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COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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FARMERS INSURANCE COMPANY OF WASHINGTON, as  
subrogee for PAUL MOLDON,

*Plaintiff/Appellant,*

v.

D-SQUARE ENERGY SYSTEMS, INC.,

*Defendant/Respondent/Cross-Appellant.*

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REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT  
D-SQUARE ENERGY SYSTEMS

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## **I. SUMMARY OF REPLY ON CROSS-APPEAL**

D-Square's technician performed a basic engine maintenance on the generator at the Moldon property two months before the house fire involving the generator. The maintenance involved changing the oil, replacing filters and spark plugs, and making sure the inside of the unit was free of debris. Twenty-twenty hindsight does not establish a duty of care, nor is it sufficient to defeat a motion for summary judgment.

There was no evidence upon which the trial court could conclude that D-Square had a duty to a homeowner to warn of materials near the generator given the nature of the service call. Further, Farmers did not meet its burden of proof establishing negligence in 2008 when D-Square filed its first motion for summary judgment. The 2008 motion should have been granted.

## **II. REPLY IN SUPPORT OF CROSS-APPEAL**

### **A. The Court Did Not Have Any Evidence to Support a Finding That a Duty of Care Existed to Warn The Homeowner**

While it is true that a trial court determines the existence of a duty of care, the parameters of that duty must be based upon at least some information made available to the court. In the present case, the evidence presented to the court could only have resulted in the conclusion that no

duty of care existed to warn the Moldons that the bundled cedar might present a fire hazard. And the evidence certainly did not support a duty to warn the Moldons based upon the Magnum manual.

The only evidence (as opposed to argument) regarding the duty of care for a service tech came from D-Square's owner, Don Dunavant. He testified that his basic service technicians were trained to examine the interior of the generator as part of a basic tune up, and to note certain known exterior concerns.

According to Mr. Dunavant, modern generators do not become hot as they operate. Wood stacked nearby but not in direct contact with the generator would not and could not catch on fire merely from the normal operation of the generator. CP 29.

The duty of care must have some relevance to the issue at hand. The trial court had no basis for determining there was a duty to warn the homeowner of "an obvious danger/hazard" beyond dangers connected with the operation of the generator itself.

The Magnum manual does not support a duty of care, either. The manual specifically states that servicing the engine is to be done in accordance with the Kohler Engine Manual. CP 376. The service tech, Tim Cislo, did not and would not need to refer to the Magnum service

manual to change the oil in a familiar Kohler engine. CP 355. Only when a technician is trouble-shooting a service call does he consult the specific manual for that generator. CP 356-357. Any warnings in the Owners Manual would not be directed to a basic service tech like Mr. Cislo.

There was no testimony from anyone and no evidence stating that a service technician performing basic maintenance on a Kohler engine needed to review the installation instructions for this Magnum generator. D-Square does not even install generators. CP 356-357. D-Square is entitled to rely upon installers to have set up a particular generator according to the manufacturer's instructions. CP 29. In this case, the Magnum generator was installed three years earlier.

Under all the facts known in 2008, there was no evidence upon which the trial court could determine there was a duty to warn the homeowner about wood stacked near a generator. In particular there was no evidence whatsoever to support the trial court's conclusion that the Magnum manual is evidence of the duty required.

**B. Farmers Did Not Raise Any Genuine Issues of Material Fact in 2008 to Counter D-Square's Evidence**

This lawsuit involves a claim of negligence against D-Square. CP 9. The elements of a claim for negligence are duty, breach of the duty, injury or damages, and proximate cause between breach and injury. A plaintiff cannot prevail in a negligence action until and unless it can prove all of the elements of negligence. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant is entitled to summary judgment when the plaintiff fails to come forward with evidence supporting each of the elements of the claim. *Young*, 112 Wn.2d at 225.

D-Square presented evidence in 2008 to support its contention that the negligence case against it was not proven. In response, Farmers failed to come forward with evidence to rebut D-Square's contentions.

A nonmoving party:

may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

*Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The trial court erroneously denied D-Square's 2008 summary judgment motion. The uncontradicted testimony presented in 2008 was that the position of the wood piles as Tim Cislo found them would not be a hazard and would not create a situation calling for a warning to the homeowner. CP 23, CP 29.

According to Mr. Dunavant, modern generators are designed as self-contained units. Their exteriors do not become hot as they operate. Wood stacked near but not abutting the generator would not and could not catch on fire merely from the normal operation of the generator. CP 29. Wood stacked nearby would not constitute an obvious hazard, as long as it was not stacked in contact with the generator. CP 29. Farmers did not present an opposing viewpoint.

Mr. Cislo testified he could walk between the unit and the cedar pile to take off the back cover to service the Kohler engine. CP 369. There was no scrap wood under the exhaust pipe. CP 364. Therefore, the position of the wood piles as Tim Cislo found them would not be a hazard and would not create a situation calling for a warning to the homeowner. Mr. Cislo stated he would have told the homeowner if there had been wood stacked against the generator or underneath where the exhaust was. CP 365-367. But there was no wood against the generator

or under the exhaust flange. CP 22-24, CP 364, CP 369. Again, Farmers did not produce contradictory testimony about the location of the wood at the time of the service call .

Therefore, even if the court correctly determined that D-Square had a duty to the homeowner to warn of obvious hazards, neither Farmers nor Magnum presented evidence that the wood pile was an obvious hazard. The only evidence presented to the trial court was from Tim Cislo and Don Dunavant. They testified the cedar was not a hazard where it was stored at the time of the service call.

Farmers failed to produce evidence of the sort admissible at trial to support its position that D-Square was negligent. The negligence elements were not established by evidence of the sort admissible at trial. Farmers responded only with impermissible conjecture and argument. *Seven Gables Corp.*, 106 Wn.2d at 13.

### **III. CONCLUSION**

The trial court should have granted D-Square's first motion for summary judgment in 2008. There was no basis for the trial court to determine that D-Square had a duty of care to warn the homeowners about the nearby stacked wood. There was no basis for ruling that a service tech

performing an engine tune up needed to consult any manufacturer's manual to perform this work.

Farmers did not come forward with any evidence in 2008 to establish that a service tech should know that a wood pile far enough away that he could walk between it and the generator was an obvious hazard. Absent such evidence, D-Square was entitled to dismissal.

A year later and after substantial discovery and depositions of expert witnesses, D-Square again moved for summary judgment, again arguing that no obvious dangers/hazards existed at the time of the service call. This time the trial court correctly determined that Farmers failed to come forward with evidence sufficient to survive D-Square's summary judgment motion. However, the trial court should have granted D-Square's original summary judgment motion in 2008.

RESPECTFULLY SUBMITTED this 29th day of July, 2010.

LAW OFFICE OF WILLIAM J. O'BRIEN

By   
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PAUL MOLDON,

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*Respondent/Cross-Appellant.*

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CERTIFICATE OF SERVICE

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The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

On the 29<sup>th</sup> day of July, 2010, I caused to be delivered a true and correct copy of:

1. *Reply Brief of Respondent/Cross-Appellant D-Square Energy Systems*; and
2. *Certificate of Service.*

to the following counsel of record:

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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.

DATED this 29<sup>th</sup> day of July, 2010.

  
\_\_\_\_\_  
Karen Langridge