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I. SUMMARY OF ARGUMENT

This case involves a fire in a house owned by respondent Paul Post and rented to appellant Thomas Martini and his wife, Judith Abson. All the occupants of the house initially escaped, but Abson went back into the burning house to look for her cats. (CP 32, 61). Abson later was found unresponsive in the upstairs back bedroom, and died of smoke inhalation. (CP 32).

The appellants alleged that one of the windows in the room where Abson was found had been “painted shut”. Post disputed this claim, and in fact after the fire he inspected the window and it was fully operable. (CP 22). Nevertheless, for summary judgment purposes it must be assumed that the window was painted shut and that Martini had provided notice of the problem to Post.

The problem with the appellants’ claim – and the basis for the trial court’s grant of summary judgment – is causation. The appellants were unable to come forward with any evidence to explain the circumstances under which Abson came to be overcome by smoke, or to establish that Abson would have survived if the window had been fully operable. Specifically, nobody knows (1) whether Abson was

even in the back bedroom when she was overcome by smoke, (2) whether Abson even considered opening a window, (3) whether Abson even had time to open a window, and (4) whether opening a window would have allowed Abson to survive. The appellants' only "evidence" is based on speculation and conjecture.

In the absence of actual evidence to connect the allegedly defective window with Abson's death, the trial court correctly granted summary judgment. Washington courts repeatedly have affirmed a trial court's grant of summary judgment on causation when the parties could present no evidence regarding what happened to cause the injury. *E.g., Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379-80, 972 P.2d 475 (1999).

In support of a motion for reconsideration the appellants submitted a declaration of Dr. Eric Kiesel, the Pierce County Medical Examiner. Dr. Kiesel's declaration purported to claim that if Abson would have been able to open a window, she would have survived. This declaration should not have been considered by the trial court on reconsideration because it was not "newly discovered evidence". In any event, the declaration did not provide

grounds for avoiding summary judgment because (1) Dr. Kiesel had no apparent expertise on the ability to survive in a fire, which depends on multiple variables, (2) Dr. Kiesel's opinion was not based on any evidence, and clearly was based solely on speculation and conjecture, and (3) even if Dr. Kiesel's opinion was correct, it only addresses one causation factor and the appellants still had no evidence that Abson was even in the back bedroom when she was overcome by smoke, whether she even thought about opening a window, and whether she even had time to open up a window before she succumbed.

The appellants also rely on appeal upon an unauthenticated photograph that appellants claim is the window at issue. This photograph was not filed with the trial court but only handed to the judge during oral argument of the motion for reconsideration. The appellants argue that the photograph shows a "handprint" on the wall adjacent to the window. Although the trial judge reviewed the photograph, it obviously is inadmissible because it was not authenticated and is not part of the trial court record. Even if it is admissible, the photograph is immaterial because (1) there is no indication that the mark even represents a

handprint, (2) there is no evidence that the mark was made by Abson rather than someone else, (3) there is no evidence that the mark was made during the fire rather than after the fire, (4) even if the mark was made by Abson that fact does not establish that she was attempting to open the window, and (5) the appellants still cannot show that Abson would have survived if she would have opened a window.

There simply is no evidence in this case that if the window had been operable, Abson would have survived. Because nobody really knows what happened, any causation argument necessarily must be based on speculation. The trial court properly granted Post's motion for summary judgment and correctly denied appellants' motion for reconsideration. This Court should affirm.

II. COUNTERSTATEMENT OF CASE

Although the appellants' statement of the case generally is accurate in terms of what they allege, three factual issues must be clarified.

First, although the appellants alleged and submitted evidence that the east wall window in the northeast back bedroom was inoperable, Post disputes this allegation. Post

denies that the window was painted shut or that Martini ever told him that it was. (CP 21). Further, after the fire Post inspected the window on the east wall, and found that it was not painted shut and was fully operable. (CP 22). For summary judgment purposes, Post concedes that it must be assumed that the window was inoperable. However, it is misleading to suggest that the evidence is undisputed that the window had been painted shut.

Second, the appellants imply that Abson was “trapped” in the back bedroom where she was found. In fact, there is no evidence regarding how Abson came to be in the back bedroom. The only evidence is that she was found there. (CP 32). She may have been trapped there. Or she may have been overcome with smoke somewhere else, and only stumbled into the back bedroom as she was losing consciousness.

Third, it is undisputed that the allegedly defective window in the northeast bedroom was not broken out during the fire. (CP 64). This evidence is relevant to whether Abson even thought about opening a window or even had time to open a window.

With regard to trial court procedure, the appellants have left out some important details. The trial court granted summary judgment on the basis of causation. (CP 82-83). The appellants moved for reconsideration, based primarily on Dr. Kiesel's declaration. (CP 84). This was not newly discovered evidence, as Dr. Kiesel had been designated as an expert witness eight months earlier. (CP 161, 170-171). The trial court considered Dr. Kiesel's declaration over Post's objection and despite a motion to strike. (CP 145-146).

Further, during oral argument of the motion for reconsideration appellants' counsel handed the judge a photograph that purported to be of the allegedly inoperable window. The trial judge did look at the photograph (over Post's objection) (RP 3), but the photograph was never authenticated, was never made a part of the court record, and was not listed as a document the trial court considered in the order denying the motion for reconsideration. (CP 185-86). The trial court denied the appellants' motion for reconsideration. (CP 185-86).

After this appeal was filed the appellants filed a motion in the Court of Appeals asking this Court to allow the photograph to be attached to its brief even though it is not

part of the trial court record. Post opposed this motion. The Court has not yet ruled on the motion, and Post requests that the Court disregard the photograph that the appellants did attach to their brief.

III. ARGUMENT

A. **BECAUSE THE APPELLANTS HAVE PRODUCED NO EVIDENCE REGARDING THE DETAILS OF ABSON'S DEATH, THEY CANNOT SHOW THAT THE ALLEGED INOPERABLE WINDOW WAS A CAUSE IN FACT OF THE DEATH.**

1. **The Appellants Have the Burden of Coming Forward with Affirmative Evidence of Causation in Order to Avoid Summary Judgment.**

Under CR 56, summary judgment is appropriate if (1) a defendant points out the absence of evidence to support the plaintiff's case, and (2) the plaintiff fails to establish a material issue of fact on an element essential to the plaintiff's case. *E.g., Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 180 (1989). In other words, once a defendant shows an absence of evidence, the burden shifts to the plaintiff to come forward with evidence sufficient to establish the existence of each essential element of his or her claim. If this showing is not made, the

defendant is entitled to summary judgment. *E.g., Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624-25, 818 P.2d 1056 (1991).

To defeat summary judgment in a negligence case, the plaintiff must show an issue of material fact as to each element – duty, breach of duty, causation, and damages. *E.g., Craig v. Washington Trust Bank*, 94 Wn. App. 820, 824, 876 P.2d 126 (1999). Significantly, "more than mere possibility or speculation is required to successfully oppose summary judgment." *Doe v. Dept. of Transportation*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997). "A non-moving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain". *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

Under these well-established principles, the appellants had the burden of coming forward with affirmative evidence of causation in order to avoid summary judgment. Bare allegations or argumentative assertions are not enough. The appellants in this case have not produced any affirmative evidence of causation that is not based on speculation.

2. Case In Fact Can Be Decided as a Matter of Law.

Proximate cause consists of two elements: cause in fact and legal causation. See *Hartley v. State*, 103 Wn.2d 768, 777-79, 698 P.2d 77 (1985). The appellants' problem in this case is that they cannot establish the cause in fact prong of proximate cause even if Post was negligent.

Cause in fact concerns the "but for" consequences of a negligent act – those events the act produces in a direct, unbroken sequence and which would not have resulted had the act not occurred. E.g., *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 203, 15 P.3d 1283 (2001). The focus is on whether or not an injury would have happened but for the negligence. E.g., *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996). If an injury would have occurred regardless of a defendant's alleged negligent conduct, that conduct cannot be the proximate cause of the plaintiff's injury. E.g., *Davis v. Globe Machine Manufacturing Co.*, 102 Wn.2d 68, 74, 684 P.2d 692 (1984); *Lunt v. Mt. Spokane Skiing Corp.* 62 Wn. App. 353, 362, 814 P.2d 1189 (1991).

The plaintiff has the burden of proving that the injury would not have occurred but for the defendant's negligent

conduct. *E.g.*, *Whitchurch v. McBride*, 63 Wn. App. 272, 275, 818 P.2d 622 (1991). Although cause in fact normally is a question for the jury, causation may be determined as a matter of law if reasonable minds could not differ. *E.g.*, *Kim*, 143 Wn.2d at 203; *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177 P.3d 180 (2008). Reasonable minds could not differ on the lack of evidence of causation in this case.

3. Speculative Theories Cannot Prevent Summary Judgment on Causation.

Washington courts repeatedly have held that evidence establishing proximate cause must rise above speculation, conjecture or mere possibility. *E.g.*, *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). A plaintiff cannot establish causation through guesswork as to how the injury might have happened. *E.g.*, *Ruff v. County of King*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995); *Kristianson v. City of Seattle*, 25 Wn. App. 324, 326, 606 P.2d 283 (1980).

As a result, while recognizing that causation typically presents a question of fact, the cases emphasize that a plaintiff cannot avoid summary judgment based on speculative theories of what might have happened.

Ordinarily, cause in fact is a question for the jury. But the court may decide this question as a matter of law if “the causal connection is so speculative and indirect that reasonable minds could not differ.”

Moore v. Hagge, 158 Wn. App. 137, 148, 241 P.3d 787 (2010), rev. denied, 171 Wn.2d 1004 (2011) (citations omitted).

In tort actions, issues of negligence and causation are questions of fact not usually susceptible to summary judgment. However, a party resisting summary judgment cannot satisfy his or her burden of production merely by relying on conclusory allegations, speculative statements or argumentative assertions.

Boguch v. Landover Corp., 153 Wn. App. 595, 610, 224 P.3d 795 (2009) (citations omitted).

[T]o survive summary judgment, the plaintiff’s showing of proximate cause must be based on more than mere conjecture or speculation [T]he plaintiff must establish more than that the . . . breach of duty *might* have caused the injury.

Miller v. Likins, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (italics in original). In this case, the appellants’ causation theory at best rises to the level of “maybe”.

4. Summary Judgment is Required if Plaintiffs' Causation Theory Is No More Likely than Other Possible Theories.

The court in *Moore* explained the meaning of speculation in the context of a summary judgment motion on causation.

" 'The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as it is another.' "

158 Wn. App. at 148, quoting *Jankelson v. Sisters of Charity of House of Providence*, 17 Wn.2d 631, 643, 136 P.2d 720 (1943).

If 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.

Moore, 158 Wn. App. at 148, quoting *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947) (emphasis added).

The court in *Boguch* adopted a similar rule regarding circumstantial evidence:

Although a plaintiff may prove the elements of negligence through circumstantial evidence, "[t]he facts relied upon to establish a theory by

circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them.' "

153 Wn. App. at 610-11, quoting *Grobe v. Valley Garbage Service, Inc.*, 87 Wn.2d 217, 225-26, 551 P.2d 748 (1976).

Finally, in *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 78 P. 3d 1771 (2003) the court stated:

But evidence establishing proximate cause must rise above speculation, conjecture or mere possibility. A jury is not permitted to speculate on how an accident or injury occurred when causation is based solely on circumstantial evidence and there is nothing more substantial to proceed on than competing theories with the defendant liable under one but not the other.

Id. at 282.

These different formulations all support the fundamental concept that causation must be shown on a "more likely than not" basis. If there are two or more causation theories that are equally likely, summary judgment must be granted. It is not enough that the defendant's conduct "might have" or "possibly" caused the injury. *E.g.*, *Conrad*, 119 Wn. App. at 282; *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn. App. 326, 331, 966 P.2d 351 (1998).

In this case, appellants' causation theory is just speculation and is not more likely than any other theory.

5. A Plaintiff Cannot Avoid Summary Judgment on Causation When the Facts Surrounding the Injury are Unknown.

Washington courts consistently have granted summary judgment based on causation when the plaintiff cannot explain how the injury occurred. As noted above, courts require concrete evidence of causation rather than mere causation theories. Four cases in which the trial court granted summary judgment on causation are illustrative.

In *Moore*, the plaintiff was hit by a vehicle while walking along the road. The plaintiff had no memory of the accident, and witnesses did not see where the plaintiff came from or what he was doing just before or when he collided with the car. 158 Wn. App. at 140-41. The plaintiff's theory (supported by the declaration of an engineering expert) was that the road where the accident occurred was inherently dangerous for pedestrians. The expert opined that if the city had implemented certain safeguards for pedestrians the accident would not have happened. *Id.* at 145-46.

The Court of Appeals affirmed the trial court's grant of summary judgment on causation. The court noted that because the plaintiff had no recollection of the accident, there was no evidence that additional safeguards would have made the plaintiff more aware or that he was confused or misled about roadway conditions. The court noted that the most the plaintiff could show is that the accident "might not have happened" if the city had installed additional safeguards. *Id.* at 151-52. That was not enough for the plaintiff to avoid summary judgment. *Id.* at 155.

In *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944, rev. denied, 158 Wn.2d 1017 (2006), the plaintiff was on a ladder installing gutters on a house. He was discovered on the ground with the ladder on the ground next to him. The plaintiff had no memory of the accident and no one else witnessed it. *Id.* at 778. The plaintiff argued that the general contractor was liable because the ladder was not properly secured at the top and because the ground was unstable. *Id.* at 780-81.

The Court of Appeals affirmed the trial court's grant of summary judgment on causation. The court stated:

One might speculate that the ladder was not properly secured at the top, or that the ground was unstable, but even assuming that those conditions constitute breaches of duty that Countrywood owed Little, he did not provide evidence showing more probably than not that one of those breaches caused his injuries. **No one, including Little, knows how he was injured.**

Id. at 782 (emphasis added).

In *Miller*, a pedestrian was struck by a passing car. 109 Wn. App. at 142-43. The plaintiff's expert claimed that if the city had taken additional precautions, the driver would have been likely to be more alerted to the possible presence of pedestrians and the accident would have been avoided. *Id.* at 147. However, the driver passed away before he could give a sworn statement and there was no direct or circumstantial evidence showing that the driver was **in fact** confused or misled by the condition of the roadway. Consequently, the Court of Appeals affirmed the trial court's grant of summary judgment. As a matter of law, the plaintiff could not satisfy her burden of showing that any negligence proximately caused the injuries. *Id.*

In *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999), the plaintiff was injured while exercising on a treadmill. However, she had no recollection

of the accident and there were no witnesses. The plaintiff developed a theory of how the injury might have occurred but conceded that she really did not recall what happened. *Id.* at 374-76. The Court of Appeals affirmed the trial court's grant of summary judgment. The court stated:

In short, Marshall provides no evidence that she was thrown from the machine, what caused her to be thrown from the machine, or how she was injured. **Given this failure to produce evidence explaining how the accident occurred, proximate cause cannot be established.** Because Marshall did not produce evidence of proximate cause, she failed to produce evidence sufficient to withstand summary judgment.

Id. at 379-80 (emphasis added).

This case is factually similar to *Moore, Little, Miller* and *Marshall*, and the same result is required. There is no evidence – direct or circumstantial – that shows how Abson came to suffer the smoke inhalation that led to her death, or whether the window was involved at all. Abson cannot testify, and there were no witnesses. The appellants and their “experts” have theories, but they represent nothing more than speculation and conjecture. Because nobody knows what happened, the appellants cannot prove causation.

6. Summary Judgment Was Appropriate Because Nobody Knows What Happened, and Whether an Operable Window Would Have Made Any Difference.

In this case, evidence of “but for” causation is lacking in at least four specific respects. First, nobody knows whether Abson was even in the back bedroom when she suffered the smoke inhalation. The appellants suggest a theory in which Abson was trapped in the bedroom, but nobody knows whether this is true. The only actual evidence is that she was found there. Another theory is that Abson was in another bedroom or in the hallway and then staggered into the northeast bedroom seconds before she collapsed. If Abson was not even in the bedroom when she started to lose consciousness, whether or not the window was operable made no difference.

Second, nobody knows whether Abson even considered opening a window. The appellants suggest a theory in which Abson tried to open a window but could not, but nobody knows whether this is true. There is no actual evidence that she tried to open the window. Another theory is that Abson spent all her energy trying to go down the stairs and exit the house, and only stumbled back into the

northeast bedroom as she was overcome by smoke. Given the chaotic scene facing Abson, it cannot be assumed that she calmly reflected upon all her options, or that it even occurred to her that opening a window might do any good. In fact, it is undisputed that Abson did not attempt to break the window. (CP 64). This at least implies that she did not think about the windows.

Third, nobody knows whether Abson even had time to open a window. The appellants imply that Abson had time to take steps to avoid injury, but nobody knows whether that is true. There is no actual evidence regarding how much time she had to open a window. Another theory is that Abson was overcome by smoke before even having time to consider taking action. Again, she may have used up all her time searching for her cats or seeking to escape down the stairs, and by the time she thought about opening a window it was too late. As stated above, the evidence does show that Abson did not break the window, which implies that she also did not have time to open it.

Fourth, nobody knows whether opening a window would have made any difference. The appellants have a theory that if Abson had been able to open a window, the

outside air would have allowed her to survive. However, other than speculation (Dr. Kiesel's declaration will be discussed below) there is no actual evidence supporting this theory. It is possible that opening a window might have helped, but given the amount of smoke in the house it may not have given her much time and in fact may have fueled the fire. An equally plausible theory is that because the smoke was too thick and because it took firefighters too long to reach Abson, opening a window would not have saved her.

The appellants argue that the fact that two other people were rescued from the front of the house after opening a window creates an inference that opening a window also would have saved Abson. However, there are far too many variables to conclude that just because two people survived in a room at the front of the house means that Abson could have survived in another room at the back of the house if a window had been opened. For instance, there is no evidence regarding whether or not the smoke was worse in the backroom or regarding how much smoke Abson had inhaled compared to the other two people. And one obvious reason the people in the front of the house were rescued is that the room was accessible to the fire trucks

and their ladders, when the northeast bedroom was not. (CP 62).

For these reasons, the trial court specifically rejected the evidence that two other people were rescued in granting summary judgment:

Really, what the plaintiffs have said is that, because somebody else in another part of the house was able to open a window and was rescued that it had to have been because she couldn't open a window that she died. I don't think that is sufficient enough evidence to meet what they have to meet.

(CP 165).

There is not enough evidence in this case to determine on a more probable than not basis what happened. There are several theories about what might have happened, but no theory is more likely. Maybe Abson did attempt to open the window, but maybe she did not even think about the windows or did not even have time to reach a window. Maybe Abson could have survived a little longer if she had opened a window, but maybe the open window would have made things worse or would not have bought her enough time to be rescued before being overcome by smoke. Maybe

Abson was never even in the northeast bedroom until seconds before she collapsed.

Because nobody knows what happened, the appellants simply do not have sufficient evidence that Post's alleged negligence caused Abson's death. In the absence of sufficient causation evidence, summary judgment was appropriate and the trial court's ruling must be affirmed.

B. THE TRIAL COURT CORRECTLY DENIED THE APPELLANTS' MOTION FOR RECONSIDERATION AND DISREGARDED DR. KIESEL'S SPECULATIVE DECLARATION.

In support of the motion for reconsideration, the appellants submitted the declaration of Dr. Eric Kiesel, at the time the Pierce County Medical Examiner. Dr. Kiesel's declaration purported to claim that if Abson would have been able to open a window, she would have survived. However, despite this declaration the trial court properly denied reconsideration.

1. Denial of Motion for Reconsideration Is Evaluated Based on an Abuse of Discretion Standard of Review.

A motion for reconsideration under CR 59 is decided by the trial court in the exercise of its discretion. The trial

court's decision will be evaluated based on an abuse of discretion standard of review. *E.g., Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

The only basis for the appellants' motion for reconsideration on causation was the declaration of Dr. Kiesel. The trial court did not abuse its discretion in determining that Dr. Kiesel's declaration did not support reconsideration of the summary judgment order.

2. The Trial Court Should Not Have Considered Dr. Kiesel's Declaration Because it Was Not "Newly Discovered Evidence".

Dr. Kiesel's declaration was submitted for the first time in support of the plaintiffs' motion for reconsideration. Under CR 59(a)(4), "newly discovered evidence" can form the basis of a motion for reconsideration, but only if the moving party shows that he/she could not have obtained the evidence earlier. *E.g., West v. Thurston County*, 144 Wn. App. 573, 580, 183 P.3d 346 (2008). Otherwise, evidence not submitted with respect to the summary judgment motion should not be considered on reconsideration.

Both a trial and a summary judgment hearing afford the parties ample opportunity to present

evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.

Wagner Development, Inc. v. Fidelity & Deposit Co. of Maryland, 95 Wn. App. 896, 907, 977 P.2d 639 (1999).

In this case, there is no question that Dr. Kiesel's declaration was not "newly discovered evidence". The appellants had disclosed Dr. Kiesel as a fact and expert witness eight months earlier (CP 161, 170-71), and the appellants did not give any reason for failing to submit the declaration in response to the original summary judgment motion.

Further, the appellants did not even attempt to argue in the trial court that the motion for reconsideration was based on CR 59(a)(4). Instead, they based their motion solely on CR 59(a)(7)-(9). Because these subsections focus on an error in law, no new evidence can be considered.

Washington courts have held that for a motion for reconsideration after trial based on subsections (5)-(9), the trial court must base its decision only on the evidence previously presented. *Holaday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127 (1987); *Jet Boats, Inc. v. Puget Sound*

National Bank, 44 Wn. App. 32, 42, 721 P.2d 18 (1986). The court in *Meridian Minerals Co. v. King Co.*, 61 Wn. App. 195, 810 P.3d 31 (1991), noted that *Holiday* involved a trial rather than a summary judgment order, and with regard to summary judgment did not state an absolute rule prohibiting new evidence. However, the court stated:

Certainly both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. Unless discovered after the opportunity passes, the parties should generally not be given another chance to submit additional evidence.

Id. at 203.

In this case, the appellants had plenty of opportunity to submit a declaration from Dr. Kiesel. They did not even attempt to explain their failure to do so until the motion for reconsideration stage. As a result, this Court should refuse to consider Dr. Kiesel's declaration in evaluating the denial of the motion for reconsideration. The appellants should not be allowed to introduce new evidence "through the back door" that does not qualify as newly discovered evidence under CR 59(a)(4).

3. Dr. Kiesel's Declaration Should Not Be Considered Because He Has Not Demonstrated Any Expertise in Occupants Surviving House Fires.

Even if the Court could consider the plaintiffs' new evidence, Dr. Kiesel's declaration should be disregarded because the opinion he expresses is beyond the scope of his expertise.

Normally the trial court's assessment of the qualifications of an expert are evaluated based on an abuse of discretion standard. However, "where the qualifications and opinions are part of a summary judgment proceeding, review is instead de novo." *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 494, 183 P.3d 283 (2008), citing *Folsom v. Burger King*, 135 Wn.2d 658, 666, 958 P.2d 301 (1998).

Dr. Kiesel is a medical doctor and a pathologist, and certainly has expertise in those areas. However, the opinion he attempts to express is that Abson would have survived if she had been able to open a window. Dr. Kiesel has no apparent expertise on this subject, which would involve a number of complex factors such as the amount of smoke in the room, the size of the room, the strength of the fire, air flow patterns, and how much smoke a person had inhaled

before opening the window. All Dr. Kiesel's expertise can tell us is the cause of death, not whether death could have been avoided.

The lack of expertise is demonstrated by the basis for Dr. Kiesel's opinion. The only stated grounds for his opinion were that two individuals in another bedroom were able to be rescued, and Abson had no natural diseases that would have contributed to her death. As discussed below, the first ground clearly is too speculative to support the appellants' claims. And the second ground has nothing to do with whether or not opening a window would have made any difference.

ER 702 requires a witness to be qualified as an expert by "knowledge, skill, experience, training, or education". Nothing in Dr. Kiesel's declaration qualifies him as an expert on an occupant's ability to survive in a burning house by opening a window. Accordingly, his declaration should be disregarded.

4. Dr. Kiesel's Opinion Is Based Solely on Speculation and Conjecture.

Even if the Court could consider new evidence and even if Dr. Kiesel qualifies as an expert on the ability to

survive in a burning house, Dr. Kiesel's opinion should be disregarded because it is based on nothing more than speculation and conjecture.

"It is well established that conclusory or speculative expert opinions lacking in adequate foundation will not be admitted." *Moore v. Hagge*, 158 Wn. App. 137, 155, 241 P.3d 787 (2010), quoting *Safeco Ins. Co. of America v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991). "[T]he opinion of an expert must still be based on facts; opinions based on assumptions are not sufficient. (Citation omitted). An expert opinion must have a proper foundation." *Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C.*, 119 Wn. App. 815, 820, 79 P.3d 1163 (2003).

[W]hile ER 703 is intended to broaden the acceptable basis for expert opinion, there is no value in an opinion that is wholly lacking some factual basis Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.

Queen City Farms, Inc. v. Central National Ins. Co. of Omaha, 126 Wn.2d 50, 102-03, 882 P.2d 703 (1994).

In this case, Dr. Kiesel's opinion is obvious speculation because nobody knows the details of Abson's smoke

exposure. It is conceivable that Abson could have gone into the bedroom without being exposed to smoke and could have survived for a period of time with the window open. However, it is equally plausible that she had been exposed to so much smoke that she would have collapsed and died immediately upon opening the window. It is possible that opening a window would have introduced more air into the room. However, it is equally plausible that the open window would have become a conduit for heat, smoke and fire to escape the room, and no outside air could have entered.

In addition, we know that it took a long time for firefighters to reach the back of the house because of access issues. Even if Abson could have survived longer with the window open, nobody knows whether she would have been able to survive long enough to be rescued. There is no evidence one way or another on this issue.

The speculative nature of Dr. Kiesel's opinion is emphasized by the primary basis for that opinion – that two people were rescued from the front of the house after opening a window. The trial court rejected this evidence in granting summary judgment (CP 165).

The reason this evidence is insufficient to avoid summary judgment or to support an expert opinion is that there are too many variables to conclude that just because two people survived in one room at the front of the house means that Abson could have survived in another room at the back of the house. Nobody knows whether or not the smoke was worse or the fire was more intense in the back room. Nobody knows how much smoke Abson had inhaled before she even entered the room. Nobody knows the air flow patterns in the two rooms. All we do know is that the primary reason the people in the front of the house were rescued is that the room was accessible to the fire trucks, while the bedroom Abson was in was not accessible.

The appellants' attempt to use a speculative opinion from Dr. Kiesel to avoid summary judgment is similar to three cases in which courts rejected expert testimony. In *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835, a pedestrian was struck by a passing car. The plaintiff's expert claimed that if the city had taken additional precautions, the driver would have been likely to be more alerted to the possible presence of pedestrians and the accident would have been avoided. *Id.* at 142-43, 147. The court noted the

absence of any evidence about how the accident happened, and concluded that the expert's opinion about where the plaintiff was struck was speculative. The Court of Appeals concluded that the trial court had properly excluded the expert testimony. *Id.* at 148-50.

In *Moore*, the plaintiff was hit by a vehicle while walking along the road. 158 Wn. App. at 140-41. The plaintiffs' expert stated the opinion that if the city had implemented certain safeguards for pedestrians the accident would not have happened. However, there was no evidence as to how the accident occurred. The court noted that the expert did not have any factual basis for his opinions, comparing the case to *Miller*.

Yet, similar to the expert in *Miller*, Neuman arrives at these opinions without evidence establishing the point of impact and without any quantitative analysis. Arguably, Neuman's testimony is even more speculative than that offered in *Miller* since Neuman had no eyewitness testimony on which to base his opinions.

Id. at 156. Accordingly, the Court of Appeals agreed that the trial court properly excluded the expert's opinion. *Id.* at 155-57.

In *Rogers*, potato seed transported from Nebraska to Washington yielded defective potato plants. In a bench trial, the trial court found that the problem was caused by exposure of the seeds to cold during its transportation by the defendant. *Id.* at 816-17. The Court of Appeals considered the testimony of two experts who claimed that the seeds were damaged because of exposure to cold. The Court concluded that the experts “based their opinion not on facts, but on mere assumptions or speculation.” *Id.* at 820. As in this case, one expert named Holland gave an opinion without having knowledge of multiple relevant variables.

Mr. Holland believed the seed was exposed to an undesirable environment and was most likely exposed to cold. But he admitted he was unaware of temperatures in Nebraska at the relevant times. He neither knew how the seed was stored, nor was he able to specify where the chill damage occurred. His opinion as to when any chill occurred was based on speculation.

Id. at 820-21.

Dr. Kiesel is just guessing about what might have happened. That is not sufficient to support an expert opinion, and accordingly cannot create a question of fact.

5. Dr. Kiesel's Declaration Is Insufficient to Support Reconsideration Because It Only Addresses One Causation Factor.

Even if the Court could consider Dr. Kiesel's declaration and even if the declaration was admissible, the declaration does not support reconsideration of the trial court's summary judgment order. If we assume that Abson would have survived if she had been able to open a window, we still do not know enough about the situation to create a question of fact on causation.

Nobody still knows whether Abson was trapped in the back bedroom or whether she simply stumbled into the room as she lost consciousness. Nobody still knows whether Abson had time to open a window before she succumbed to smoke inhalation. Nobody still knows whether Abson even thought to open a window. All we do know is that Abson did not attempt to break a window, which suggests that she either did not have enough time or did not even think about the windows.

Dr. Kiesel's declaration – even if accepted at face value – only provides one piece of the puzzle. But it still requires guesswork to be able to say that “but for” the windows being inoperable Abson would have survived.

Because there still is not enough information about how the incident unfolded, the cases involving unknown facts cited above are applicable and the appellants still have not come forward with enough evidence to create a question of fact on causation.

C. THE “MARK” TO THE SIDE OF THE WINDOW DOES NOT CREATE A QUESTION OF FACT WITH REGARD TO CAUSATION.

In their motion for reconsideration the appellants alleged without any supporting evidence that a “handprint” was discovered on the soot near the alleged inoperable window. Then at oral argument appellants’ counsel handed the trial judge a photograph that purported to show the window at issue and a mark next to it. The judge agreed to look at the photograph over Post’s objection. (RP 3). In their brief the appellants again allege that “handprints were found around the inoperable window”, and attach the photograph as an appendix. The appellants’ motion to allow the photograph to be attached – even though it is not part of the trial court record – is still pending.

This photograph is inadmissible and cannot be considered in evaluating the trial court’s orders. Even if the

photograph was admissible, it is completely immaterial and does not create a question of fact on causation.

1. The Photograph of a Mark Adjacent to the Allegedly Inoperable Window Is Inadmissible.

This Court should not consider the appellants' photograph for several reasons. First, the photograph is not part of the trial court record. It was not submitted in any of the appellants' materials in opposition to summary judgment or in support of reconsideration. As a result, it could not have been considered as evidence (as opposed to for illustrative purposes) by the trial court and cannot be considered by this Court. The fact that the trial court looked at the photograph during oral argument does not convert it into admissible evidence.

Second, CR 56(h) requires a trial court to designate the documents and other evidence considered in a summary judgment motion. Similarly, RAP 9.12 allows an appellate court to consider only the evidence set forth in the summary judgment order. Neither the order granting summary judgment nor the order denying reconsideration listed the photograph as evidence that was considered by the trial court. (CP 82-83; CP 185-86).

Third, the photograph was never authenticated or even identified by any witness. ER 901(a) states the requirement of authentication or identification is satisfied by evidence “sufficient to support a finding that the matter in question is what its proponent claims”. There is no such evidence in this case. This photograph may be of the allegedly defective window, or it may be a photograph of another window in the house or a window in some other house. In the absence of any evidence identifying the photograph, it cannot be considered in a summary judgment proceeding or on appeal.

2. Even if the Photograph Was Admissible, It Does Not Create a Question of Fact on Causation.

Even if the appellants’ photograph was admissible, it provides no evidence that is material to the causation issue. There is absolutely no evidence that this mark represents a handprint rather than some other smudge, that the mark was made by Abson rather than someone else, or that the mark reflects an attempt to open the window.

First, reviewing the photograph shows a mark to the window that could be a handprint but also could be something else. The mark itself is ambiguous, and there is

no expert testimony indicating that the mark definitely is or even could be a handprint.

Second, there is no evidence that the mark was made by Abson. As the appellants note, two other people were in the house during the fire and one of them could have made the mark. A firefighter could have made the mark.

Third, there is no evidence that the mark was made during the fire rather than after the fire. Certainly there were many people in the house after the fire. Possible people who could have made the mark are firefighters, Post, Martini, fire investigators and any other number of people. And since the mark seems to be on “top” of the soot rather than covered by soot, the clear inference is that it was made after the fire.

Fourth, there is no indication that the mark was made by someone attempting to open the window. If Abson had attempted to open the window, one would expect some marks or handprints on the window pane itself. Why would somebody attempting to open a window make a handprint several inches to the right of the window?

In the absence of any evidence that the mark had anything to do with Abson or with an attempt to open the

window, the presence of this mark cannot create any inference that Abson did attempt to open the window. Connecting the mark to Abson is pure speculation.

D. BECAUSE THE APPELLANTS WERE AWARE THAT THE WINDOW ALLEGEDLY WAS DEFECTIVE, POST CAN HAVE NO LANDLORD LIABILITY UNDER WASHINGTON LAW.

The discussion above indicates that summary judgment was appropriate based on insufficient evidence of causation. Accordingly, the Court does not need to address any other liability issues. However, even if there was evidence to support causation, summary judgment still would be appropriate based on the issue of liability. Because the appellants knew that the window allegedly was painted shut, under Washington law Post can have no liability.

Washington law is clear that a landlord is subject to liability for injuries caused to a tenant only if caused by hidden defects in the premises.

Washington common law provides that a landlord will be liable to a tenant for harm caused by

- (1) latent or hidden defects in the leasehold
- (2) that existed at the commencement of the leasehold
- (3) of which the landlord had actual knowledge

(4) and of which the landlord failed to inform the tenant.

Frobig v. Gordon, 124 Wn.2d 732, 735, 881 P.2d 226 (1994).

In this case, the appellants admit that they knew that the window (allegedly) was painted shut. (CP 69). As a result, this was not a “latent or hidden” defect and the first *Frobig* element cannot be satisfied. Similarly, the fourth *Frobig* element indicates that the landlord’s only duty is to inform the tenant. Obviously, there was no need for Post to inform the appellants because they already had knowledge that the window (allegedly) was painted shut. As a result, there can be no common law liability in this case.

The appellants’ also have alleged violation of the Residential Landlord-Tenant Act, RCW 59.18.060. However, monetary damages arising from injuries are not available for breach of a landlord’s duties under the RLTA. *E.g.*, *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 472, 17 P.3d 641 (2001); *Aspon v. Loomis*, 62 Wn. App. 818, 825-26, 816 P.2d 751 (1991) (“ . . . the Legislature did not intend to impose a duty on landlords to keep noncommon areas safe from defects”).

Division 3 of the Court of Appeals has held that even though no direct cause of action is available under the RLTA, the violation of the RLTA might subject the landlord to liability under the Restatement (Second) of Property: Landlord & Tenant § 17.6. *E.g., Lian v. Stalick*, 106 Wn. App. 811, 822, 25 P.3d 467 (2001). Section 17.6 subjects the landlord to potential liability for the failure to repair a dangerous condition that violates the implied warranty of habitability or a duty created by statute or administrative regulation.

However, the Supreme Court has not addressed whether § 17.6 should be adopted to allow a “back door” imposition of liability under the RLTA. Further, this Court has twice declined to adopt § 17.6. *Pruitt v. Savage*, 128 Wn. App. 327, 332, 115 P.3d 100 (2005); *Sjogren v. Properties of the Pacific Northwest, L.L.C.*, 118 Wn. App. 144, 150-51, 75 P.3d 592 (2003). This Court should adhere to the rulings in these cases.

The appellants had full knowledge that the window allegedly was inoperable. This precludes common law liability as a matter of law. Further, this Court also should

hold as a matter of law that the appellants cannot recover for a known defect under the RLTA or Restatement § 17.6.

IV. CONCLUSION

The appellants have been unable to come forward with sufficient affirmative evidence to avoid summary judgment on causation. Because nobody knows what happened, it is impossible to say whether the allegedly defective window had anything to do with Abson's death. Guesswork is not enough. The trial court's grant of summary judgment was correct.

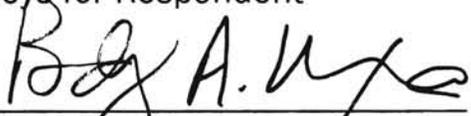
Further, the trial court's denial of the appellants' motion for reconsideration was appropriate. Dr. Kiesel's declaration should not have been considered, but in any event it was not based on any expertise in determining the possibility of survival in a fire and his opinion was based on pure speculation. In addition, even Dr. Kiesel's declaration did support an inference that opening the window might have allowed Abson to survive, the appellants still provided no evidence that Abson was even in the northeast bedroom more than a few seconds before she collapsed, that Abson

even considered opening the window, or that Abson even had time to open the window.

For the reasons stated above, respondent Paul Post requests that this Court affirm the trial court's grant of summary judgment and dismissal of the appellants' complaint.

Dated this 19 day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 19 day of September, 2012, I caused to be delivered a copy of the document to which this certification is attached to all parties of record in the following manner.

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