 372 at 382.

B. The Undisputed Facts Before The Trial Court Was That The Re-Juv-Nal Was Properly Diluted When It Was Applied To Koehler's Residence.

Re-Juv-Nal comes from the manufacturer in a concentrated form. It has to be diluted with water to the manufacturer's recommended concentration before it is applied. (CP 691, 694, 697). Koehler has alleged that Servpro employees must have applied Re-Juv-Nal in a direct concentration. However, she has no proof of this fact. On this point Koehler, herself, testified as follows:

Q With respect to testing, have you done any tests whatsoever to determine what the concentration was of the Re-Juv-Nal that was used at your home by the Servpro employees?

A No, but I can dowse it.

Q Well, unfortunately you are under oath and you have to just answer the question. Why haven't you done that, why haven't you retained someone to figure out whether or not you, in fact, had as you theorize a high concentration of Re-Juv-Nal sprayed on your walls and floor? Why haven't you done that?

A Because I can't find anybody that knows anything about it or knows how to analyze it and I have tried . . .

(CP 672, 782).

Koehler admitted that she had no evidence of the concentration of Re-Juv-Nal that was sprayed at her house. In her deposition she testified as follows:

Q At this point you don't have any evidence of what concentration of Re-Juv-Nal was sprayed at your house, do you?

A That's correct.

(CP 673, 798).

The declarations of James Young and Michael McGrath are clear and undisputed that the Re-Juv-Nal that was sent with the Servpro technicians was premixed to the factory dilution before it was sent out

in the field. (CP 691, 694).

C. Koehler Has Failed To Provide Any Evidence Of Two Essential Elements Of Her Claim.

Koehler has failed to provide any evidence of two essential elements of her claim: that there is a defect with the Re-Juv-Nal or that there is a causal link between use of Re-Juv-Nal and her alleged symptoms. Failure to establish these elements are fatal to Koehler's case.

Koehler has no testimony linking Re-Juv-Nal to her medical symptoms. Koehler's own testimony on this point is abundantly clear.

At her deposition, Koehler testified as follows:

Q The question is have you consulted any experts
. . .

A No because I haven't found them.

Q So there is no expert at this point that will give
an opinion linking the Re-Juv-Nal exposure that
you had to your current symptoms?

A That's correct. . . .

(CP 674, 805).

Koehler also has not had any expert do any chemical analysis regarding the Re-Juv-Nal or any expert test her house for Re-Juv-Nal.

(CP 674, 805).

D. Koehler Has Failed To Establish That Servpro Breached Its Standard Of Care.

In order to establish a tort claim for negligence, the plaintiff must establish the existence of a duty, breach of the duty and resulting injury. *Marshall v. Bally's Pac West, Inc.*, 94 Wn.App. 372, 972 P.2d 475 (1999). There is an absolute failure of proof from the plaintiff regarding the standard of care owed by a remediation contractor or the fact that Servpro breached that duty. The undisputed testimony before the court is that it is standard practice in the remediation industry to use products such as Re-Juv-Nal. (CP 690). Re-Juv-Nal is widely used in hospitals, schools and other public facilities throughout the country without any health problems. (CP 697). Sylvette Boyagain of AIES who investigated the use of Re-Juv-Nal on behalf of Allstate indicated that she found "no evidence would indicate that a chemical disinfectant was improperly used". (CP 964).

E. Res Ipsa Loquitur Doctrine Does Not Apply.

Koehler's reliance on the doctrine of res ipsa loquitur is

misplaced. Koehler's claim against Servpro does not meet the elements required under Washington law to apply the doctrine of res ipsa loquitur.

The Washington courts have outlined three criteria that must be met if res ipsa loquitur is to be applied. They are as follows: 1) the occurrence producing the injury must be of a kind which ordinarily does not occur in the absence of negligence; 2) the injury is caused by an agency or instrumentality within the exclusive control of the defendant; and 3) the injury causing occurrence must not be due to any contribution on the part of the plaintiff. *Howell v. Spokane and Inland Empire Blood Bank*, 114 Wn.2d 42, 785 P.2d 815 (1990).

The Washington courts have consistently recognized the doctrine of res ipsa loquitur as to be applied sparingly and only in exceptional circumstances. In the case of *Tinder v. Nordstrom*, 84 Wn.App. 787, 929 P.2d 1209 (1999), the court stated as follows:

Res ipsa loquitur is ordinarily sparingly applied
'in particular and exceptional cases, and only
where the facts and the demands of justice make
its application essential.'

84 Wn.App. 787 at 792.

In the case at bar, the doctrine of res ipsa loquitur should not be

applied to the claims against Servpro. The plaintiff has asserted both negligence claims against Servpro and a products liability claim against Hillyard. Washington courts have held that in cases of products liability where there may be multiple causes of the potential injury, the doctrine of res ipsa loquitur does not apply. The reason for this is that the plaintiff has failed to establish that a specific defendant had exclusive control over the instrumentality that produced the injury.

Howell v. Spokane and Inland Empire Blood Bank, supra, involved a claim against a blood bank arising out of contaminated blood that infected the plaintiff with the HIV virus. The blood in question came from the Spokane and Inland Empire Blood Bank (SIEBB). It was transfused into the plaintiff at the Deaconess Medical Center. The plaintiffs brought a products liability claim against SIEBB and Deaconess Medical Center. They also asserted a negligence claim citing the doctrine of res ipsa loquitur. The court held that res ipsa loquitur did not apply since the plaintiff had not met the burden of establishing the exclusive control. On this point the court stated as follows:

The hospital did not have exclusive control over the transferred blood. The blood was donated by

John Doe X, collected by SIEBB, and transfused at the hospital. In this context, no defendant can be said to have exclusive control over the blood so as to infer negligence. Therefore, the trial court properly dismissed the application of *res ipsa loquitur* to infer negligence on the part of the hospital as a matter of law.

114 Wn.2d 42 at 58.

The court similarly rejected the application of the *res ipsa loquitur* doctrine in the case of *Charbonneau v. Wilbur Ellis Company*, 9 Wn.App. 474, 512 P.2d 1126 (1963). In *Charbonneau, supra*, the plaintiff's apple orchard was damaged following the application of a dormant spray. The plaintiff had bought the spray consisting of an emulsified oil and diazinon from Wilbur Ellis Company. The emulsified oil used in the spray was formulated by Yakima Valley Spray Company. After purchasing the emulsified oil and diazinon, the plaintiff properly diluted the solution with water and applied it to his orchard. The plaintiff's orchard was damaged.

The plaintiff brought suit against both Wilbur Ellis and Yakima Valley Spray Company under the theories of product liability and *res ipsa loquitur*. The court held that the doctrine of *res ipsa loquitur* did not apply. The defendant did not have exclusive control over the

instrumentality. The emulsified oil was formulated by Yakima Valley Spray. The emulsified oil and diazinon were products of Wilbur Ellis. The plaintiff then diluted the solution to the proper ratio with water and applied it to his orchard. No defendant was said to have exclusive control over the instrumentality.

If the emulsified oil was manufactured improperly, a products liability claim may be stated against Yakima Valley Spray. However, Yakima Valley Spray did not have exclusive control over the product sold by Wilbur Ellis which was the emulsified oil and diazinon. Wilbur Ellis did not have exclusive control over the instrumentality causing the events because a component was manufactured by Yakima Valley Spray. This is not to say that a products liability claim could not be formulated against either Yakima Valley Spray or Wilbur Ellis, however, the doctrine of *res ipsa loquitur* does not apply.

In the case at bar, the same logic as in *Howell v. Spokane and Inland Empire Blood Bank, supra*, and *Charbonneau v. Wilbur Ellis, supra*, applies. Servpro did not manufacture the Re-Juv-Nal. If the Re-Juv-Nal was improperly manufactured, Servpro could properly apply the Re-Juv-Nal in a non-negligent fashion following the

manufacturer's recommendations. If the product was defective, Koehler's injuries could occur without any negligence on the part of Servpro. The products liability claim, by its very nature, is not a negligence claim. The fact that Koehler's injuries might be the result of a defective product as opposed to the negligent application of that product means that Koehler has not met the first criteria for imposing the doctrine of res ipsa loquitur. The type of injury Koehler complains of (a chemical reaction to a product) could occur without negligence. Additionally, as in both *Howell v. Spokane and Inland Empire Blood Bank, supra*, and *Charbonneau v. Wilbur Ellis, supra*, Servpro did not have exclusive control over the instrumentality causing the injury. The product, Re-Juv-Nal, was manufactured by Hillyard. The active ingredients in the Re-Juv-Nal were manufactured by the chemical suppliers that Hillyard used. (CP 697). Servpro properly diluted the Re-Juv-Nal and applied it in Koehler's basement. (CP 691, 694). No defendant had exclusive control over the instrumentality which is required for the doctrine of res ipsa to apply.

F. The Trial Court Properly Exercised Its Discretion In Denying Plaintiff's Oral Request To Continue The Motion For Summary Judgment.

At the summary judgment hearing on October 24th, Koehler orally requested the court continue the motion so she could conduct additional discovery. Koehler orally indicated that the defendants discovery responses were inadequate. The court properly denied these motions.

At no time prior to the oral argument on the summary judgment motions did the plaintiff ever file any discovery motions to compel Servpro to supplement its interrogatory responses. Koehler also failed to make a showing that any additional discovery was necessary or unavailable to justify a continuance under CR 56(f).

The defendants' motions for summary judgment were originally scheduled for August 29th. The plaintiff requested and was granted additional time to respond to the motions. In early September 2008, Koehler claimed she still needed additional time to respond to the summary judgments. On September 9th the trial judge conducted a hearing to consider Koehler's request to continue the pending

summary judgment motions. The trial court granted the plaintiff's motion and continued the summary judgment motions to October 24th. In the order granting Koehler's motion for a continuance, the court noted that this was the second request for a continuance of the summary judgment motions. The court indicated it would not grant any further continuances. The court also indicated that if the plaintiff did seek a further continuance, such request must be supported by medical documentation. (CP 87).

Due to the multiple continuances of the motions for summary judgment, Koehler had known since early August that the summary judgment motions were pending. However, Koehler never took any steps to compel discovery against any of the defendants to require them to provide "complete discovery responses". Koehler never filed a written motion under CR 56(f) requesting additional time to conduct discovery. The court's order of September 18th clearly indicated that if a continuance were to be requested, it had to be supported by medical documentation. (CP 87). No medical documentation was provided to the court on October 24, 2008 when plaintiff orally requested

additional time to respond to the motions for summary judgment.

The trial court properly exercised its discretion and denied plaintiff's motion for yet another continuance of the summary judgment motions.

G. Koehler Claim That She Was Deprived Of Due Process Of Law Is Frivolous.

Koehler has alleged in this appeal that she was deprived of due process of law because the trial court limited her oral argument to thirty minutes. This argument is unsupported by the law or the evidence. Koehler submitted extensive briefing and declarations in opposition to the various motions for summary judgment. King County Local Rule LRC 56(c)(1) specifically states that the length of oral argument should be determined by the assigned judge. Typically each side in a summary judgment calendar in King County is allotted ten minutes for oral argument. The trial court exercised great latitude in allowing the plaintiff extra time to present her case. There is no abuse of discretion by the trial court in controlling the length of time of Koehler's oral argument. There has been no deprivation of "due process of law".

H. The Trial Court Properly Granted Allstate's Motion To Strike Portions Of The Declarations of Timothy Ronald Fung, Jerry Bedlington, Mark Keltner and Nicholas Chariton As Containing Hearsay, Speculation And Unfounded "Expert Opinion".

The rule in Washington is clear that a party opposing a motion for summary judgment must come forward with admissible evidence supporting that opposition (CR 56(e)). Washington courts require that affidavits and declarations in support or opposition to a motion for summary judgment set forth facts that would be admissible in evidence. *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.2d 1184 (1983). CR 56(e) requires that:

Supporting and opposing affidavits 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 herein.

Hearsay statements, speculations and unqualified testimony and unauthenticated documents are not admissible into evidence.

Therefore, they cannot be considered by a court in ruling on a summary judgment motion. *International Ultimate, Inc. v. St. Paul*

Fire & Marine Ins. Co., 122 Wn.App. 736, 87 P.3d 774 (2004).

Washington courts have long held that summary judgment declarations or affidavits must be based on personal knowledge and set forth admissible facts and affirmatively show that the affiant is competent to testify as to the matters there. *Bloomster v.*

Nordstroms, Inc., 103 Wn.App. 252, 11 P.3d 883 (2000). A

declaration which states beliefs formed on the basis of hearsay are not made on personal knowledge and are inadmissible. *State v. Evans Campaign Committee*, 86 Wn.2d 503, 564 P.2d 75 (1976). Hearsay evidence contained in a declaration in opposition to a motion for summary judgment does not meet the requirements of CR 56(e) and is not competent evidence.

Each of the declarations that were challenged by the defendants attempted to assert as facts statements or beliefs made by third parties. These statements are hearsay and statements about which the declarant lacked personal knowledge. See ER 602, 801(c) and 802.

None of the individuals who provided declarations for the plaintiff were qualified as "experts". ER 701 provides that lay

witnesses may testify to his or her opinions but only in a very narrow area. ER 701 specifically precludes lay witnesses from testifying as to issues based on "scientific, technical or other specialized knowledge . . . unless the witness has been accepted by the court as an expert regarding the particular subject." ER 702 states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

However, under ER 702 the court must first determine if the proffered witness qualifies as an expert. *State v. Faar-Lenzini*, 93 Wn.App. 453, 970 P.2d. 313 (1969). In none of the declarations offered by Koehler were the witnesses qualified as "expert witnesses". The trial court properly excluded these portions of the declarations. The declaration of an unqualified expert testimony by a trial court will not be disturbed absent an abuse of discretion. *State v. Greene*, 139 Wn.2d 64, 984 P.2d 1024 (1999), *State v. Phillips*, 123 Wn.App. 761, 98 P.3d 838 (2006).

V. CONCLUSION

Servpro respectfully requests that this court uphold the granting

of the summary judgment by the trial court. There has been a complete failure of proof on Koehler's part regarding essential portions of her claim. Washington law is clear that if a plaintiff is unable to establish an essential element of her case, it must be dismissed. *Seybold v. Neu*, 105 Wn.App. 666, 19 P.3d 1086 (2001).

Koehler has failed to produce any evidence that the Re-Juv-Nal applied to Koehler's basement by Servpro was not properly diluted. Koehler has also failed to produce any competent evidence to establish any defect in the use of Re-Juv-Nal. Finally, Koehler has failed to provide any evidence linking the exposure to Re-Juv-Nal to plaintiff's symptoms.

The law in Washington is clear that Koehler needs expert testimony to provide the causal link between her symptoms and the exposure to Re-Juv-Nal. The case of *Fabrique v. Choice Hotels, Int'l*, 144 Wn.App. 675, 183 P.3d 1118 (2008) is directly on point. In *Fabrique*, the plaintiff claimed that she suffered arthritic symptoms due to salmonella exposure. The court held that in cases involving medical factors beyond the ordinary persons lay knowledge, expert testimony is needed. The court stated as follows:

Expert medical testimony is necessary to establish causation where the nature of the injury involves obscure medical factors which are beyond the ordinary lay persons knowledge, which would necessitate speculation in order to make findings.

144 Wn.App. 675 at 685.

Similarly in the case of *Seybold v. Neu, supra*, the court stated:

Expert testimony is required where an essential element in the case is best established by an opinion that is beyond the expertise of a layman.

105 Wn.App. 666 at 676.

Neither Koehler nor any of the declarants who submitted declarations on her behalf are qualified as experts. At best, the admissible portions of the declarations are anecdotal and do not raise to the level of expert testimony that Koehler needs to establish her case against Servpro.

The trial court's rulings should be affirmed.

DATED this 2 day of August, 2010.

Respectfully Submitted,



DAVID M. SODERLAND, WSBA# 6927
Attorney for Respondents Professional
Cleaning and Restoration Services, LLC
and Youngs

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of REPLY BRIEF OF RESPONDENTS PROFESSIONAL CLEANING AND RESTORATION SERVICES,LLC, DBA SERVPRO AND YOUNGS to be mailed, via postage prepaid First Class Mail, to Appellant at the following address of record:

Mary Fung Koehler
2629 B – 11th Avenue East
Seattle, WA 98102-3902

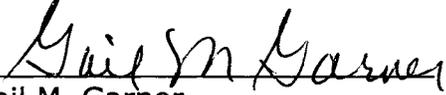
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 3 day of August,
2010.


Gail M. Garner