

07466-8

07466-8

NO. 67466-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

ANNE E. OMAN and KRAIG G. OMAN, husband and wife, and the
marital community composed hereof,

Plaintiffs/Appellants,

v.

SEAN THORNE and GINA THORNE, husband and wife; BMW OF
NORTH AMERICA, LLC; and NORTHWEST FINANCIAL GROUP,
INC., a/k/a BMW OF BELLEVUE,

Defendants/Respondents.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 30 PM 4:43

BRIEF OF RESPONDENT BMW OF BELLEVUE

August G. Cifelli, WSBA No. 13095
Jonathan M. Minear, WSBA No. 41377
Attorneys for Respondent BMW of
Bellevue

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

5394241

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE	4
A. Nine days before the fire, BMW of Bellevue was unable to service the Thornes' vehicle.	4
B. The Omans' Pontiac was destroyed before the parties' experts could inspect it and determine whether it caused the fire.....	6
C. The Omans' expert focused on BMW service information bulletins as a basis for alleging that BMW of Bellevue was negligent.	6
D. After discovery and multiple vehicle inspections of the Thornes' BMW, all defendants successfully moved for summary judgment.	7
E. After dismissal of the Omans' claims against both BMW defendants on summary judgment, the Omans moved for reconsideration and asked the superior court to consider new evidence from their expert.	11
IV. SUMMARY OF ARGUMENT.....	13
V. ARGUMENT.....	15
A. The Omans assign error only to the order granting summary judgment, so that this court should not review the order denying reconsideration or any evidence submitted after the summary judgment ruling.	15
B. The standard of review here is de novo, and the record supports the dismissal of both claims against BMW of Bellevue as a matter of law.....	16
C. As a matter of law, the Omans raised no genuine factual dispute that BWM of Bellevue violated the WPLA.	18
D. As a matter of law, the Omans failed to raise a genuine factual dispute that BWM of Bellevue was negligent in servicing the Thornes' car.	21

1.	Washington courts rarely apply res ipsa loquitur, and this doctrine raises an inference only of breach, not of causation.....	21
2.	Res ipsa loquitur does not apply because complex machines like motor vehicles can wear out and break in the absence of negligence.	23
3.	Res ipsa loquitur does not apply because BMW of Bellevue did not have actual or constructive exclusive control over the Thornes' vehicle.....	26
4.	Res ipsa loquitur does not apply because the Omans spoliated the evidence needed to show that they did not contribute to the incident.	27
E.	The Omans have not raised a genuine issue of material fact that BMW of Bellevue proximately caused this fire.	28
1.	At summary judgment, the Omans failed to present evidence that BMW of Bellevue more likely than not proximately caused this fire.....	30
2.	Mr. Newbery's revised declaration on reconsideration still did not opine that BMW of Bellevue proximately caused the fire.	33
VI.	CONCLUSION	35

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Federal

Irwin v. United States, 236 F.2d 774, 775 (2d Cir. 1956)23

State

Adams v. W. Host, Inc., 55 Wn. App. 601, 779 P.2d 281 (1989).....25

Anderson Hay & Grain Co., Inc. v. United Dominion, 119 Wn. App. 249,
76 P.3d 1205, *rev. denied* 151 Wn. 2d 1016, 88 P.3d 964 (2003) ..19, 20

Andrews v. Burke, 55 Wn. App. 622, 779 P.2d 740, *rev. denied*, 113
Wn.2d 1024, 782 P.2d 1070 (1989)24

Berschauer-Phillips Const. Co. v. Seattle Sch. Dist. No. 1, 124 Wn. 2d
816, 881 P.2d 986 (1994)19

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997) ...17

Cambro Co. v. Snook, 43 Wn.2d 609, 262 P.2d 767 (1953)24

CHD, Inc. v. Taggart, 153 Wn. App. 94, 220 P.3d 229 (2009)15

Coppernoll v. Reed, 155 Wn.2d 290, 119 P.3d 318 (2005).....17

Curtis v. Lein, 169 Wn.2d 884, 239 P.3d 1078 (2010).....17, 21, 22, 23

Daugert v. Pappas, 104 Wn.2d 254, 704 P.2d 600 (1985)28

Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 819 P.2d 370 (1991)....29

Ferrin v. Donnellfeld, 74 Wn.2d 283, 444 P.2d 701 (1968).....21

Gardner v. Seymour, 27 Wn.2d 802, 180 P.2d 564 (1947)22, 29

Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609,
P.3d 579, *rev. denied* 142 Wn.2d 1010, 16 P.3d 1263 (2000)15

Graham v. Concord Const. Inc., 100 Wn. App 851, 999 P.2d 1264
(2000)19

Green v. Normandy Park, 137 Wn. App. 665, 151 P.3d 1038 (2007),
rev. denied, 163 Wn.2d 1003, 180 P.3d 783 (2008).....16

Henderson v. Tyrrell, 80 Wn. App. 592, 910 P.2d 522 (1996)27

Homeworks Const., Inc. v. Wells, 133 Wn. App. 892, 138 P.3d 654
(2006)27

<i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004).....	32, 34
<i>Kristjanson v. City of Seattle</i> , 25 Wn. App. 324, 606 P.2d 283 (1980)	30, 31
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975)	28
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372, 972 P.2d 475 (1999)	21
<i>McKenna v. Harrison Mem'l Hosp.</i> , 92 Wn. App. 119, 960 P.2d 486 (1998)	19
<i>McKinney v. Frodsham</i> , 57 Wn.2d 126, 356 P.2d 100 (1960).....	22
<i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001)	28, 29
<i>Morgan v. Kingen</i> , 166 Wn.2d 526, 210 P.3d 995 (2009)	17
<i>Pac. Nw. Shooting Park Ass'n v. City of Sequim</i> , 158 Wn.2d 342, 144 P.3d 276 (2006)	16, 17
<i>Pacheco v. Ames</i> , 149 Wn.2d 431, 69 P.3d 324 (2003)	24
<i>Pier 67, Inc. v. King County</i> , 89 Wn.2d 379, 573 P.2d 2 (1977)	27
<i>Pratt v. Thomas.</i> , 80 Wn.2d 117, 491 P.2d 1285 (1971).....	21
<i>Prentice Packing & Storage Co. v. United Pac. Ins. Co.</i> , 5 Wn.2d 144, 106 P.2d 314 (1940)	29
<i>Queen City Farms v. Cent. Nat. Ins. Co.</i> , 126 Wn.2d 50, 882 P.2d 703 (1994)	29
<i>Robinson v. Cascade Hardwoods, Inc.</i> , 117 Wn. App. 552, 72 P.3d 244 (2003)	21, 23
<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	28
<i>Ruffer v. St. Cabrini Hosp. of Seattle</i> , 56 Wn. App. 625, 784 P.2d 1288, <i>rev. denied</i> , 114 Wn.2d 1023 (1990).....	28
<i>Rutter v. Estate of Rutter</i> , 59 Wn.2d 781, 370 P.2d 862 (1962).....	15
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn. App. 170, 817 P.2d 861 (1991), <i>rev.</i> <i>denied</i> , 118 Wn.2d. 1010 (1992).....	29
<i>Sanchez v. Haddix</i> , 95 Wn.2d 593, 627 P.2d 1312 (1981).....	28, 29
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998)	21
<i>Steel v. Johnson</i> , 9 Wn.2d 347, 115 P.2d 145 (1941).....	32

<i>Tuttle v. Allstate Ins. Co.</i> , 134 Wn. App. 120, 138 P.3d 1107 (2006).....	23
<i>Voorde Porte v. Evans</i> , 66 Wn. App. 358, 832 P.2d 105 (1992)	24
<i>Whitehouse v. Bryand Lumber & Shingle Co.</i> , 50 Wash. 563, 97 P. 752 (1908)	19
<i>Zukowsky v. Brown</i> , 79 Wn.2d 586, 488 P.2d 269 (1971)	24, 26

Statutes

RCW 7.72.010(1)	18
RCW 7.72.010(1)(b).....	19
RCW 7.72.010(2)	18
RCW 7.72.010(3)	18
RCW 7.72.020	18
CR 56(c)	16
CR 56(f).....	34
ER 705	32

Rules and Regulations

RAP 2.5(a).....	20
RAP 9.12	16
RAP 10.3(a)(4)	15
RAP 10.3(g).....	15
RAP 12.1(a).....	15

Other Authority

16 DeWolf & Allen, <i>Wash. Prac.: Tort Law & Prac.</i> § 1.53 (3d ed. 2011)	22
65A C.J.S. Negligence, Fires § 907 (2011 ed.)	24

I. INTRODUCTION

On November 4, 2009, Gina and Sean Thorne's automobile, a 2007 BMW 335xi, unexpectedly caught fire while parked at the South Bellevue Community Center. In the adjacent parking space, Appellant Anne Oman had parked her and her husband's 2010 Pontiac Vibe, which also caught fire. Both owners were inside the Community Center, and no one was injured. After extinguishing the fire and conducting an investigation, the Bellevue Fire Department could not conclude what started the fire, or why or how it occurred.

The Omans sued the Thornes and Respondent BMW of North America, LLC for damage to the Omans' Pontiac. The Omans later amended their Complaint to include Respondent Northwest Financial Group, Inc., a/k/a BMW of Bellevue ("BMW of Bellevue"), based on the fact that **nine days before the fire**, Mr. Thorne had brought his BMW in for diagnostic service, which BMW of Bellevue was unable to provide. The Omans pleaded two causes of action against BMW of Bellevue: negligence by *res ipsa loquitur* and violation of the Washington Product Liability Act ("WPLA"), chapter 7.72 RCW.

After conducting discovery, BMW of Bellevue moved for summary judgment, arguing that (1) it did not manufacture, design, or sell the Thornes' vehicle, (2) it had no exclusive control over that vehicle for

over a week, and (3) the parties' experts were unable to determine conclusively the fire's origin or cause after a total of 10 vehicle inspections. BMW of North America also moved for summary judgment seeking dismissal of all claims against that company based on similar arguments.

The Omans filed an expert declaration proposing alternative possibilities for why the fire started, but offering no firm conclusions. No physical evidence corroborated their expert's theories.

The Honorable Susan J. Craighead granted these summary judgment motions, explaining at oral argument that, even with all reasonable inferences in favor of the Omans, they lacked sufficient proof of causation. The Omans unsuccessfully moved for reconsideration and filed a revised expert declaration. The Thornes also successfully moved for summary judgment of all claims against them.

The Omans appeal the superior court's order granting summary judgment of dismissal in favor of BMW of Bellevue and BMW of North America.

II. ASSIGNMENTS OF ERROR

Assignments of Error

BMW of Bellevue assigns no error to the superior court's April 8, 2011, orders granting summary judgment, which properly dismissed all of

the Omans' claims against BMW of Bellevue and BMW of North America.

Issues Pertaining to Assignment of Error

BMW of Bellevue disagrees with the Omans' statement of issues. BMW of Bellevue believes that that this appeal presents a single issue related to this party, which is more properly stated as follows:

Whether the superior court properly dismissed the Omans' claims against BMW of Bellevue on summary judgment, where:

1. The Omans have no evidence that BMW of Bellevue was a manufacturer or product seller for the Thornes' car, so the Omans cannot prove their product-liability claim as a matter of law;
2. The Omans have no evidence that BMW of Bellevue had actual or constructive exclusive control over the Thornes' vehicle where the company could not diagnose anything wrong and had no contact with it for nine days, so the Omans cannot prove their claim of *res ipsa loquitur* as a matter of law; and
3. Without committing improper speculation, the superior court could not reasonably infer that BMW of Bellevue somehow caused this fire based on the Omans' expert's opinion that one of three possible problems with the Thornes' car engine could have ignited the vehicles.

III. STATEMENT OF THE CASE

A. Nine days before the fire, BMW of Bellevue was unable to service the Thornes' vehicle.

On October 26, 2009, Mr. Thorne brought his 2007 BMW 335xi to BMW of Bellevue, complaining that the car was running rough and that the "service engine soon" light was illuminated. Clerk's Papers (CP) 130, 143. The BMW mechanics attempted to perform a diagnostic check on the car but could not do so because their computer had not yet received an automatic software update. CP 122, 130. Without this software, the BMW mechanics could not diagnose any problems with the car and recommended that Mr. Thorne return in a week. CP 130. Mr. Thorne did not complain that there was a fuel leak or gasoline smell, and none was recorded. CP 130, 564-65. When he left, BMW of Bellevue placed no restrictions on his use of the vehicle. CP 130.

After that visit, BMW of Bellevue had no contact with the Thornes' vehicle. CP 248. The Thornes had leased their car new in 2007 from a dealership in Colorado. CP 123, 150.

Nine days later, on the morning of November 4, 2009, the Thornes' car caught fire while parked at the South Bellevue Community Center located at 14509 SE Newport Way in Bellevue, Washington. CP 91, 109. In the adjacent parking space, Ms. Oman had parked her and her husband's 2010 Pontiac Vibe, which also caught fire. CP 91, 110.

At approximately 6:55 a.m., the Bellevue Fire Department was called about the fire, and they arrived more than five minutes later. CP 109, 111. On arrival, firefighters found both vehicles “fully involved” in the fire and spent several more minutes extinguishing them. CP 110, 113. After conducting an investigation, the fire department could not conclude what started the fire, or why or how it occurred. CP 109-13. No one was injured in this incident. *Id.*

On January 25, 2010, the Omans sued the Thornes and Respondent BMW of North America in King County Superior Court for damaging their car. CP 3-7. On June 3, 2010, the Omans amended their Complaint to add claims against Defendant-Respondent BMW of Bellevue, based on the fact that nine days earlier the Thornes brought in their car for diagnostic service, which BMW of Bellevue was unable to provide. CP 90-95, 130. The Omans pleaded two claims against BMW of Bellevue: negligence by res ipsa loquitur and violation of the WPLA. CP 90-95.

The Omans alleged that BMW of Bellevue negligently serviced the Thornes’ vehicle, CP 93-94, 401, and premised that allegation on the assumption that the Thornes’ BMW ignited first and that the flames spread to the Omans’ Pontiac. CP 91.

B. The Omans' Pontiac was destroyed before the parties' experts could inspect it and determine whether it caused the fire.

Shortly after the fire in November 2009, the Omans' counsel contacted Farmers Insurance Company of Washington ("Farmers") to discuss the case and the disposition of the Omans' vehicle. CP 297-98, 456, 524. On December 22, 2009, Ms. Oman released her interest in her vehicle to Farmers. CP 294, 296. On January 28, 2010, Farmers sold the car for salvage. CP 294. The car was destroyed **more than four months before the Omans sued BMW of Bellevue** in June 2010. CP 95, 294. At no time did the Omans instruct Farmers to preserve the vehicle. CP 298. Nor did they inform the defendants that the vehicle was to be destroyed or provide an opportunity to inspect it. CP 273-74, 298.

C. The Omans' expert focused on BMW service information bulletins as a basis for alleging that BMW of Bellevue was negligent.

The Omans hired independent fire expert Trevor Newbery. CP 433-35. His expert opinion focused on two BMW factory service information bulletins: one that BMW of Bellevue checked in their November 2009 inspection of the Thornes' BMW, CP 130, and one that he alleges the company should have checked. CP 434-35. The first, service information bulletin SI B12 06 09, is dated July 2009, with an original date of April 2009. CP 450. This bulletin addresses misfires and

“Service Engine Soon” lamp codes when the engine is at full operating temperature. *Id.* The bulletin does not mention fire hazards. CP 450-51. The text notes that “a number of mechanical reasons” can cause misfire faults. CP 450.

The second bulletin is service information bulletin SI B13 04 09. CP 435. It discusses rough running on the vehicle’s start and activation of the engine code light indicating “Service Engine Soon.” CP 453. However, this bulletin is dated March 2010, approximately four months after the incident, so BMW of Bellevue could not have reviewed it in November 2009. CP 91, 453.

D. After discovery and multiple vehicle inspections of the Thornes’ BMW, all defendants successfully moved for summary judgment.

On June 18, 2010, approximately two weeks after naming BMW of Bellevue as a defendant in the lawsuit, the Omans moved for partial summary judgment of the issue of liability. CP 90-95, 98-105. In response, BMW of Bellevue moved for a continuance under CR 56(f) to allow the parties to conduct additional discovery. CP 175-80.

In October 2010, the superior court heard argument on the Omans’ motion for partial summary judgment on liability. CP 299. The superior court denied their motion and later confirmed that it did so because further expert analysis was needed. CP 300-04; Report of Proceedings (RP)

(April 8, 2011) at 33 (“I bent over backwards to give plaintiffs an opportunity to develop the facts. . . . I wanted the experts to look at this, at this car. . . .”).

BMW of Bellevue retained Adam Farnham, a senior fire-protection engineer, as a fire expert in the case; BMW of North America retained Ryan Cram, a BMW National Technical Engineer. CP 249-50, 269-70. Both experts were unable to determine the cause of the fire. CP 250, 255, 270, 590. Because the Omans’ car had been destroyed before any inspections could occur, CP 270, 273-74, 407-08, the parties’ experts were able to inspect only the Thornes’ BMW and an exemplar Pontiac Vibe; there were a total of 10 individual inspections by experts in this case. CP 250, 269, 443.

In March 2011, BMW of Bellevue and BMW of North America moved for summary judgment. CP 305-76, 377-91. Both parties supported their motions with declarations that their experts were unable to determine a cause of the fire. CP 319-22, 373-76, 390.

The Omans responded, relying on Mr. Newbery’s declaration proposing several alternate possibilities as to causation, but offering no firm conclusions as to any of them. CP 392-409, 433-35. Unlike BMW of Bellevue, CP 175-80, the Omans did not move for additional time under CR 56(f) for their expert to secure adequate factual support. *See* CP 392-

409. His declaration referred to his expert report, which set forth only the following tentative conclusions as to causation:

2. The fire was caused by a malfunction of **one of the vehicle components** in the driver's side area of the BMW's engine compartment.

....

4. The high pressure fuel pump, the fuel injectors, and the positive battery cable at the rear driver's side of the engine compartment **are all potential causes of the fire.**

CP 448 (emphasis added).

These conclusions relied on an investigation in April 2008 by the National Highway Traffic Safety Administration (NHTSA) regarding problems with a 2007 BMW 335xi's high pressure fuel pump. CP 447. However, Mr. Newbery omitted the fact that this investigation related to complaints of vehicles stalling, not fire hazards. CP 447, 564, 572.

On April 8, 2011, the superior court heard oral argument on the summary judgment motions. CP 600. At the close of the arguments, the superior court found that the Omans failed to present proof of causation and ruled for the defendants. CP 600-06; RP (April 8, 2011) 34-35. The superior court explained its ruling as follows:

So I think that there are two basic problems with the res ipsa loquitur theory, **the lack of exclusive control** and the lack of proof that the only possible thing that could have caused this to happen was some kind of negligence.

Turning to the product liability theory, you know, for the purposes of this motion, I've assumed that the fire began in the BMW, and based on what I've read, it probably did, but that really only takes you so far. **In order to be able to identify a product defect, you have to be able to identify what the cause and the origin was.** So just because it started in the BMW doesn't necessarily mean that there was a problem with the fuel pump or a problem with the fuel injectors, or whatever it is.

And so I just – I just – **there's just no evidence that establishes that there was a product defect that caused this fire.** And the declaration of the plaintiffs' expert articulates potential causes of the fire but never really makes the jump of saying, **on a more probable than not basis** the fire caused by the fuel pump or the fuel injectors, or whatever it was, and that's really what you need to have to show – to get past summary judgment on a product liability claim.

RP (April 8, 2011) at 34-35 (emphasis added).

The superior court then delivered its specific ruling as the Omans' claims against BMW of Bellevue:

Now, as to BMW of Bellevue, I think **the same problems exist with the res ipsa loquitur theory as to BMW of Bellevue**, and I'm not going to rearticulate those. I think everyone understands that **the Product Liability Act does not apply to servicing.** Plaintiff acknowledges that straight negligence was probably the best theory as to BMW of Bellevue, and BMW of Bellevue to its credit has sort of analyzed the case along those lines as well. But we're left with the same analytical problem that I've just articulated with respect to the plaintiffs' expert.

Even if we assume that the service bulletin was in existence, and even if we assume that BMW of Bellevue should have consulted that service bulletin, there's no expert testimony to show that the problems identified in that service bulletin could lead to the fire, could have led to

the fire, and there was certainly no more probably than not kind of testimony here. So as much as I'm very sorry about what happened to plaintiffs' vehicle, I am going to grant both motions for summary judgment.

RP (April 8, 2011) at 35-36 (emphasis added). The superior court concluded that the Omans: (1) did not raise a genuine issue of material fact that BMW of Bellevue had exclusive control over the Thornes' vehicle, (2) could not prove product liability because the WPLA does not apply to servicing vehicles, and (3) did not raise a genuine issue of material fact that BMW of Bellevue proximately caused the fire. *Id.*

E. After dismissal of the Omans' claims against both BMW defendants on summary judgment, the Omans moved for reconsideration and asked the superior court to consider new evidence from their expert.

On April 18, 2011, the Omans moved for reconsideration, asking the superior court to consider a revised declaration from Mr. Newbery dated April 17, 2011. CP 607-08, 620-23. In his new declaration, he reiterated his same basic opinions but couched them in "more probable than not" language:

5. More probably than not, a malfunction of **one of the vehicle's components** in the driver's side area of the BMW's engine compartment caused the fire.
6. More probably than not, the specific malfunction that caused the fire was **one or more of the following**:

- a. Fuel leaking from malfunctioning fuel injectors being ignited by the hot exhaust surface at the back of the engine.
- b. Fuel leaking from a malfunctioning high pressure fuel pump being ignited by the hot exhaust surface at the back of an engine.
- c. The positive battery cable arcing against a ground or melting and arcing due to a defect in the cable.

CP 621-22 (emphasis added). He did not point to any corroborating physical evidence of a fuel leak or electrical arcing. *Id.*

Mr. Newbery's revised declaration also expanded on the written service bulletins and NHTSA notification but nevertheless admitted that he needed additional information to reach a conclusion:

7. The fuel injector failure identified by service bulletin S1 B13 04 09 **could have** caused this fire. The bulletin does not contain a detailed description of the failure. **It is necessary to obtain more information from BMW** about whether the fuel injector failures referenced in this bulletin can cause an external fuel leak.
8. The high pressure fuel pump identified by recall 10E-A02 **could have** caused this fire. The recall does not contain a detailed description of the failure. **It is necessary to obtain more information from BMW** about whether the high pressure fuel pump failures referenced in this recall can cause an external fuel leak.

CP 622 (emphasis added). But these admissions are telling. He cannot opine on a more probable than not basis that these possibilities **did** cause

the fire because he admittedly needs additional information to know whether these possible problems **could** cause an external fuel leak. *Id.*

The superior court denied the Omans' motion for reconsideration. CP 624-25. Ultimately, the Thornes also successfully moved for summary judgment of all of the Omans' claims against them. CP 626-27.

Abandoning their claims against the Thornes, the Omans now appeal the superior court's orders granting summary judgment in favor of BMW of Bellevue and BMW of North America. App. Br. at 2.

IV. SUMMARY OF ARGUMENT

The Omans assigned error only to the superior court's orders granting summary judgment. They did not assign error to the superior court's denial of their motion for reconsideration. This court therefore should not review the superior court's order denying reconsideration or consider any new evidence that they submitted after the summary judgment rulings.

This court should affirm the superior court's summary judgment of dismissal of BMW of Bellevue for the following reasons.

First, the Omans appear to abandon their product-liability claim against BMW of Bellevue. In any event, the company was not a manufacturer or product seller for the Thornes' car, so as a matter of law the Omans cannot prove their claims.

Second, the Omans cannot raise a genuine issue of material fact regarding their negligence claim as a matter of law. Under Washington law, they are not entitled to the inference of *res ipsa loquitur* because they cannot prove which vehicle was the instrumentality of the fire, especially following the sale and destruction of their Pontiac approximately four months before suing BMW of Bellevue. Furthermore, the Omans cannot prove that BMW of Bellevue had actual or constructive exclusive control over the Thornes' BMW where the company was unable to diagnose any problems without the proper software and then had no contact with the vehicle for nine days before the fire.

Finally, all of the Omans' claims fail as a matter of law because they cannot raise a genuine issue of material fact that BMW of Bellevue proximately caused this fire. The superior court properly decided that it could not reasonably infer from the Omans' expert's declaration that BMW of Bellevue caused this fire based on his vague opinion that one of three possible problems with the Thornes' car engine could have ignited the vehicles. Even his revised declaration submitted after summary judgment fails to opine as to a particular cause of the fire.

V. ARGUMENT

- A. The Omans assign error only to the order granting summary judgment, so that this court should not review the order denying reconsideration or any evidence submitted after the summary judgment ruling.**

On this appeal, the Omans argue that the superior court erred not only in granting summary judgment but also in denying their motion for reconsideration. App. Br. at 31-33. This is improper, and this court should ignore it. This court does not consider arguments unless a party supports them with assignments of error and sets forth issues pertaining thereto. RAP 10.3(a)(4); RAP 10.3(g); RAP 12.1(a); *Rutter v. Estate of Rutter*, 59 Wn.2d 781, 787-88, 370 P.2d 862 (1962); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 620, 1 P.3d 579, *rev. denied* 142 Wn.2d 1010, 16 P.3d 1263 (2000). Here, the Omans assigned error only to the April 8, 2011, summary judgment order. See App. Br. at 2; CP 604-06. The Omans correctly argue the de novo standard for reviewing a ruling on summary judgment. App. Br. at 11-12. However, they fail to discuss that this court reviews a ruling on reconsideration only for a manifest abuse of discretion. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 100, 220 P.3d 229 (2009). Because the Omans fail to assign error to the superior court's April 26, 2011, order denying reconsideration and fail to brief its standard of review, this court should not review that ruling. CP 624-25; *Rutter*, 59 Wn.2d at 787-88.

The Omans also improperly ask this court to consider the April 17, 2011, declaration of their expert Mr. Newbery, which they submitted in support of their motion for reconsideration. See CP 620-23; App. Br. at 31. This evidence is not properly before this court. “On review of an order granting or denying a motion for summary judgment[,] the appellate court will consider only evidence and issues called to the attention of the superior court.” RAP 9.12. “It is the appellate court’s task to review a ruling on a motion for summary judgment based solely on the record before the trial court.” *Green v. Normandy Park*, 137 Wn. App. 665, 678-79, 151 P.3d 1038 (2007), *rev. denied*, 163 Wn.2d 1003, 180 P.3d 783 (2008). Here, the superior court did not, and could not, consider this declaration at the summary judgment hearing on April 8, 2011. CP 600-06. As such, this court should not consider this evidence on appeal.

B. The standard of review here is de novo, and the record supports the dismissal of both claims against BMW of Bellevue as a matter of law.

This court reviews de novo a superior court’s order granting summary judgment. *Pac. Nw. Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 350-51, 144 P.3d 276 (2006). Summary judgment is proper if the pleadings, depositions, and other documents show that “there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). Factual disputes must be

material to preclude summary judgment, and a “material fact” is one on which the outcome of the litigation depends. *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). This court construes evidence in the light most favorable to the nonmoving party. *See Pac. Nw. Shooting Park Ass’n*, 158 Wn.2d at 350.

If the moving party shows the absence of a genuine issue of material fact, then the burden shifts to the nonmoving party to set forth specific facts that would raise a genuine issue of material fact for trial. *Id.* at 350-51. If the nonmoving party fails to show an issue of material fact as to any element of a claim, then summary judgment on that claim is appropriate. *Id.* at 351.

Whether an inference of *res ipsa loquitur* inference applies is a legal question that this court determines as a matter of law. *See Curtis v. Lein*, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010). Finally, Washington courts may affirm a superior court’s ruling on any theory or basis that the record supports. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997).

C. As a matter of law, the Omans raised no genuine factual dispute that BWM of Bellevue violated the WPLA.

The Omans appear to abandon on appeal their WPLA claim against BMW of Bellevue:

During oral argument ... counsel clarified that the correct claim against BMW of Bellevue is common law negligence for breaching its duty to properly repair the Thornes' BMW, **not a WPLA claim against BMW of Bellevue** as the product seller.

App. Br. at 10 n.2 (emphasis added).

Even if the Omans were to pursue a WPLA claim against BMW of Bellevue, however, that claim still fails as a matter of law. The WPLA creates potential liability for manufacturers and product sellers for damage caused by their products. RCW 7.72.020. But the WPLA narrowly defines these terms. A “manufacturer” is an entity that “designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale.” RCW 7.72.010(2). A “product seller,” in turn, is “any person or entity that is engaged in the business of selling products,” which are “any object[s] possessing intrinsic value, capable of delivery either as an assembled whole or component part.” RCW 7.72.010(1); RCW 7.72.010(3). The Act specifically excludes from the definition of “product seller” any “**provider of professional services** who utilizes or sells products within the legally authorized scope of the professional practice of the provider.”

RCW 7.72.010(1)(b) (emphasis added). The Omans could have sued the manufacturer of the Thornes' BMW, but their attorney admitted at oral argument that they simply "just chose not to." RP (April 8, 2011) 23.

Though the Omans sued BMW of Bellevue under the WPLA, they cannot make a prima facie case that BMW of Bellevue even qualifies as a manufacturer or product seller. In fact, the Omans concede that BMW of Bellevue was not the manufacturer or product seller – the Thornes' BMW was made in Germany and leased in Colorado. App. Br. at 5.

The Omans allege that BMW of Bellevue is nevertheless liable under the WPLA for negligently servicing the Thornes' automobile. CP 401. But "providers of professional services" are not product sellers. RCW 7.72.010(1)(b). Automobile repairs or servicing are not products under the WPLA. *Anderson Hay & Grain Co., Inc. v. United Dominion*, 119 Wn. App. 249, 260, 76 P.3d 1205, *rev. denied* 151 Wn. 2d 1016, 88 P.3d 964 (2003) (building contractor not product seller under WPLA); *see also Berschauer-Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn. 2d 816, 822, 881 P.2d 986 (1994) (architectural inspection service provider not product seller under WPLA); *Graham v. Concord Const. Inc.*, 100 Wn. App. 851, 856, 999 P.2d 1264 (2000) (engineering services provider not product seller under WPLA); *McKenna v. Harrison Mem'l Hosp.*, 92 Wash.App. 119, 121, 960 P.2d 486 (1998) (hospital that

supplied allegedly defective surgical device not product seller under WPLA). “Courts have distinguished between product sellers and providers of professional services by looking at the contract to determine if its primary purpose was to provide a service or product.” *Anderson Hay & Grain Co., Inc.*, 119 Wn. App. at 260.

It is beyond dispute that Thornes’ service contract with BMW of Bellevue concerned efforts to diagnose the car’s rough running. CP 130. Besides, the Omans repeatedly gloss over the fact that BMW of Bellevue was missing the software required to diagnose any problem with the car and requested that Mr. Thorne return at a later date. *Id.*

The Omans direct a new breach-of-warranty claim under the WPLA at BMW of North America. *See* App. Br. at 21, CP 92-93. They do not allege breach of warranty against BMW of Bellevue. Even if they did, they improperly raise such new claims for the first time on appeal. This court therefore must ignore such new claims. RAP 2.5(a).

Because the Omans concede that BMW of Bellevue is not a product seller, no other grounds exist under the WPLA for them to claim product liability against BMW of Bellevue. Accordingly, this court should affirm the superior court’s grant of summary judgment as to their product-liability claim.

D. As a matter of law, the Omans failed to raise a genuine factual dispute that BMW of Bellevue was negligent in servicing the Thornes' car.

To prove negligence, the Omans must establish the existence of a legal duty, a breach of this duty, proximate causation, and injury. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998). Even if breach is clearly established, a defendant is not liable unless its negligence proximately caused the incident. *Ferrin v. Donneldefeld*, 74 Wn.2d 283, 285, 444 P.2d 701 (1968); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377-78, 972 P.2d 475 (1999) (citing *Pratt v. Thomas*, 80 Wn.2d 117, 119, 491 P.2d 1285 (1971)).

1. Washington courts rarely apply res ipsa loquitur, and this doctrine raises an inference only of breach, not of causation.

The Omans assert their negligence claim against BMW of Bellevue under a theory of res ipsa loquitur. CP 93-94. This doctrine is “ordinarily sparingly applied[] in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.” *Curtis*, 169 Wn.2d at 889 (internal quotation marks omitted) (quoting *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997)). The plaintiff bears the “ultimate burden of persuading the court by a preponderance of the evidence that negligence has occurred.” *Robinson v. Cascade Hardwoods, Inc.*, 117 Wn. App. 552, 563, 72 P.3d 244 (2003).

“When res ipsa loquitur applies, it provides an inference as to the defendant’s **breach of duty.**” *Curtis*, 169 Wn.2d at 892 (emphasis added). Even with an inference of breach, however, a plaintiff must still demonstrate evidence of proximate causation: “If the evidence shows that the event could easily have occurred as a result of more than one cause, res ipsa is not available as a means of proving negligence.” 16 DeWolf & Allen, *Wash. Prac.: Tort Law & Prac.* § 1.53 (3d ed. 2011); see, e.g., *McKinney v. Frodsham*, 57 Wn.2d 126, 135, 356 P.2d 100 (1960) (evidence that a third person’s negligence caused the injury defeats claim based on res ipsa loquitur); *Gardner v. Seymour*, 27 Wn.2d 802, 811, 180 P.2d 564 (1947) (res ipsa inference was inappropriate where decedent had knowledge of elevator shaft and defendant’s control was not exclusive). “The mere occurrence of an accident and an injury does not necessarily infer negligence.” *Tinder*, 84 Wn. App. at 792-93; see 16 DeWolf & Allen, *Wash. Prac.: Tort Law & Prac.* § 1.53 (3d ed. 2011) (“[R]es ipsa loquitur cannot be invoked from the mere fact that an injury occurred.”).

The elements of this doctrine are as follows:

A plaintiff may rely upon res ipsa loquitur’s inference of negligence if (1) the accident or occurrence that caused the plaintiff’s injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff’s injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence.

Curtis, 169 Wn.2d at 891; *see also Irwin v. United States*, 236 F.2d 774, 775 (2d Cir. 1956) (res ipsa is “inapplicable where the defendant does not have control of the agency causing the accident”). If the moving defendant does not have “exclusive control” and plaintiffs “cannot offer a complete explanation, it would work injustice upon that defendant to presume negligence on their part and thus demand of that defendant an explanation of that defendant when the facts indicate that such is beyond their ability.” *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 130, 138 P.3d 1107 (2006). That is the impossible situation in which the Omans put BMW of Bellevue in this lawsuit by alleging res ipsa.

2. Res ipsa loquitur does not apply because complex machines like motor vehicles can wear out and break in the absence of negligence.

For the superior court to permit res ipsa loquitur in an action, the context, manner, and circumstances of the damage must be the kind that does not ordinarily happen absent negligence. *Robinson*, 117 Wn. App. at 565-66; *see Curtis*, 169 Wn.2d at 891. Washington recognizes three situations that fulfill this requirement:

“(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3)

when proof by experts in an esoteric field creates an inference that negligence caused the injuries.”

Pacheco v. Ames, 149 Wn.2d 431, 438-39, 69 P.3d 324 (2003) (quoting *Zukowsky*, 79 Wn.2d at 595). The fact that damage “rarely occurs is not sufficient, standing alone, to invoke res ipsa loquitur.” *Andrews v. Burke*, 55 Wn. App. 622, 628, 779 P.2d 740, rev. denied, 113 Wn.2d 1024, 782 P.2d 1070 (1989).

The facts of this case do not fit any of these three situations. As for the first prong, this case is not one involving palpable human error. The Omans’ experts’ inability to decide what went wrong, or what BMW of Bellevue should have fixed speaks directly to this fact. CP 8.

As for the second prong, “[n]ormal experience indicates that a fire could result **even in the absence of negligence.**” *Voorde Porte v. Evans*, 66 Wn. App. 358, 365, 832 P.2d 105 (1992) (emphasis added); see also *Cambro Co. v. Snook*, 43 Wn.2d 609, 617, 262 P.2d 767 (1953). “[T]he cause of a fire cannot be established by the res ipsa loquitur doctrine, and fires of unknown origin are not the type of accident to which the doctrine of res ipsa loquitur applies.” 65A C.J.S. Negligence, *Fires* § 907 (2011 ed.). This makes intuitive sense. Most people have had the unpleasant experience of machines failing or breaking down. Though fewer people have seen a car fire, most drivers have dealt with situations where his or

her car quits unexpectedly or begins smoking under the hood. This is not a case where negligence alone could have caused such a fire. The Omans' simplistic assertions that cars do not usually catch fire or that gasoline is highly combustible, App. Br. at 27, while superficially plausible, ignore the basic fact that "[m]echanical devices . . . can wear out or break down without negligence." *Tinder*, 84 Wn. App. at 793; see *Adams v. W. Host, Inc.*, 55 Wn. App. 601, 606, 779 P.2d 281 (1989) (malfunctioning elevator not so unusual that it only happens in the absence of negligence). It is precisely this non-negligent failure that can lead to possible fire in machines with gasoline tanks.

Third, this is not the type of case requiring proof by experts in an esoteric field. See, e.g., *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wn.2d 12, 19-20, 499 P.2d 1 (1972). The Washington Supreme Court has set the bar much higher. *Id.* For example, in *ZeBarth*, the Washington Supreme Court ruled that *res ipsa loquitur* was appropriate in a case alleging that radiation therapy caused paralysis a year later in a patient being treated for Hodgkin's disease, where "highly specialized medical doctors," at least one of whom was a radiotherapist "of international renown," were needed to opine on questions of "exceptional complexity and scientific sophistication." *Id.* at 13, 19, 22. Unlike *ZeBarth*, this case requires three professional, though-readily available, engineers to determine how the fuel

in these cars ignited, and whether BMW of Bellevue or BMW of North America could have proximately caused that to occur. CP 15.

3. Res ipsa loquitur does not apply because BMW of Bellevue did not have actual or constructive exclusive control over the Thornes' vehicle.

Though plaintiffs usually satisfy the “exclusive control” element with evidence of physical control, courts have allowed this doctrine in cases where plaintiffs submitted proof that defendant had “the responsibility for the proper and efficient functioning of the instrumentality that caused the injury.” *Tinder*, 84 Wn. App. at 795. Constructive exclusive control of the instrumentality still requires that “the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it.” *Zukowsky v. Brown*, 79 Wn.2d 586, 595, 488 P.2d 269 (1971).

Here, the Omans elected to plead their negligence claim under the theory of res ipsa loquitur to avoid their burden of proving any specific breach of a duty that BMW of Bellevue owed to the Thornes, a duty which the Omans allege ultimately ran to them. CP 90. But the Omans concede that BMW of Bellevue had no contact with the vehicle for the nine days before the incident. CP 8-9. Rather, the Thornes had exclusive possession and control of the vehicle during that time. CP 257. The Omans offer no reason why BMW of Bellevue should have placed any restrictions on the

Thornes' driving, and BMW of Bellevue did not do so. BMW of Bellevue took no responsibility for the Thorne vehicle's performance. CP 259. Given these circumstances, no facts exist to show that BMW of Bellevue had taken the responsibility such that they should be deemed to be in constructive exclusive control of this vehicle.

4. Res ipsa loquitur does not apply because the Omans spoliated the evidence needed to show that they did not contribute to the incident.

In deciding whether to apply a favorable inference or rebuttable presumption as a sanction in spoliation cases, the superior court considers the potential importance or relevance of the missing evidence and the culpability or fault of the adverse party. *Henderson v. Tyrrell*, 80 Wn. App. 592, 609, 910 P.2d 522 (1996). Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. *Id.* A party may be responsible for spoliation without acting in bad faith. *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006). Where a party controls evidence and fails to preserve it without satisfactory explanation, the only inference the fact-finder may draw is that such evidence would be unfavorable to that party. *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

Here, the experts of both defendant-BMW entities opined that they could not rule out that the Omans' Pontiac first caught fire without

investigating that now-destroyed vehicle. CP 384, 559. Here, this court should hold that *res ipsa loquitur* does not apply to in this case and affirm the superior court's dismissal of the Omans' negligence claim.

E. The Omans have not raised a genuine issue of material fact that BMW of Bellevue proximately caused this fire.

To survive summary judgment, a plaintiff must present evidence of proximate cause based on more than mere conjecture or speculation. *See, e.g., Ruff v. King County*, 125 Wn.2d 697, 706-07, 887 P.2d 886 (1995); *Daugert v. Pappas*, 104 Wn.2d 254, 260, 704 P.2d 600 (1985); *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001); *Ruffer v. St. Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 628, 784 P.2d 1288, *rev. denied*, 114 Wn.2d 1023 (1990). “[W]here the facts are undisputed and do not admit of reasonable differences of opinion, the question of proximate cause is one of law subject to review by this court.” *LaPlante v. State*, 85 Wn.2d 154, 159-60, 531 P.2d 299 (1975). A factual determination may not be based on conjecture. *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981); *Ruffer*, 56 Wn. App. at 628.

[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred. . . . “[N]o legitimate inference can be drawn that an accident happened in a certain way by **simply showing that it might have happened in that way**, and without further

showing that it could not reasonably have happened in any other way.”

Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947) (emphasis added and citations omitted) (quoting *Whitehouse v. Bryant Lumber & Shingle Co.*, 50 Wash. 563, 565, 97 P. 752 (1908)); see also *Sanchez*, 95 Wn.2d at 599. An expert must opine on a “more probable than not” basis as to the damage’s root cause. See, e.g., *Miller*, 109 Wn. App. at 148-50.

Courts may infer a consequence from an established circumstance but cannot infer a circumstance when no more than a possibility is shown. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940). “Presumptions may not be pyramided on presumptions, nor inference upon inference.” *Id.*

The opinion of an expert which is only a conclusion or which is based only on assumptions, is not evidence which satisfies summary judgment standards because it is not evidence which permits a case to go to a jury. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787, 819 P.2d 370 (1991); *Miller*, 109 Wn. App. at 148; *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), *rev. denied*, 118 Wn.2d. 1010 (1992). Where there is no basis for the expert opinion other than theoretical speculation, expert testimony should be excluded. *Queen City Farms v. Cent. Nat. Ins. Co.*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994).

For example, in *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 324-25, 606 P.2d 283 (1980), a driver in a automobile collision sued the City of Seattle, alleging that the collision's cause was the City's failure to maintain, properly design, and properly control use of the road. Plaintiff's expert opined that additional stopping sight distance could have prevented the accident. *Id.* at 326. The superior court granted summary judgment of dismissal to the City because that testimony was speculative. *Id.* On appeal, this court affirmed, because "recovery cannot be based on what might have happened," and that it would be mere guesswork to say that the City's maintenance proximately caused the collision. *Id.* at 326-27. This court explained that the expert opinion can only be characterized as speculation or conjecture because it amounted to one that the plaintiff "might have reacted in a way which could have avoided the collision and that [the other driver] might have heeded warning signs to drive more carefully." *Id.* at 326.

1. At summary judgment, the Omans failed to present evidence that BMW of Bellevue more likely than not proximately caused this fire.

To survive BMW of Bellevue's motion, the Omans needed to respond with more than mere argument, conclusory allegations, speculative statements, or assertions that BMW proximately caused the fire. Mr. Newbery offered only possible explanations as to the cause,

opining that “the fire was caused by a malfunction of **one of the vehicle components** in the driver’s side area of the BMW’s engine compartment.” CP 434 (emphasis added). The closest he came to a substantive conclusion was that “[t]he high pressure fuel pump, the fuel injectors, and the positive battery cable at the rear driver’s side of the engine compartment **are all potential causes of the fire.**” CP 448 (emphasis added). But this does nothing more than speculate what “might” have failed, without explaining how those alternatives caused the fire. *See Kristjanson*, 25 Wn. App. at 326. He failed to base his tentative conclusions on actual facts; nor does not identify whether or how each component failed or how that failure caused this vehicle fire. CP 433-35. He also failed to make these ambiguous conclusions on a “more probable than not” basis. CP 433-35, 448.

Mr. Newbery also sought to interpret BMW’s service bulletins but completely failed to demonstrate their relevance to this case. CP 434-35. His opinion that BMW of Bellevue should have relied on SI B13 04 09, CP 435, was nonsensical because it was issued approximately four months **after** Mr. Thorne brought in the car in November 2009. CP 453, 564-65. Similarly, Mr. Newbery’s opinion that BMW of Bellevue improperly relied on service information bulletin SI B12 06 09, CP 434, contravenes the undisputed fact that BMW of Bellevue’s mechanics read that

suggested bulletin, found it inapplicable to this situation, and asked Mr. Thorne to return a week later after the software update. CP 130, 259. BMW of Bellevue performed no repairs to this vehicle at that time. CP 130. Even if the Omans were to argue abruptly that BMW **should have relied** on that bulletin instead, it makes no mention of fire hazards. CP 450-51. Rather, the bulletin simply addresses misfires and “Service Engine Soon” lamp codes when the engine is at full operating temperature. CP 450.

The Omans also relied on the Bellevue Fire Department’s reports concluding that the fire started in the Thornes’ BMW. CP 285-91, 417-22. But those reports are based on inadmissible hearsay evidence that cannot defeat summary judgment. *Id.* “Although public records are a statutory exception to the hearsay rule, the record cannot be based on ‘conclusions involving the exercise of judgment or discretion or the expression of [an] opinion.’” *In re Estate of Jones*, 152 Wn.2d 1, 13 n.5, 93 P.3d 147 (2004) (quoting *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)); see ER 705. In any event, these reports do not touch on causation and do not raise a genuine issue of material fact. CP 132.

In sum, the Omans’ submissions, even viewed in a light most favorable to them, amount to nothing more than speculation and conjecture as to what might have caused this fire — evidence which is

wholly insufficient to remove the danger of speculation and conjecture as to causation. The Omans have presented zero evidence that BMW of Bellevue knew of or should have known of a fire hazard with the Thornes' vehicle or how any hypothetical hazard could have caused the fire. Without proof raising a genuine issue of material fact as to proximate causation, the superior court had no alternative but to grant summary judgment dismissing all claims against BMW of Bellevue.

2. Mr. Newbery's revised declaration on reconsideration still did not opine that BMW of Bellevue proximately caused the fire.

Even if this court elects to consider Mr. Newbery's revised declaration of April 17, 2011, which the Omans filed after the superior court had dismissed their claims on summary judgment, he still opined that there were three possible reasons for the fire:

5. More probably than not, a malfunction of one of the vehicle's components in the driver's side area of the BMW's engine compartment caused the fire.
6. More probably than not, the specific malfunction that caused the fire was **one or more of the following**:
 - a. Fuel leaking from malfunctioning fuel injectors being ignited by the hot exhaust surface at the back of the engine.
 - b. Fuel leaking from a malfunctioning high pressure fuel pump being ignited by the hot exhaust surface at the back of an engine.

- c. The positive battery cable arcing against a ground or melting and arcing due to a defect in the cable.

CP 621-22 (emphasis added). Although Mr. Newbery's revised declaration belatedly set forth his testimony in the correct "more probable than not" terminology, that declaration restates his earlier one, and his opinion still amounts to nothing more than speculation and conjecture as to the fire's cause. *Id.*

In this revised declaration, Mr. Newbery discusses the written service bulletins and NHTSA notification, but he admits that he needs more information to reach an actual conclusion as to causation:

7. The fuel injector failure identified by service bulletin S1 B13 04 09 **could have** caused this fire. The bulletin does not contain a detailed description of the failure. **It is necessary to obtain more information from BMW about whether the fuel injector failures referenced in this bulletin can cause an external fuel leak.**
8. The high pressure fuel pump identified by recall 10E-A02 **could have** caused this fire. The recall does not contain a detailed description of the failure. **It is necessary to obtain more information from BMW about whether the high pressure fuel pump failures referenced in this recall can cause an external fuel leak.**

CP 622 (emphasis added). The Omans failed to move separately under CR 56(f) for additional time to secure this information, *see* CP 392-409, which they admit is necessary. CP 622. This stands in glaring contrast to

BMW of Bellevue's earlier, successful motion for continuance in response to the Omans' motion for partial summary judgment. CP 175. Mr. Newbery still fails to point to any corroborating evidence of fuel leaking from malfunctioning fuel injectors, fuel leaking from a malfunctioning high pressure fuel pump or arcing of the positive battery cable. CP 622. After all the inspections and destructive testing in this case, the Omans finally concede on appeal that it is "impossible to precisely determine the exact cause of the fire." App. Br. at 10.

VI. CONCLUSION

No one knows why the Omans' Pontiac and the Thornes' BMW caught fire on November 4, 2009, and because the Pontiac was destroyed before any testing, no one will ever know whether it had any telltale signs that it ignited first. In an attempt to bridge a chasm of requisite evidence, the Omans pleaded negligence by *res ipsa loquitur* against BMW of Bellevue, in addition to their product-liability claim.

But these claims both fail as a matter of law. The Omans have not presented a genuine issue of material fact that BMW of Bellevue had actual or constructive exclusive control over the Thornes' vehicle based on the company's brief contact nine days before. Without evidence that BMW of Bellevue was a manufacturer or product seller for this car, the Omans cannot prove their product-liability claim. Finally, both of the

Omans' claims fail as a matter of law because the Omans did not demonstrate a genuine issue of material fact that BMW of Bellevue proximately caused this fire. The superior court properly decided that it could not reasonably infer proximate causation based on Mr. Newbery's opinion that one of three possible problems with the Thornes' car engine could have started the fire. Therefore, this court should affirm the superior court's reasoned decision to dismiss the Omans' claims against BMW of Bellevue.

Respectfully submitted this 30th day of January, 2012.

LEE SMART, P.S., INC.

By: _____



August G. Cifelli, WSBA No. 13095
Jonathan M. Minear, WSBA No. 41377
Attorneys for Respondent BMW of
Bellevue

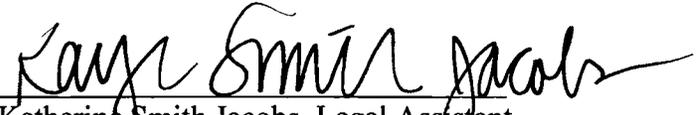
DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on January 30, 2012, I caused service, via legal messenger, of the foregoing pleading on each and every attorney of record herein:

Ms. Anna D. Knudson
Bergman Draper & Frockt, PLLC
614 First Avenue, Third Floor
Seattle, WA 98104-2233

Mr. Peter Steilberg
Merrick, Hofstedt & Lindsey, P.S.
3101 Western Avenue, Suite 200
Seattle, WA 98121

DATED this 30th day of January, 2012 at Seattle, Washington.


Katherine Smith Jacobs, Legal Assistant

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JAN 30 PM 4:43