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NO. 43484-9-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY _____
DEPUTY

THOMAS MARTINI, individually and as the personal representative of
the ESTATE OF JUDITH ABSON; DEBORAH SVANCARA;
KIMBERLY SVANCARA, a minor; and CHRISTINA SVANCARA, a
minor,

Appellants,

vs.

PAUL W. POST,
individually,

Respondent.

BRIEF OF APPELLANTS

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A. INTRODUCTION

Appellants file this appeal to reverse the trial court's Order granting summary judgment in favor of Appellee Paul Post. In response to Post's motion for summary Judgment, Appellants provided the trial court with declarations of an expert witness and eye witnesses. These declarations, in and of themselves, were sufficient to create an issue of material fact that should have precluded the entry of summary judgment. In their motion for reconsideration, Appellants provided an additional expert declaration, which should have compelled the trial court to reverse its prior ruling and deny summary judgment. Although a simple inference is sufficient to create a question of material fact, Appellants submitted direct, unequivocal expert testimony to establish that Paul Post breached the standard of care that is required of a landlord and proximately caused Judith Abson's death. Therefore, Appellants ask this Court to reverse the trial court's summary judgment ruling and remand this case back for trial on the merits.

B. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The trial court erred when it ruled that no issues of material fact existed and Paul Post was entitled to summary judgment as a matter of law.

Issue Pertaining to Assignment of Error No. 1

Whether the trial court erred when it granted Paul Post's motion for summary judgment even though Appellants submitted sworn declarations from both expert and lay witnesses, which created an issue of fact regarding the proximate cause of Judith Abson's death?

Assignment of Error No. 2

The trial court erred when it denied Appellants' motion for reconsideration of its prior summary judgment order dismissing their claim, even though Appellants submitted additional evidence that reaffirmed that questions of material fact were present.

Issue Pertaining to Assignment of Error No. 2

Whether the trial court erred when it denied Appellants' motion for reconsideration even though Appellants submitted additional expert testimony that created additional material issues of fact to preclude the entry of summary judgment?

C. STATEMENT OF THE CASE

(1) Underlying Facts

On February 27, 2009, Appellants were living in a rental home located at 1315 South 8th Street in Tacoma. CP 68. Paul Post was their landlord. Id. The two-story plus house had four bedrooms on the top floor: Debi Svancara lived in the northwest bedroom; Kimberly Svancara's

room was in the northeast corner; Christina Svancara's room was in the southwest corner; and Judith Abson and Thomas Martini had the master bedroom in the southeast corner. CP 59. During the initial walk-through of the home, Mr. Martini noted multiple problems with the house and asked Mr. Post to repair them. CP 68-69. In particular, Mr. Martini told Mr. Post that the windows in the northeast bedroom could not be opened. CP 69. This room had two windows - one was installed along the north wall while the other faced eastward. Id. After the walk-through, Mr. Post did not fix the stuck windows. Id.

The problems with the windows continued after Mr. Martini and his family moved into the house. Id. During their tenancy, no one in Ms. Abson's family was ever able to open the window along the north wall in the northeast bedroom. Id. Eventually, after a great deal of effort, Ms. Abson and her daughters were sometimes able to open the east-facing window in the northeast bedroom. However, it always took the strength of at least two people to open it.

On February 27, 2009, Mr. Martini, Ms. Abson and her children woke up to a fire. CP 69. While most of the family made it out of the house, Ms. Abson became trapped in the northeast bedroom. CP 61. After escaping the fire, Deborah Svancara, Ms. Abson's oldest daughter, and a houseguest ran back into the house and became trapped upstairs with

Ms. Abson. CP 61-62. Ms. Svancara and the houseguest were confined in the southeast bedroom, but could hear Ms. Abson yelling at them to get out. CP 62. To prevent themselves from suffocating, Ms. Svancara and the houseguest opened the bedroom window and took turns putting their heads outside to breathe fresh air. The fire department arrived a few minutes later and rescued Ms. Svancara and the houseguest through the southeast bedroom window. Id. The fire crews eventually found Ms. Abson in the northeast bedroom, unconscious from smoke inhalation. Id. She was transported by ambulance to a nearby hospital, where she died later that day.

(2) The Inoperable Window

As stated above, Ms. Abson died from smoke inhalation after becoming trapped in an upstairs back bedroom of her rental home. Appellee Paul Post had been notified that the windows in the northeast bedroom were defective when Ms. Abson's family moved into the home. CP 69. During the initial walkthrough, Mr. Martini asked Mr. Post to repair the window. Id. Mr. Martini made this same request to Mr. Post on at least two other occasions. Id. The requested repairs were never made. Id. After the fire was put out, handprints were found around the inoperable window, in the room where Judy was found. See Appendix.

Appellants' experts have opined that the window should have been operable and that Appellee's negligent maintenance of his rental property proximately caused Ms. Abson's death. See Declarations of Noel Putaansuu, CFEI (CP 63-67) and Eric L. Kiesel, M.D., Ph.D. (CP 95-144). Additionally, Tacoma Municipal Code ("TMC") requires landlords to ensure that windows are not painted shut. TMC 2.01.070.

D. PROCEDURAL BACKGROUND

On April 29, 2011, Appellants filed this lawsuit in Pierce County Superior Court against Paul Post. CP 8-11. On March 23, 2012, the trial court granted Appellee's motion for summary judgment. CP 82-83. On April 24, 2012, the trial court denied Appellants' motion for reconsideration of its earlier summary judgment order. CP 184-186.

E. ARGUMENT

(1) The Trial Court Erred by Granting Summary Judgment Despite Numerous Disputes of Material Fact

In this case, the trial court erred by granting Mr. Post's motion for summary judgment even though Appellants submitted declarations establishing that Ms. Abson's death was proximately caused by the negligent maintenance of Appellants' rental home. Appellants provided the trial court with evidence sufficient to raise a material issue of fact as required under CR 56(c).

As this Court knows well, the burden of proving that a case should be summarily dismissed rests with the moving party, the appellee in this case. The trial court “must consider the facts submitted and all reasonable inferences therefrom in the light most favorable to the nonmoving party.” Sheriff’s Ass’n. v. Chelan County, 109 Wn.2d 282, 294-95, 745 P.2d 1 (1987); see also CR 56(c). Summary judgment “must be denied if a right of recovery is indicated under any provable set of facts.” Smith v. Acme Paving Co., 16 Wn.App. 389, 393, 558 P.2d 881 (1976). “A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact.” Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). Summary judgment must be denied “if the record shows any reasonable hypothesis which may entitle the non-moving party to relief.” Mostrom v. Pettibon, 25 Wn.App. 158, 162, 607 P.2d 864 (1980). Questions of proximate cause are also generally questions for the jury. See e.g., Schooley v. Pinch’s Deli Market, Inc., 80 Wn.App. 862, 874, 912 P.2d 1044 (1996), aff’d, 134 Wn.2d 468, 951 P.2d 749 (1998). With regard to the appropriate appellate standard of review, this Court reviews determinations on summary judgment de novo. Enterprise Leasing, Inc. v. City of Tacoma, 139 Wn.2d 546, 551, 988 P.2d 961 (1999).

In this case, the declaration of Appellants’ expert, Noel Putaansuu, as well as violations of local building ordinances, establish that Mr. Post

failed to satisfy the standard of care expected of a landlord. The Tacoma Municipal Code provides, in pertinent part:

Minimum building requirements.

No owner shall maintain, or permit to be maintained, any property which does not comply with the requirements of this chapter....

E. Windows and Glazing

Window and glazing shall be in good condition and maintain a weather barrier against the elements. All glazing shall be uncracked and unbroken. Operable windows shall be able to operate in the manner in which they were designed, and shall not be painted closed or otherwise bind in a manner rendering them inoperable....

TMC 2.01.070. While evidence that Appellee violated a local ordinance does not constitute negligence *per se*, it may be considered as evidence of negligence. RCW 5.40.050. While evidence of breach of duty is not necessarily evidence of proximate cause, such evidence may be admissible on the issue of proximate cause as well as breach of duty. See Taggart v. State, 118 Wn.2d 195, 226, 822 P.2d 243 (1992) (the question of legal causation is so intertwined with the question of duty that the former may be answered by addressing the latter). Appellants' expert Noel Putaansuu also testified that Appellee should have ensured that all windows were open-able and functional while leasing the premises. CP 64-65.

Here, although Ms. Abson died and is unable to testify whether she tried to open the window, it is reasonable to infer that had she been able to open a window, she would not have succumbed to smoke inhalation. Ms. Abson was not the only person who became trapped upstairs during the fire. One of Ms. Abson's daughters and a houseguest were unable to escape after running back into the house. See Svencara Declaration 2-3. Although they had trouble breathing after barricading themselves in the southeast bedroom, they managed to survive the fire, and prevent themselves from succumbing to smoke inhalation because they were able to open a window. Id. Additionally, Ms. Abson was found unconscious by firefighters, but did not die in the fire. CP 61-62. Rather, she died at the hospital later that day as a result of complications from smoke inhalation. Had it been possible for her to open any window in the northeast bedroom, she should have been able to breathe and remain conscious before the firefighters arrived.

Overall, Appellants' obligation under CR 56(c) was to establish a single question of "material fact" in order to defeat Mr. Post's motion for summary judgment. In response to his motion, Appellants submitted evidence to establish multiple issues of material fact, which should have precluded the entry of summary judgment. The trial court simply erred by

granting summary judgment and this case should be remanded for trial on the merits.

(2) The Trial Court Also Erred by Refusing to Grant Appellants' Motion for Reconsideration.

A motion for reconsideration is reviewed by this court under the abuse of discretion standard. Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). However, where a trial court grants summary judgment and then denies a motion for reconsideration, evidence offered in support of the motion for reconsideration is properly part of an appellate court's de novo review. Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 675, n. 6, 911 P.2d 1301 (1996).

In their motion for reconsideration, Appellants asked the trial court to reconsider its summary judgment ruling based upon the previously submitted evidence in opposition to Appellee's motion and the additional evidence submitted through the declaration of Dr. Eric Kiesel. CP 95-144. During oral argument, Appellants also presented the trial court with a photo of handprints around an inoperable window in the room where firefighters found Ms. Abson. See Appendix. The trial court reviewed these supplemental materials before denying Appellants' motion for

reconsideration. CP 184. This additional testimony and evidence was sufficient, on its own, to defeat summary judgment.

At the time of Ms. Abson's death, Eric Kiesel, M.D., Ph.D., was serving as the Chief Medical Examiner for Pierce County. CP 96. Dr. Kiesel performed Ms. Abson's autopsy. Id. In a declaration that was filed with the trial court in Appellants' motion for reconsideration, Dr. Kiesel opined that had Ms. Abson been able to open a window in the room where she was found, she likely would have survived the fire. CP 97. In his declaration, Dr. Kiesel opines, in part:

The cause of Ms. Abson's death was smoke inhalation and carbon monoxide poisoning. Smoke contains many noxious components, including carbon monoxide. Carbon monoxide alone can be lethal at levels as low as 45 percent in the absence of other injuries or health problems. Health problems such as coronary artery disease, chronic lung disease or a history of smoking can make an individual more susceptible to carbon monoxide poisoning at lower levels. However, an otherwise healthy person is more likely to tolerate higher levels of carbon monoxide before dying. Carbon monoxide poisoning can be insidious. It binds to hemoglobin within the red blood cells stronger than oxygen does. The treatment of choice for smoke inhalation is to first remove the person from the smoke-filled environment and into fresh air. If carbon monoxide poisoning is a concern because of the length of time in the smoke, health care providers administer oxygen and hyperventilate the person to treat the poisoning.

Had Ms. Abson been able to open a window in the room where she was found, it is more likely than not that she would have survived. My opinion is based, in large part, on the following facts:

- a) The two individuals trapped in the upstairs front bedroom were able to survive the fire by opening the window and taking turns putting their heads outside to breathe while waiting for the fire crews to arrive.
- b) Ms. Abson had no identified natural diseases that would have contributed to her death.

CP 97-98. The declaration of Dr. Kiesel establishes causation in and of itself.

Combined with testimony from Appellants' lay and expert witnesses that the window was inoperable before and after Ms. Abson's death, and the fact that Appellee's failure to repair the window violated local building codes, the opinion of Dr. Kiesel should have been sufficient for the trial court to overturn its previous entry of summary judgment. These facts and opinions establish that Paul Post breached the standard of care expected of landlords, and that this breach was a proximate cause of Ms. Abson's death.

Overall, the trial court abused its discretion by failing to grant the motion for reconsideration in light of all the evidence proffered by Appellants in opposition to Appellee's motion for summary judgment. While Appellants will concede that the abuse of discretion standard is difficult to overcome on appeal, the facts of this case meet this lofty standard. Given that the ultimate legal question on reconsideration remains whether Appellants have produced sufficient evidence to establish

a material issue of fact, the evidence submitted by Appellants in opposition to summary judgment required the trial court to grant Appellants' motion for reconsideration. When the trial court failed to grant Appellants' motion for reconsideration, it simply abused its discretion.

F. CONCLUSION

Judith Abson died after becoming trapped in a second-story bedroom during a fire. She and her family had made multiple complaints to their landlord that the windows would not open. He never made the requested repairs. Witnesses have testified that the windows were inoperable both before and after Ms. Abson's death, and that they should not have been painted shut. Additionally, an expert forensic pathologist opined that had Ms. Abson been able to open the windows in the room where she was found, she would not have died from smoke inhalation. The trial court's decision to grant summary judgment and deny Appellants' motion for reconsideration was in error and should be reversed.

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DATED this 31st day of August, 2012.

Respectfully submitted,

/s/ Anna L. Price

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APPENDIX



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STATE OF WASHINGTON

BY _____
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

THOMAS MARTINI, *et al.*

Appellants,

v.

PAUL POST,

Respondent

No. 43484-9-II

Declaration of Service

The undersigned declares and states under the penalty of perjury pursuant to the laws of the State of Washington as follows:

I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On August 31, 2012, I caused the Appellants Brief and this Declaration of Service to be filed in the above captioned matter and, on the same date, a copy of Appellants Brief to be served on counsel for Respondents, along with a copy of the Verbatim Report of Proceedings and this Declaration of Service, in the manner indicated:

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Dated this 31st day of August, 2012.



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THOMAS MARTINI, *et al.*

Appellants,

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No. 43484-9-II

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On September 4, 2012, I caused the original and a copy of Appellants Brief and this Declaration of Service to be filed in the above captioned matter as follows:

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Dated this 4th day of September, 2012.

A handwritten signature in cursive script, reading "Pamela S. Wells". The signature is written in black ink and is positioned above a horizontal line.

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