

No. 44073-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BONNY M. BOLSON,
Appellant,

vs.

HAYDEN G. WILLIAMS and DONITA C. WILLIAMS, individually
and on behalf of the marital community composed of HAYDEN G. &
DONITA C. WILLIAMS; WILLIAMS & SCHLOER, CPA'S, P.S., a
Washington professional service corporation,
Respondents.

APPELLANT'S OPENING BRIEF
(corrected)

VREELAND LAW PLLC
Victor J. Torres, WSBA No. 38781
Attorneys for Appellant
500 108TH Avenue NE, Suite 740
Bellevue, WA 98004
(425) 623-1300

Table of Contents

I.	INTRODUCTION.....	- 1 -
II.	ASSIGNMENTS OF ERROR.....	- 2 -
III.	STATEMENT OF THE CASE.....	- 4 -
A.	The Parties.....	- 4 -
B.	The Puyallup River Flooded the Defendants' Premises.....	- 4 -
C.	The Premises was Contaminated with Black Water.....	- 5 -
D.	Defendants Attempted to Clean and Repair the Premises.....	- 5 -
E.	The Defendants Knew that the Premises was Not a Safe Place for Their Employees, But did Nothing.....	- 6 -
F.	Plaintiff Bonny Bolson is Diagnosed with Sarcoidosis.....	- 9 -
G.	Plaintiff's Expert Witness, Dr. Jack D. Thrasher, Opined that Defendants' Negligence Proximately Caused Plaintiff's Injuries.....	- 10 -
H.	The Trial Court Granted Summary Judgment Ruling that Only a Medical Doctor Could Testify as to Causation.....	- 14 -
IV.	ARGUMENT.....	- 16 -
A.	Standard of Review.....	- 16 -
B.	Summary Judgment was Inappropriate Because the Trial Court Usurped the Role of the Jury on the Issues of Negligence and Proximate Causation.....	- 17 -
C.	Summary Judgment was Inappropriate Because the Trial Court Failed to Properly Recognize Dr. Thrasher's Qualifications.....	- 24 -
1.	<i>Dr. Thrasher is a Qualified Expert Under Washington Law.....</i>	- 25 -
2.	<i>Defendants Failed to Preserve Challenges to the Admissibility of Dr. Thrasher's Opinions, So Any Disputes Go to His Credibility and the Weight of His Opinions.....</i>	- 27 -
3.	<i>Neither the Trial Court Nor the Defendants Cited a Single Case which Held that a</i>	

	<i>“Medical” Doctor was Required in This Type of Case.</i>	- 32 -
4.	<i>Viewed in the Light Most Favorable to Plaintiff, Dr. Thrasher’s Opinions Provided Sufficient Evidence of Proximate Causation to Defeat Summary Judgment.</i>	- 38 -
D.	Summary Judgment was Inappropriate Because the Trial Court Should Not have Determined the Remaining Elements of Negligence as a Matter of Law.	- 39 -
1.	<i>There is No Dispute that All Defendants Owed Plaintiff a Duty.</i>	- 39 -
2.	<i>Defendants Breached Their Duty to Plaintiff by Doing Nothing which is Not Reasonable.</i>	- 41 -
3.	<i>There is No Dispute that Plaintiff Suffered Injuries and was Ultimately Diagnosed with a Disease.</i>	- 43 -
E.	The Trial Court Improperly Dismissed Plaintiff’s Emotional Distress Claims.	- 43 -
1.	<i>Plaintiff’s Negligent Infliction of Emotional Distress Claim Should be Reinstated.</i>	- 43 -
2.	<i>Summary Judgment on Plaintiff’s Intentional Infliction of Emotional Distress Claims was Inappropriate Because Defendants’ Gambled with Their Employees’ Lives.</i>	- 44 -
F.	The Issue of Collateral Estoppel is Not Before This Court Since Defendants Failed to Timely Cross-Appeal.	- 45 -
V.	CONCLUSION	- 47 -

Table of Authorities

CASES

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000), 27 P.3d 608 (2001)	- 45 -
<i>Attwood v. Albertson’s Food Ctrs., Inc.</i> , 92 Wn. App. 326, 966 P.2d 351 (1998).....	- 19 -
<i>Barker v. Advanced Silicon Materials, LLC</i> , 131 Wn. App. 616, 128 P.3d 633 (2006).....	- 16 -
<i>Bernethy v. Walt Failor’s, Inc.</i> , 97 Wn.2d 929, 653 P.2d 280 (1982).....	- 18 -
<i>Birklid v. Boeing Co.</i> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	- 44 -
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996).....	- 17 -
<i>Bonner v. ISP Techs., Inc.</i> , 259 F.3d 924 (8th Cir. 2001)	- 35 -
<i>Breit v. St. Luke’s Memorial Hosp.</i> , 49 Wn. App. 461, 743 P.2d 1254 (1987)	- 33 -, - 34 -
<i>Bruns v. PACCAR, Inc.</i> , 77 Wn. App. 201, 890 P.2d 469 (1995).....	- 30 -
<i>Bunch v. King County Dept. of Youth Servs.</i> , 155 Wn.2d 165, 116 P.3d 381 (2005).....	- 43 -
<i>Burke v. Pepsi–Cola Bottling Co.</i> , 64 Wn.2d 244, 391 P.2d 194 (1964).....	- 31 -
<i>Caufield v. Kitsap County</i> , 108 Wn. App. 242, 29 P.3d 738 (2001).....	- 41 -
<i>Clausen v. M/V New Carissa</i> , 339 F.3d 1049 (9th Cir. 2003) ...	- 19 -
<i>Coates v. Tacoma Sch. Dist. No. 10</i> , 55 Wn.2d 392, 347 P.2d 1093 (1960)	- 17 -
<i>Douglas v. Freeman</i> , 117 Wn.2d 242, 814 P.2d 1160 (1991)...	- 32 -
<i>Drake v. Smersh</i> , 122 Wn. App. 147, 89 P.3d 726 (2004).....	- 17 -
<i>Ferebee v. Chevron Chem. Co.</i> , 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984)	- 31 -
<i>Genty v. Resolution Trust Corp.</i> , 937 F.2d 899 (3d Cir. 1991)..	- 35 -
<i>Gifford v. Matejka</i> , No. 25886-2-II, 2001 Wash. App. LEXIS 1560 (July 20, 2001).....	- 35 -
<i>Goodman v. Boeing Co.</i> , 75 Wn. App. 60, 877 P.2d 703 (1994).....	- 33 -, - 34 -
<i>Harris v. Robert C. Groth, M.D., Inc., P.S.</i> , 99 Wn.2d 438, 663 P.2d 113 (1983).....	- 33 -, - 34 -
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985)	- 19 -
<i>Heller v. Shaw Indus., Inc.</i> , 167 F.3d 146 (3d Cir. 1999)	- 19 -

<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 553 P.2d 1096 (1976)	- 43 -
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	- 17 -
<i>In re Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	- 28 -
<i>In re Young</i> , 24 Wn. App. 392, 600 P.2d 1312 (1979)	- 27 -
<i>Intalco Aluminum Corp. v. Dep't of Labor & Indus.</i> , 66 Wn. App. 644, 833 P.2d 390 (1992)	- 29 -, - 30 -, - 31 -
<i>Judd v. Dep't of Labor & Indus.</i> , 63 Wn. App. 471, 820 P.2d 62 (1991).....	- 33 -, - 34 -
<i>Keegan v. Grant County Public Util. Dist. No. 2</i> , 34 Wn. App. 274, 661 P.2d 146 (1983).....	- 27 -
<i>Kloepfel v. Bokor</i> , 149 Wn.2d 192, 66 P.3d 630 (2003).....	- 44 -
<i>Lamborn v. Phillips Pac. Chem. Co.</i> , 89 Wn.2d 701, 575 P.2d 215 (1978)	- 40 -
<i>Lamon v. McDonnell Douglas Corp.</i> , 91 Wn.2d 345, 588 P.2d 1346 (1979)	- 27 -
<i>Larsen v. Walton Plywood Co.</i> , 65 Wn.2d 1, 390 P.2d 677 (1964).....	- 28 -
<i>Larson v. Georgia Pac. Corp.</i> , 11 Wn. App. 557, 524 P.2d 251 (1974).....	- 27 -
<i>Loudermill v. Dow Chem. Co.</i> , 863 F.2d 566 (8th Cir. 1988)-	- 36 -, - 37 -
<i>McCarthy v. Dep't of Soc. & Health Servs.</i> , 110 Wn.2d 812, 759 P.2d 351 (1988).....	- 40 -
<i>Mebust v. Mayco Mfg Co.</i> , 8 Wn. App. 359, 506 P.2d 326 (1973).....	- 46 -
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011).....	- 41 -
<i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001)	- 17 -
<i>Mondelli v. Kendel Homes Corp.</i> , 631 N.W.2d 846 (Neb. 2001).....	- 35 -
<i>Mucsi v. Graoch Assocs. Ltd. P'ship No. 12</i> , 144 Wn.2d 847, 31 P.3d 684 (2001).....	- 40 -
<i>Paoli R.R. v. Monsanto Co.</i> , 916 F.2d 829 (3d Cir. 1990).....	- 35 -
<i>Raum v. City of Bellevue</i> , 171 Wn. App. 124, 286 P.3d 695 (2012).....	- 28 -
<i>Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.</i> , 96 Wn.2d 939, 640 P.2d 1051 (1982)	- 31 -
<i>Riggins v. Bechtel Power Corp.</i> , 44 Wn. App. 244, 722 P.2d 819 (1986).....	- 22 -, - 23 -
<i>Roche v. Lincoln Prop. Co.</i> , 278 F. Supp. 2d 744 (E.D. Va. 2003).....	- 37 -

<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995)	- 17 -
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998)	- 19 -
<i>Smith v. Acme Paving Co.</i> , 16 Wn. App. 389, 558 P.2d 811 (1976).....	- 16 -
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992)	- 31 -
<i>Swanson v. McKain</i> , 59 Wn. App. 303, 796 P.2d 1291 (1990), <i>rev. denied</i> , 116 Wn.2d 1007 (1991).....	- 40 -
<i>Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.</i> , 171 Wn.2d 88, 249 P.3d 607 (2011)	- 16 -
<i>Westberry Gislaved Gummi AB</i> , 178 F.3d 257 (4th Cir. 1999) .	- 19 -
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	- 16 -
<i>Winfrey v. Rocket Research Co.</i> , 58 Wn. App. 722, 794 P.2d 1300 (1990).....	- 41 -
<i>Zuchowicz v. United States</i> , 140 F.3d 381 (2d Cir. 1998).....	- 20 -

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (9th ed. 2009)	- 26 -
MERRIAM-WEBSTER'S DICTIONARY	- 26 -

RULES

CR 56(c)	- 16 -
ER 702.....	- 1 -, - 25 -, - 27 -
RAP 2.4(a).....	- 45 -
RAP 5.2(f).....	- 45 -

TREATISES

16 WASH. PRAC., <i>Tort Law And Practice</i> § 4.2 (3d ed. 2012)	- 19 -
2 J. Wigmore, <i>Evidence</i> § 569 (rev. 1979).....	- 34 -
5A K. Tegland, WASH. PRAC., <i>Evidence</i> § 289 (2d ed. 1982)....	- 34 -
5A-36C ENVIRONMENTAL LAW PRACTICE GUIDE § 36C.06 (2012) -	34 -

I. INTRODUCTION

The Superior Court erred in determining that plaintiff's claims failed as a matter of law because there was insufficient expert testimony on causation. Absent scientifically complex issues, negligence and proximate cause are questions of fact for the jury. Expert testimony on the issue of causation is not normally required. Based on the factual circumstances of this case, eye witness testimony, and the proximity in time of events, causation can be reasonably and naturally inferred by a jury.

Nonetheless, plaintiff supplied an expert witness—Dr. Jack D. Thrasher, a toxicologist and immunotoxicologist—to assist the Superior Court in understanding the link between the hazardous conditions of the premises and plaintiff's injuries. In granting summary judgment on the issue of causation, the Superior Court erroneously imported the standard from medical negligence cases—that “medical testimony” can only be provided by a “medical doctor.” In reality, there is no such requirement. Expert testimony under ER 702 is allowed—but not required—if it assists the trier-of-fact and the expert is qualified based on his knowledge, skill, experience, training, or education. Because there is sufficient evidence of negligence, and because Dr. Thrasher is qualified to

provide expert testimony on causation, this Court should reverse the decision below and remand this matter for trial.

II. ASSIGNMENTS OF ERROR

The trial court erred in granting defendants' motion for summary judgment, and denying plaintiff's motion for reconsideration, by finding that plaintiff's expert toxicologist/immunotoxicologist was not qualified to provide testimony on the element of proximate cause.

Issues Pertaining to Assignments of Error

1. Did the trial court error when it granted summary judgment based on a lack of causation where there exists an unbroken chain of events and a temporal relationship between defendants' conduct and plaintiff's injuries? **Yes**.
2. Did the trial court error when it determined that expert testimony was ***required*** in this case? **Yes**.
3. Did the trial court error when it failed to qualify Dr. Jack Thrasher as an expert under ER 702's lenient standards based on his knowledge, skill, training, and experience? **Yes**.

4. Did the trial court error when it failed to qualify Dr. Jack Thrasher as an expert where there were no challenges to the admissibility of his opinions? Yes.
5. Did the trial court error when it failed to qualify Dr. Jack Thrasher as an expert simply because he was not a "medical" doctor with "M.D." after his name? Yes.
6. Did the trial court error when it granted summary judgment based on a lack of causation where Dr. Thrasher's expert opinions were more than sufficient to defeat summary judgment? Yes.
7. Did the trial court error when it granted summary judgment on the remaining elements of negligence where there were disputed issues of material fact or there was no dispute of fact in favor of plaintiff? Yes.
8. Did the trial court error in granting summary judgment on plaintiff's negligent infliction of emotional distress claim where there was sufficient evidence to defeat summary judgment? Yes.
9. Did the trial court error in granting summary judgment on plaintiff's intentional infliction of emotional distress where

causation is not required and there are no bases in the record for the dismissal of this claim? Yes.

III. STATEMENT OF THE CASE

A. The Parties.

Defendant landowners, Hayden and Donita Williams own the premises located on the banks of the Puyallup River at 1843 East Main, Puyallup, WA 98372.¹ Defendant-employer Williams & Schloer ("W&S") leases the premises for its accounting firm.² W&S is owned by Hayden Williams and Tina Schloer.³ Plaintiff Bonny Bolson worked for defendants as a Tax Accountant and Enrolled Agent from January 28, 2003, until her termination on December 3, 2010.⁴

B. The Puyallup River Flooded the Defendants' Premises.

On January 7, 2009, a severe storm engulfed the Puget Sound region that caused massive flooding of homes and businesses near the area's rivers.⁵ That night, defendants discovered that their building's crawlspace was entirely underwater, the floor and subfloor were submerged, the carpets were saturated,

¹ CP 2, 10, 18, 22.

² CP 185–86.

³ CP 11.

⁴ CP 24, 248.

⁵ CP 3, 14.

and the Puyallup River had risen to at least one-quarter inch above the building floor.⁶

C. The Premises was Contaminated with Black Water.

The building was contaminated by Category 3 water or “black water” from the Puyallup River.⁷ Black water is water that is grossly contaminated and contains pathogenic, toxigenic, and other harmful agents including microbes, silt, and other organic matter.⁸

D. Defendants Attempted to Clean and Repair the Premises.

On January 9, 2009, the black waters began to recede and defendants initiated their attempted cleanup and repairs led by Doug Schloer.⁹ Mr. Schloer was the husband to Tina Schloer (who are in the middle of divorce) and the on-call maintenance and repair man.¹⁰ Mr. Schloer had no experience cleaning up black water.¹¹ Some of the actions undertaken by defendants and Mr. Schloer include the following:

⁶ CP 15, 19, 22–23, 54, 103, 178, 203–04.

⁷ CP 221, 258.

⁸ *Id.*

⁹ CP 3, 11, 15, 19, 23, 102, 220, 249–50, 260.

¹⁰ CP 207.

¹¹ CP 102–03, 222, 260–61.

- Requiring the employees to help clean up and move items from the building to a temporary storage unit outside;¹²
- Setting up a temporary work space in the back of the building for the employees to continue working because of the busy tax season;¹³
- Sawing of flooring and subflooring that exposed the waterlogged crawlspace and contaminated insulation during daytime work hours;¹⁴
- Attempting to dry out the building, using box fans that also circulated wood particles, dust, mold, bacteria, and pathogen by-products into the work environment;¹⁵ and
- Applying bleach during the times when employees were working in the building.¹⁶

Defendants attempted repairs on the premises for approximately one month until the first week of February.¹⁷

E. The Defendants Knew that the Premises was Not a Safe Place for Their Employees, But did Nothing.

Defendants knew that the premises—the work environment they provided to their employees—experienced a natural disaster and changed it for the worse.¹⁸ According to Ms. Schloer, “there was a damp smell from the moisture, a smell of bleach, a sawdust

¹² CP 3, 23, 45, 48, 179, 204, 249, 261.

¹³ CP 4, 15, 23, 44, 48, 220.

¹⁴ CP 103, 220, 242–43, 249, 251.

¹⁵ CP 3, 11, 19, 23, 47–48, 58, 103, 181, 205, 220, 222, 242–43, 249–51, 261.

¹⁶ CP 11–12 (“ . . . defendants further admit that bleach was applied to the subflooring areas of the premises during times when employees were working.”). See also CP 19, 23, 45, 48, 58, 222, 250, 261–62.

¹⁷ CP 250.

¹⁸ CP 18–21, 22–25, 178, 203–04.

smell, and lots of noise.”¹⁹ Mr. Williams also acknowledged the smells and odors of the workplace.²⁰ Employee Tina Dougher recalls that “there was a mild musty smell, a very strong bleach smell, and a lot of noise.”²¹ Employee Jacie Russum observed that during the repair work, “it was noisy and smelled like river water after a flood and sawdust.”²² Plaintiff recalls the work environment was stinky with mixed aromas of “dead things and mold.”²³ In spite of the contaminated and hazardous conditions, however, according to Ms. Schloer, “Because it was a busy tax season, we had to set up some of our employees in the back room.”²⁴

Defendants concede that they received complaints from plaintiff and other employees about the work environment conditions and reports of symptoms.²⁵ Employees complained about the smell and noise from working in a post-flood environment

¹⁹ CP 23.

²⁰ CP 21 (“After the project was done and the new carpet was down, there was **no further smell . . .**”) (emphasis added).

²¹ CP 45.

²² CP 48.

²³ CP 48, 251.

²⁴ CP 23. *See also* CP 20.

²⁵ CP 12 (“ . . . the defendants admit that Ms. Bolson and other employees complained during the construction period about coughing and headaches, and possibly irritated eyes.”). *See also* CP 181, 205.

and amid the repair work being performed.²⁶ Ms. Schloer admits that some employees suffered from “watery eyes/stuffy noses.”²⁷ Employees confirmed that they suffered sniffing and headaches.²⁸ In fact, some employees “left work early because they were gagging and had intense headaches.”²⁹ Plaintiff suffered, among other things, headache, cough, red eyes, and generally feeling like she “caught the flu.”³⁰

About a week into the repair work, the employees became concerned and worried about mold because of the strong odors.³¹ They purchased two petri dish mold test kits with their own money from a local hardware store.³² Employee Jacie Russum told Ms. Schloer that the employees administered the mold test kits that revealed mold was present in the work environment.³³ Despite the test kits showing mold, defendants refused to send the test kits to a laboratory for further analysis because they did not want to spend company funds on the mold kits and they felt there was no reason

²⁶ CP 45, 48, 181, 205, 251.

²⁷ CP 251.

²⁸ CP 48.

²⁹ CP 250.

³⁰ *Id.*

³¹ CP 48, 251.

³² CP 45, 48, 180, 204, 251, 262.

³³ CP 23, 45, 251.

to believe further analysis was warranted.³⁴ Defendants were also not interested in performing any environmental analysis during the repair work.³⁵ The message that the employees received was that defendants would “wait and see” and that defendants would “check for problems after the cleanup.”³⁶

After the carpet was installed, plaintiff purchased identical mold test kits with her own money.³⁷ After administering the tests, plaintiff placed the dishes on Ms. Russum’s desk along with a personal check for the laboratory analysis.³⁸ Ms. Russum returned plaintiff’s check and stated that defendants warned her that mold tests were not to be conducted or mailed in under any circumstances.³⁹

F. Plaintiff Bonny Bolson is Diagnosed with Sarcoidosis.

Prior to the January 2009 flood, defendants and her co-workers knew that plaintiff had suffered allergies before, including reactions to mold.⁴⁰ Plaintiff had medical imaging of her lungs

³⁴ CP 24, 49, 180, 204, 251.

³⁵ CP 21, 24, 45, 49.

³⁶ CP 45, 49.

³⁷ CP 45, 49, 252.

³⁸ CP 45, 49, 252.

³⁹ CP 45, 49, 252.

⁴⁰ CP 45, 49, 249.

taken on January 20, 2008—a year before the flood—that appeared normal and unremarkable.⁴¹

After the flood and exposure to defendants' building, however, plaintiff developed flu-like symptoms during the repair work that persisted for the next several months.⁴² On July 2, 2009, x-rays revealed abnormal scars in plaintiff's chest and lungs not present in the January 20, 2008 medical films.⁴³ After months of treatment, her treating doctors diagnosed her with Sarcoidosis—an inflammatory disease that can appear in almost any body organ, but most commonly affects the lungs.⁴⁴

G. Plaintiff's Expert Witness, Dr. Jack D. Thrasher, Opined that Defendants' Negligence Proximately Caused Plaintiff's Injuries.

Plaintiff presented expert testimony from Dr. Jack D. Thrasher, who has over 45 years of experience in the field of toxicology and over 25 years of experience in the field of immunotoxicology.⁴⁵ Toxicology is the study of the adverse effects

⁴¹ CP 252.

⁴² *Id.*

⁴³ CP 238–39, 252.

⁴⁴ CP 12 (“... defendants admit that the plaintiff underwent a series of medical exams and procedures and was ultimately diagnosed with sarcoidosis.”). See also CP 4–5, 24, 45, 49–50, 252.

⁴⁵ CP 255–56. Dr. Thrasher's complete curriculum *vita*e can be found at CP 270–80.

of chemicals on living organisms.⁴⁶ Immunotoxicology is the study of adverse effects on the immune system from exposure to “agents” including, among other things, chemicals and biological materials.⁴⁷ Further, immunotoxicologists study allergens, immune dysregulation, autoimmunity, and chronic inflammation.⁴⁸

Although Dr. Thrasher holds a doctorate in Human Anatomy/Cell Biology, the exclusive focus of his post-graduate professional work has been toxicology and immunotoxicology.⁴⁹ He has held several academic appointments including at the University of Colorado School of Medicine at Denver and at the University of California School of Medicine at Los Angeles.⁵⁰ He has consulted for numerous public entities and private sector companies in the areas of environmental toxicology and immunotoxicology including the Center for Immune and Toxic Disorders, State of New Mexico Department of Health, and treating physicians nationwide.⁵¹ And, he is extensively published in peer-reviewed publications including those focused on the health effects of occupants in buildings that

⁴⁶ CP 256.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ CP 256, 270–80.

⁵⁰ CP 256, 270.

⁵¹ CP 257, 270–72.

have been water-damaged or contain molds, mycotoxins, and other toxic materials.⁵²

Dr. Thrasher reviewed every single piece of paper in this case: all pleadings, all discovery exchanged by the parties, and all of plaintiff's medical records and films.⁵³ Based on his review of the evidence in the case, Dr. Thrasher opined on whether the defendants performed a proper clean up and the unhealthy conditions of the work environment (corroborated by plaintiff's expert industrial hygienist) including the following:

- The indoor environment after the flood was unhealthy and harmful due to black water contamination;⁵⁴
- Anyone entering or working in the building should have been provided and worn protective clothing;⁵⁵
- Defendants' use of box fans was not a proper and acceptable use within an environment contaminated with black water;⁵⁶
- The presence of musty odors observed by employees indicated mold and bacterial growth;⁵⁷
- Defendants' application of bleach with employees in the building in an attempt to kill mold was an inappropriate and unauthorized off-label use;⁵⁸
- Based on the musty odors, employees' complaints, and the fact that employees were experiencing symptoms

⁵² CP 256, 258, 272–80.

⁵³ CP 255.

⁵⁴ CP 221, 258–63.

⁵⁵ CP 221–22, 261, 285–86, 289.

⁵⁶ CP 222, 261.

⁵⁷ CP 259–60, 262–65.

⁵⁸ CP 222, 261–62, 286.

commonly related to mold and other toxins, defendants should have tested the environment to determine the danger to the employees' health, safety, and welfare,⁵⁹ and

- Defendants testing of the environment more than three years removed from the incident cannot reflect the dangers present in the environment during and/or after the flood.⁶⁰

And, based on his review of the case materials, Dr. Thrasher concluded that the unhealthy work environment was the proximate cause of plaintiff's injuries.

It is accepted in the field of toxicology, and even in modern medicine, that certain people are at a higher risk when it comes to exposure to toxins, mold, bacteria, and other potentially dangerous situations. These include the young, the elderly, those with pre-existing illnesses, genetic predisposition, and those with a compromised immune system. Ms. Bolson had pre-existing allergies to mold and the owners knew of her sensitivities. Therefore, she is considered as having an increased risk to exposure to mold. She, and other employees with pre-existing conditions, should not have been allowed in the flooded office during the alleged remediation efforts. In fact, during the alleged remediation, Ms. Bolson had to work from home most of the time because of the effects that the contaminated work environment had on her. And, when she did go into the office, even for short periods of time, Ms. Bolson immediately began feeling ill and suffered from some of the symptoms previously discussed above.

It is my professional opinion that Ms. Bolson's Sarcoidosis was, on a more probable than not basis,

⁵⁹ CP 222, 263.

⁶⁰ CP 223, 263.

caused by her exposure to mold, its by-products, and other environmental contaminants that were present in the W&S office immediately after the January 2009 flood.

Further, even if Ms. Bolson had pre-existing conditions or illnesses, it is my opinion, on a more probable than not basis, that her exposure to the contaminated work environment exacerbated the injuries she suffered and continues to suffer.⁶¹

Dr. Thrasher's opinion on the proximate cause of plaintiff's injuries is further substantiated by current medical literature. He found at least 18 peer reviewed research papers published in the past few years on the association of dampness, mold, and Sarcoidosis.⁶²

H. The Trial Court Granted Summary Judgment Ruling that Only a Medical Doctor Could Testify as to Causation.

On July 5, 2012, defendants moved for summary judgment dismissal of all claims against all defendants.⁶³ In their moving papers, defendants argued that testimony was required from a "medical expert" or a "medical doctor" in order to demonstrate evidence of "medical causation."⁶⁴ In its oral ruling on August 3, 2012, the trial court held:

⁶¹ CP 267-68.

⁶² CP 266.

⁶³ CP 89.

⁶⁴ CP 97-99. Defendants relied, in part, on records contained in plaintiff's Labor and Industries ("L&I") occupational injury claim; however, the trial court properly did not consider the L&I file or records on summary judgment. RP 19-27.

I am going to grant summary judgment. The key issue to me here that is not proven or not — it doesn't have to be proven — it doesn't meet the test necessary to go forward in this case is causation. I do agree with that.

It's not sufficient to have **someone who is not a medical doctor** telling the jury to draw conclusions on this sort of thing. There has to be a connection done by medical testimony as far as I read the law.

I understand **a reviewing court may disagree with me** on that, but my reading of the reviewing courts repeatedly is that that is the requirement.

Now, there are exceptions, and I do appreciate that But, this case here does require someone to draw the connection, the proximate cause between the two on a more likely than not basis. And it's not present in this case that I could find. And **Dr. Thrasher doesn't have the skill**. He's not the expert to do that, irrespective of his conclusions. Therefore, summary judgment will be granted.⁶⁵

The trial court entered an order granting defendants' summary judgment.⁶⁶

On August 13, 2012, plaintiff moved the trial court to reconsider its ruling that Dr. Thrasher was not a qualified expert to testify on the element of causation.⁶⁷ The trial court denied plaintiff's motion.⁶⁸ This timely appeal follows.⁶⁹

⁶⁵ RP 33–34.

⁶⁶ CP 321–22.

⁶⁷ CP 298–309; 313–19.

⁶⁸ RP 37.

IV. ARGUMENT

A. Standard of Review.

An appellate court reviews a summary judgment order *de novo*. *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 98, 249 P.3d 607 (2011). Summary judgment may only be granted where the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issues to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). When considering a motion for summary judgment, the court must consider all facts and all reasonable inferences from those facts in a light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

On motion for summary judgment, the trial court does not weigh the evidence or assess witness credibility and neither does the court on appeal. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006). Summary judgment must be “employed with caution lest worthwhile causes perish short of a determination of their true merit.” *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 392, 558 P.2d 811 (1976).

⁶⁹ CP 326–34.

The issues of negligence and proximate cause are not susceptible to summary judgment unless there is but *one* reasonable conclusion based on the facts of the particular case. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 741, 927 P.2d 240 (1996); *Ruff v. King County*, 125 Wn.2d 697, 703–04, 887 P.2d 886 (1995); *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835 (2001). It is only where the facts are undisputed and the inferences therefrom are plain and not subject to reasonable doubt or a difference of opinion that the issue of proximate cause evolves into a question of law for the court. *Coates v. Tacoma Sch. Dist. No. 10*, 55 Wn.2d 392, 397, 347 P.2d 1093 (1960) (citations omitted).

An appellate court reviews a trial court's decision to grant or deny a motion for reconsideration for abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997).

B. Summary Judgment was Inappropriate Because the Trial Court Usurped the Role of the Jury on the Issues of Negligence and Proximate Causation.

It was error for the Court to usurp the jury's responsibility by determining proximate cause as a matter of law despite the

unbroken sequence of events and by ignoring the strong temporal relationship between defendants' actions and plaintiff's injuries. Based on the factual circumstances, no expert testimony was required. A jury could have naturally inferred causation from the temporal proximity of defendants' negligent conduct and plaintiff's exposure to a dangerous work environment and injuries. Further, Washington courts have held that a jury is capable of drawing its own conclusions about proximate cause without expert testimony where the injury is apparently related to an event. As such, this Court should reverse and allow the jury to perform its responsibility.

The trial court erred when it granted summary judgment and determined that an expert was required on the issue of proximate causation⁷⁰—taking away the jury's ability to make that determination. It is well-established that the issue of proximate causation is a question for the jury. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982). A proximate cause is one that in natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred. *Id.* at 935; see also *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 482,

⁷⁰ RP 33.

951 P.2d 749 (1998). The jury must make this finding because “the determination of whether the injury would have occurred but for the defendant’s conduct itself requires the positioning of a hypothetical world in which the defendant had acted with reasonable care.” 16 WASH. PRAC., *Tort Law And Practice* § 4.2 (3d ed. 2012).

In making this showing, a plaintiff need only present evidence that would allow a jury to determine that without the defendant’s act or omission, the plaintiff would not have been injured. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). In fact, “[t]he plaintiff need not establish causation by direct and positive evidence, but only by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable.” *Attwood v. Albertson’s Food Ctrs., Inc.*, 92 Wn. App. 326, 331, 966 P.2d 351 (1998).

A temporal relationship can also demonstrate causation. “[A] temporal relationship between exposure to a substance and the onset of a disease or a worsening of symptoms can provide compelling evidence of causation.” *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1059 (9th Cir. 2003) (citing *Westberry Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 154 (3d Cir. 1999) (“if a person were

doused with chemical X and immediately thereafter developed symptom Y, the need for published literature showing a correlation between the two may be lessened"); *Zuchowicz v. United States*, 140 F.3d 381, 385, 390 (2d Cir. 1998)).

The trial court turned these rules upside down by deciding that expert testimony by a medical doctor on causation is required to prevent summary dismissal. Viewed in the light most favorable to plaintiff, based on the facts, chain of circumstances, and temporal relationship between defendants' conduct and plaintiff's injuries a jury could naturally infer that plaintiff's injuries would not have occurred but for defendants' conduct. For example, plaintiff's subjective complaints show, from the time of her exposure to the toxic work environment, that she experienced flu-like symptoms and consistent and constant pulmonary-related issues including coughing and shortness of breath.⁷¹ She suffered from these symptoms from the time of the flood until she was diagnosed with Sarcoidosis, and through remission almost a year later.⁷² To fortify the temporal connection, medical films taken on January 28, 2008,

⁷¹ CP 238–39, 252.

⁷² CP 238–39, 252.

show that plaintiff was asymptomatic.⁷³ Then, on July 2, 2009, medical films showed abnormal scarring in her lungs and biopsies soon after confirmed Sarcoidosis.⁷⁴ With the absence of any other intervening event, exposure, or documented medical issues, a jury could conclude and reasonably infer that exposure to the unhealthy work environment caused plaintiff's injuries. It was error for the trial court to take the case away from a jury. The trial court acknowledged that there was a genuine issue of material fact when it granted summary judgment "irrespective of [Dr. Thrasher's] conclusions."⁷⁵ The trial court erred by determining that there was no proximate cause as a matter of law.

The trial court understood that the temporal relationship was enough to overcome summary judgment when it queried defendants' counsel: "And you're basically telling me that you don't think the coincidence of time is sufficient to take it to the jury."⁷⁶ To ignore this simple fact as evidence of causation at summary judgment was error. Further, a jury is capable of deciding whether

⁷³ CP 238-39, 252.

⁷⁴ CP 238-39, 252.

⁷⁵ RP 33.

⁷⁶ RP 14.

the defendants' negligence was a proximate cause without having testimony from an expert on this ultimate issue of fact.

In their moving papers and at oral argument, defendants relied on *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 254, 722 P.2d 819 (1986) for the proposition that expert testimony from a medical doctor is required on the issue of proximate cause.⁷⁷ But, that case is easily distinguishable. There, the plaintiff tripped and fell over exposed rebar at the workplace. *Id.* at 247. According to her treating physicians, the accident caused an injury to her knee that necessitated surgery. *Id.* Plaintiff testified that she experienced hip pain and headaches—not present before—only **after** this knee surgery. *Id.* at 254. Over defendant's objection, the trial court refused to admit a jury instruction stating that plaintiff was required to prove damages by expert medical testimony. *Id.* at 253, 254 n.8.

The appellate court rightfully held that the trial court committed reversible error. *Id.* at 254. It determined that the jury should have been instructed that medical evidence was required to establish whether it was the original event (the fall over rebar) or subsequent knee surgery that proximately caused her hip pain and

⁷⁷ CP 97-98; RP 13-14.

headaches she started to suffer from **after** surgery. *Id.* at 254. The appellate court reasoned that the post-surgical hip pain and headaches were “aspects of the injury **not apparently related** to the accident and subsequent surgery.” *Id.* (emphasis added).

The *Riggins* case does not stand for the proposition that “medical causation” testimony by a “medical doctor” is required in this case. The rule of *Riggins* is that medical testimony can be required if there is more than one apparent cause of an injury. But, if an injury is “apparently related” to an accident, a jury can draw its own conclusions regarding the causal link without expert testimony. *Riggins* is inapplicable here because there are no intervening causes or events—such as surgery—that render plaintiff’s complaints obscure such that a jury could not find causation based on the unbroken chain of events. Based on the close proximity and temporal chronology of events, and the fact that employees other than plaintiff became symptomatic, there was sufficient evidence for a jury to conclude that plaintiff’s injuries were causally connected to defendants’ conduct and the toxic work environment. Even under the rule of *Riggins*, however, the trial court committed reversible error.

C. Summary Judgment was Inappropriate Because the Trial Court Failed to Properly Recognize Dr. Thrasher's Qualifications.

Even if expert testimony is required on causation in this particular case, it was error for the trial court to summarily dismiss the case in light of Dr. Thrasher's opinions. First, under ER 702 there is a relatively low bar for expert testimony. Dr. Thrasher met that bar because his testimony would help the trier-of-fact understand the link between Ms. Bolson's injuries and defendants' hazardous worksite. Second, there were no challenges to the admissibility of Dr. Thrasher's testimony, and any disagreements with his opinions go to the weight and not the admissibility of his testimony. Third, there is no authority that medical doctors with the title "M.D." are the only experts who may give expert opinion testimony on issues of medical causation. Further, the modern trend is not a draconian requirement that only medical doctors can give expert opinions such that a jury should not weigh Dr. Thrasher's opinions. Finally, Dr. Thrasher's expert opinions were sufficient for the trial court to deny summary judgment. Because the trial court determined that Dr. Thrasher was not qualified as a matter of law, this Court should reverse.

1. ***Dr. Thrasher is a Qualified Expert Under Washington Law.***

The trial court erred when it ruled that Dr. Thrasher was “not the expert” to testify on the issue of causation because he “doesn’t have the skill.”⁷⁸ The trial court committed the same error on reconsideration:

I did consider whether or not this particular expert witness could give medical evidence on **whether or not someone was hurt from toxic material**, and the answer I gave to that was no. **He’s a toxicologist, but he’s not qualified as a medical doctor.**⁷⁹

The fallacy of the trial court’s ruling is that Dr. Thrasher ***is*** exactly the type of expert who could address and answer that question.

Under ER 702’s relaxed standard for qualifying expert witnesses, Dr. Thrasher is “a witness qualified as an expert by knowledge, skill, experience, training, or education [who] may testify thereto in the form of an opinion or otherwise.” Based on his CV, his “scientific, technical, or other specialized knowledge,” and his skill, experience, and training, Dr. Thrasher is more than qualified to opine on the causal relationship at issue in this case.⁸⁰

⁷⁸ RP 33.

⁷⁹ RP 37 (emphasis added).

⁸⁰ See Part III, § G, *supra*. See also CP 254–58, 270–80.

Dr. Thrasher explained that toxicology and immunotoxicology are the studies of the adverse effects of toxic agents on living systems.⁸¹ In other words, a toxicologist is a person trained in a science dealing with poisons and their effects on living organisms. See MERRIAM-WEBSTER'S DICTIONARY (defining toxicology as "a science that deals with poisons and their effect and with the problems involved (as clinical, industrial, or **legal**).").⁸² Similarly, BLACK'S LAW DICTIONARY defines toxicology as "[t]he **branch of medicine** that concerns poisons, their effects, their recognition, their antidotes, and generally the **diagnosis** and therapeutics of poisoning; the science of poisons." BLACK'S LAW DICTIONARY at 1629 (9th ed. 2009). Under any of these definitions, including Dr. Thrasher's own explanation, a toxicologist would be a "medical" expert capable of recognizing and diagnosing symptoms caused by exposure to molds, toxins, and other agents.

⁸¹ CP 256.

⁸² CP 304 n.1 (<http://www.merriam-webster.com/dictionary/toxicologist?show=0&t=1344617919> (last visited Aug. 10, 2012)).

2. Defendants Failed to Preserve Challenges to the Admissibility of Dr. Thrasher's Opinions, So Any Disputes Go to His Credibility and the Weight of His Opinions.

The trial court erred when it failed to qualify Dr. Thrasher as an expert, especially in the absence of any challenge to the admissibility of his testimony. Defendants never made any motion to strike any part of Dr. Thrasher's declaration or his opinions.⁸³ There was no challenge to Dr. Thrasher's status as a toxicological expert pursuant to ER 702, or otherwise, to exclude Dr. Thrasher. Failure to file a motion to strike waives any deficiency in the declaration. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). Once the basic requisite qualifications are established, any alleged deficiencies in an expert's qualifications go to the weight, rather than the admissibility, of his testimony. *Keegan v. Grant County Public Util. Dist. No. 2*, 34 Wn. App. 274, 283–84, 661 P.2d 146 (1983); *In re Young*, 24 Wn. App. 392, 397, 600 P.2d 1312 (1979); *Larson v. Georgia Pac. Corp.*, 11 Wn. App. 557, 560, 524 P.2d 251 (1974).

There being no legal challenges to the admissibility of Dr. Thrasher and his opinions, the only dispute that remained was a

⁸³ CP 311.

difference of opinion between Dr. Thrasher and defendants' industrial hygienist.⁸⁴ However, disagreement between experts goes to the weight, not the admissibility, of the evidence. *In re Thorell*, 149 Wn.2d 724, 756, 72 P.3d 708 (2003). *See also Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 390 P.2d 677 (1964) ("The weight to be given to an expert witness's testimony is for the trier of fact to determine."). Some of those disputes are addressed here:

*No physical examination of plaintiff.*⁸⁵ Plaintiff has been in remission since December 2009 rendering any examination of plaintiff's injury impossible. More importantly, expert medical opinions are commonly based solely on a review of records in many cases. *Raum v. City of Bellevue*, 171 Wn. App. 124, 154 n.25, 286 P.3d 695 (2012) ("The weight, if any, to be given a medical expert's opinion based solely on a medical records review is within the jury's province.").

*No inspection of the building.*⁸⁶ Although defendants' expert industrial hygienist conducted an inspection and analysis of the

⁸⁴ Interestingly, neither the trial court nor defendants have indicated why defendants' expert industrial hygienist is qualified to reach her conclusions that plaintiff's disease could not have been caused by her exposure to the post-flood workplace environment, while simultaneously arguing that Dr. Thrasher, a toxicologist, is not qualified to reach his opinions.

⁸⁵ CP 295; RP 13.

⁸⁶ CP 295, RP 14.

building, this occurred more than three (3) years after the events of plaintiff's injuries. As such any inspection that Dr. Thrasher could have conducted, and any opinions arising from that investigation, would be irrelevant to the conditions that existed just prior to, during, or immediately following defendants' negligent conduct.⁸⁷

No specific finding of a toxic substance.⁸⁸ Washington courts have routinely found sufficient evidence in toxic tort cases without proof of a specific chemical causal agent. For example, in *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992), plaintiffs alleged they were injured as a result of exposure to air pollution in an aluminum production plant where they worked. Neither party named one chemical agent as the source of the disease. *Id.* at 655. Instead, the experts testified that an *unspecified* toxin or a combination of toxins constituted the employment condition that proximately caused the plaintiffs' disease. *Id.* Defendant claimed that this medical testimony was insufficient because the physicians could not identify the specific toxic agent or agents that caused the plaintiffs' disease. *Id.* Reviewing toxic tort cases in other jurisdictions, the court adopted

⁸⁷ CP 223, 263.

⁸⁸ CP 295, RP 14.

the reasoning that plaintiffs are not required to prove the precise chemical causing their injury and that a plaintiff “should not be denied recovery simply because the precise etiological link between the plaintiff’s disease and a specific toxin or toxins in the work place has not yet been made.” *Id.* at 657–58. Although the plaintiff’s claims in *Intalco* arose under workers’ compensation standards, other Washington courts have declined to distinguish *Intalco* on that issue and have expanded its reasoning outside of the realm of workers’ compensation. *See, e.g., Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 211–17, 890 P.2d 469 (1995) (adopting *Intalco*’s holding that “more probable than not” standard does not require absolute certainty ruling that there is no requirement to specifically identify the chemicals or contaminants causing plaintiff’s injuries). Here, Dr. Thrasher opined on a more probable than not basis that plaintiff’s disease was caused or exacerbated by her “exposure to mold, its by-products, and other environmental contaminants that were present in the W&S office immediately after the January 2009 flood.”⁸⁹ Under *Intalco* and *Bruns*, this is sufficient evidence of causation to be decided on by a jury.

⁸⁹ CP 267–68.

The determination of weight and credibility to be given each of them is the **province of the jury** and **not for the Court** to decide. *State v. Ortiz*, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992) (reliability of and weight to be given expert testimony is for the jury to decide); *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 943, 640 P.2d 1051 (1982) (citing *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 246, 391 P.2d 194 (1964)) (the credibility of witnesses and the weight to be given the evidence are matters which rest within the province of the jury; and, even if the court were convinced that a wrong verdict had been rendered, it should not substitute its judgment for that of the jury so long as there was evidence which supports the verdict).

Accordingly, the trial court erred by effectively disqualifying Dr. Thrasher as an expert, weighing the evidence of his testimony against defendants' allegations, or otherwise not considering his testimony on the issue of proximate causation. The trial court should have denied summary judgment and allowed this case to proceed to trial setting up "a classic battle of the experts, a battle in which the jury must decide the victor." *Intalco*, 66 Wn. App. at 662 (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1535 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984)).

3. ***Neither the Trial Court Nor the Defendants Cited a Single Case which Held that a “Medical” Doctor was Required in This Type of Case.***

The trial court erred when it held that Dr. Thrasher “doesn’t have the skill,” that Dr. Thrasher was not the expert to testify on proximate cause, and that it was “not sufficient to have someone who is not a medical doctor telling the jury to draw conclusions on this sort of thing.”⁹⁰ Moreover, basic rules of grammar, rules of statutory/contractual construction, and other cannon rules command that the disjunctive “or education” in ER 702 does not require that Dr. Thrasher have a 4-year medical degree—he may be qualified by his knowledge, skill, experience, training.

Expert testimony on the issue of causation is only necessary in some scientifically complicated cases, such as medical malpractice, where the facts are beyond the understanding of the jury. *Douglas v. Freeman*, 117 Wn.2d 242, 252, 814 P.2d 1160 (1991) (“Expert testimony usually is required to establish proximate cause in medical malpractice cases. ***It is not always necessary, however, to prove every element of causation by medical testimony. If, from the facts and circumstances and the***

⁹⁰ RP 33. Defendants similarly argued, “They don’t even have a medical doctor in this case.” RP 13.

medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient.") (emphasis added).

Yet, even in a medical malpractice case or obscure medical injury case, testimony on causation is not required to be provided by a "medical" doctor. The trial court orally ruled that expert "medical" testimony was required, and took issue with the fact that Dr. Thrasher was not a "medical" doctor just as defendants argued. Even assuming, *arguendo*, that this case involves matters beyond the ability of a lay juror to comprehend without the aid of expert testimony, it does not follow that only testimony from a "medical" doctor will suffice.

Quite the opposite, the modern trend in the law is not to impose *per se* limitations on the testimony of otherwise qualified non-physicians and shying away from formal titles and degrees. *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); *Goodman v. Boeing Co.*, 75 Wn. App. 60, 81, 877 P.2d 703 (1994); *Judd v. Dep't of Labor & Indus.*, 63 Wn. App. 471, 475, 820 P.2d 62 (1991); *Breit v. St. Luke's Memorial Hosp.*, 49 Wn. App. 461, 465–66, 743 P.2d 1254 (1987). "The witness need not possess the academic credentials of an expert; practical

experience may suffice. Training in a related field or academic background alone may also be sufficient.” *Breit*, 49 Wn. App. at 464–65 (quoting 5A K. Tegland, WASH. PRAC., *Evidence* § 289 (2d ed. 1982)). Also, “the line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses.” *Harris*, 99 Wn.2d at 450 (quoting 2 J. Wigmore, *Evidence* § 569, at 790 (rev. 1979)). Thus, whether an expert is licensed to practice medicine is one of many, but not dispositive, factors to be considered when the court makes its determination as to whether an expert is qualified. *Harris*, 99 Wn.2d at 450–51; *Goodman*, 75 Wn. App. at 81; *Judd*, 63 Wn. App. at 475; *Breit*, 49 Wn. App. at 466. The trial court erred when it failed to consider Dr. Thrasher's testimony, making a dispositive determination that he was not a “medical” doctor and, thus, not a qualified expert.

On the other hand, in the few published cases, courts across the country have allowed—and nearly insisted—that a toxicologist, such as Dr. Thrasher, provide expert medical causation testimony in toxic exposure cases.⁹¹ For example, in *Paoli R.R. v. Monsanto*

⁹¹ Matthew Bender & Co., 5A-36C ENVIRONMENTAL LAW PRACTICE GUIDE § 36C.06 (2012) (stating that there have been a few mold liability cases where expert testimony from toxicologists was allowed into evidence including *Mondelli*

Co., 916 F.2d 829, 855 (3d Cir. 1990), the Third Circuit found that the district court abused its discretion in concluding that a toxicologist could not testify that PCBs (chemical widely used as a coolant fluid) caused the plaintiffs injuries:

The district court's insistence on a certain kind of degree or background is inconsistent with our jurisprudence in this area. The language of Rule 702 and the accompanying advisory committee notes make clear that various kinds of "knowledge, skill, experience, training, or education" . . . qualify an expert as such.

In *Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3d Cir. 1991), the court held that the trial court's exclusion of the witness, without considering his credentials as a toxicologist, simply because he did not possess a medical degree, was inconsistent with expert witness jurisprudence. The court held that "[m]edical doctors . . . are not the only experts qualified to render an opinion as to the harm caused by exposure to toxic chemicals." *Id.* at 917.

The Eight Circuit has reached similar conclusions. See, e.g., *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 928-31 (8th Cir. 2001) (appellate court upheld the district court's ruling to allow the expert testimony of a pharmacologists/toxicologist and a

v. Kendel Homes Corp., 631 N.W.2d 846 (Neb. 2001) and *Gifford v. Matejka*, No. 25886-2-II, 2001 Wash. App. LEXIS 1560 (July 20, 2001)).

neuropsychologist/neurotoxicologist where plaintiff was exposed to an organic solvent during her employment on an assembly line in a urethane filter production plant).

Likewise, in *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 569–70 (8th Cir. 1988), the Eight Circuit held that plaintiff's expert was properly qualified to offer testimony on both the effects of exposure to chemicals and the medical probability even though he was not a medical doctor. Although he did not have a "medical" degree, the court noted that "he possessed considerable academic and practical knowledge in the field of toxicology." *Id.* at 569. It held that "[t]he relative skill or knowledge of an expert goes to the weight of that witness' testimony, not its admissibility," and that any shortcomings are more properly addressed "in cross-examination and closing arguments to the jury." *Id.* And, while "[i]t is true that laymen cannot give opinion as to the causes of disease and death," the expert was qualified:

Although Dr. Lowry is not a medical doctor, he is an expert in toxicology. He has had substantial experience in the performance of autopsies as a toxicologist consultant, determining clinical or toxicological related events in death. Therefore, the Court finds that based upon his education and experience Dr. Lowry is an expert, thus, qualified to offer his opinion as to Loudermill's cause of death.

* * *

We are not convinced that the magistrate abused his discretion in admitting this evidence or that the district court erred in its approval of the admission of this evidence. The jury was well aware that **Dr. Lowry was not a medical doctor, but that he was a Ph.D. with scientific training.** The weight and value of Dr. Lowry's testimony was for the jury to evaluate. The testimony was, however, sufficient to cross the threshold of admissibility.

Id. at 570.

Finally, in *Roche v. Lincoln Prop. Co.*, 278 F. Supp. 2d 744 (E.D. Va. 2003), the district court granted defendants' motion to bar the testimony of plaintiffs' expert witness relating to injuries stemming from exposure to toxic levels of mold in their apartment. Plaintiffs' expert was a medical doctor who was board certified in internal medicine and pulmonary diseases, however, not board certified as an allergist. In the end, the district court barred the expert's testimony on whether mold exposure caused respiratory ailments in part because he was **not** a toxicologist or a microbiologist. *Id.* at 754.

In this case, it is clear that Dr. Thrasher is qualified to provide expert medical causation testimony based on his knowledge, skill, experience, and training. The fact that he does not have the post-nominal letters "M.D." goes to his credibility that

is to be weighed by the jury. He thoroughly reviewed plaintiff's medical records, reviewed the report of defendants' expert industrial hygienist, and the evidence and records in this case including the eye witness declarations. Dr. Thrasher opined that plaintiff's injuries were caused by her exposure at the workplace and defendants' failures to protect her. This was sufficient for the trial court to deny summary judgment. Failing to consider Dr. Thrasher's opinions as sufficient evidence of causation was error.

4. *Viewed in the Light Most Favorable to Plaintiff, Dr. Thrasher's Opinions Provided Sufficient Evidence of Proximate Causation to Defeat Summary Judgment.*

The trial court provided some insight as to how it would have ruled had it qualified Dr. Thrasher, as it should have, and not granted summary judgment "irrespective of his conclusions."⁹² As discussed above, however, Dr. Thrasher was a qualified expert to opine on the cause of plaintiff's injuries. And, viewed in the light most favorable to plaintiff, on the issue of causation, the evidence showed:

- Dr. Thrasher opined that plaintiff's disease was caused or exacerbated by defendants' negligence and exposure to toxic agents in defendants' building;

⁹² RP 33.

- Dr. Thrasher came to his opinions based on a thorough and complete review of the facts of the case including all pleadings, all discovery, and all witness declarations;
- Dr. Thrasher's opinions are within the subject areas of his knowledge and expertise;
- Dr. Thrasher's opinions are corroborated by witness testimony, symptomatology experienced by others aside from plaintiff, plaintiff's expert industrial hygienist, and peer-reviewed scientific literature; and
- Dr. Thrasher's opinions are on a more probable than not basis.

The trial court erred in granting summary judgment.

D. Summary Judgment was Inappropriate Because the Trial Court Should Not have Determined the Remaining Elements of Negligence as a Matter of Law.

It is clear that the trial court granted summary judgment for the sole reason that it did not find evidence of causation based on its misguided view that Dr. Thrasher was not a "medical" doctor qualified to provide opinion testimony. Given the evidence advanced by plaintiff, the trial court could not have granted summary judgment on any other issue.

1. *There is No Dispute that All Defendants Owed Plaintiff a Duty.*

Regardless of their status as either owners of the premises or plaintiff's employer, all of the defendants owed plaintiff the same high duty of care. The landowner defendants were liable to plaintiff

as an invitee of the premises.⁹³ This imposed an affirmative duty on the landowner defendants to exercise reasonable care and discover dangerous conditions. *Swanson v. McKain*, 59 Wn. App. 303, 309–10 n.4, 796 P.2d 1291 (1990), *rev. denied*, 116 Wn.2d 1007 (1991). “Reasonable care requires the landowner to inspect for dangerous conditions, ‘followed by such repair, safeguards, or warning as may be reasonably necessary for [an invitee’s] protection under the circumstances.’” *Mucsi v. Graoch Assocs. Ltd. P’ship No. 12*, 144 Wn.2d 847, 856, 31 P.3d 684 (2001).

The employer defendant had “an affirmative and continuing duty to provide all employees a reasonably safe place to work. The standard of care to be exercised by the employer is to take the precaution of an ordinarily prudent person in keeping the workplace reasonably safe.” *McCarthy v. Dep’t of Soc. & Health Servs.*, 110 Wn.2d 812, 818, 759 P.2d 351 (1988). This imposed a duty to maintain reasonably safe premises and to warn of dangerous conditions not readily apparent to the employee. *Lamborn v. Phillips Pac. Chem. Co.*, 89 Wn.2d 701, 707, 575 P.2d 215 (1978);

⁹³ Defendants do not dispute plaintiff’s status as an invitee. CP 95 (“In a premises liability case, a possessor of land is subject to liability for physical harm caused to invitees (including employees) . . .”). See also CP 123–29.

Winfrey v. Rocket Research Co., 58 Wn. App. 722, 725, 794 P.2d 1300 (1990).

2. Defendants Breached Their Duty to Plaintiff by Doing Nothing which is Not Reasonable.

Questions of breach are reserved for the jury. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 609, 257 P.3d 532 (2011); *Caufield v. Kitsap County*, 108 Wn. App. 242, 256, 29 P.3d 738 (2001). Nevertheless, there is adequate evidence in the record that a jury could find that defendants breached their duty to plaintiff.

Defendants were supposed to take reasonable care in protecting plaintiff from the dangers on the premises—they failed. Defendants were aware that all of the employees complained about the moldy odors.⁹⁴ Defendants do not dispute that they knew, yet they provided no response and ignored notice of a dangerous condition.⁹⁵ Defendants were aware that all of the employees were so concerned about the working conditions that they wanted to conduct mold testing.⁹⁶ Defendants do not dispute that they knew, yet they opted to “wait and see” and “check for problems after the

⁹⁴ CP 21, 23, 45, 48, 251.

⁹⁵ RP 27–30.

⁹⁶ CP 20–21, 23–24.

cleanup.⁹⁷ Defendants were aware that their employees suffered from flu-like symptoms working on the premises.⁹⁸ Again, defendants do not dispute that they knew, yet they took no action and ignored the fact that their employees were becoming ill due to the dangerous workplace conditions.⁹⁹ Rather than being concerned about the safety of their employees and protecting them from dangerous conditions at the workplace, defendants were more concerned about their bottom line and placed their employees in the middle of the dangers.¹⁰⁰ If doing nothing is not reasonable, then surely knowingly exposing your employees to dangerous conditions is not reasonable. While there is sufficient evidence to determine this issue as a matter of law in plaintiff's favor, this was a question that should have gone to the jury, nonetheless.

⁹⁷ CP 45, 49; RP 28. Defendants waited over three years—and only prompted by plaintiff's suit—to check for and determine the dangers to which they exposed their employees. CP 20, 263; RP 30.

⁹⁸ CP 12, 181, 205, 251.

⁹⁹ RP 28–29.

¹⁰⁰ CP 20, 23.

3. *There is No Dispute that Plaintiff Suffered Injuries and was Ultimately Diagnosed with a Disease.*

Defendants admit that plaintiff suffered injuries and was ultimately diagnosed with Sarcoidosis.¹⁰¹ Defendants did not challenge this element of plaintiff's negligence claim in their summary judgment motion.¹⁰² Even so, the jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact. *Bunch v. King County Dept. of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

E. *The Trial Court Improperly Dismissed Plaintiff's Emotional Distress Claims.*

1. *Plaintiff's Negligent Infliction of Emotional Distress Claim Should be Reinstated.*

Plaintiff's negligent infliction of emotional distress ("NIED") claim is tested against the established elements for negligence. *Hunsley v. Giard*, 87 Wn.2d 424, 434–36, 553 P.2d 1096 (1976). For the same reasons argued above, there is sufficient evidence for plaintiff's NIED claim to go to a jury.

¹⁰¹ CP 12 ("... defendants admit that the plaintiff underwent a series of medical exams and procedures and was ultimately diagnosed with sarcoidosis."). See also CP 4–5, 24, 45, 49–50, 252.

¹⁰² CP 129–30.

2. Summary Judgment on Plaintiff's Intentional Infliction of Emotional Distress Claims was Inappropriate Because Defendants' Gambled with Their Employees' Lives.

The trial court erred in dismissing plaintiff's intentional infliction of emotional distress ("IIED" or "outrage") claim because there is no causal connection that must be proved. A claim of outrage requires proof of the following elements: 1) extreme and outrageous conduct; 2) intentional or reckless infliction of emotional distress; and 3) resulting severe emotional distress. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995). An outrage claim does not require any proof of medical diagnosis. *Kloepfel v. Bokor*, 149 Wn.2d 192, 203, 66 P.3d 630 (2003). Rather, once extreme and outrageous conduct is shown, it can be fairly presumed that emotional distress was suffered. *Id.* at 202.

The facts, viewed in the light most favorable to plaintiff, support a claim for outrage. Defendants failed to inform plaintiff and other employees about the unsanitary conditions on the premises; forced them to work in the building breathing in toxic particles; ignored employees' concerns and onset of symptoms; threw away the employees' tests paid for with their own money; and played "wait and see" to find out if anyone would get worse.

Defendants gambled with people's lives—a wager they had no right to make. Reasonable minds could conclude that these actions were, indeed, outrageous.

F. The Issue of Collateral Estoppel is Not Before This Court Since Defendants Failed to Timely Cross-Appeal.

Defendants did not cross-appeal the trial court's order granting plaintiff's motion to exclude, or otherwise not consider, plaintiff's L&I records and the time within which to do so has since lapsed. RAP 5.2(f). Failure to cross-appeal an issue precludes its review on appeal. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000), 27 P.3d 608 (2001). A respondent is not entitled to affirmative relief absent a cross-appeal. RAP 2.4(a).

The trial court did not find any collateral estoppel effect under the Industrial Insurance Act ("IIA") because it granted plaintiff's motion to exclude plaintiff's L&I claim file, including medical records, from consideration.¹⁰³ As part of their motion for summary judgment, defendants submitted select documents in their possession from plaintiff's L&I claim wherein she alleged an "occupational injury." In addition to her response to summary

¹⁰³ RP 27:8–10; CP 322.

judgment, plaintiff moved the trial court to “strike, exclude, and seal plaintiff’s L&I as well as medical records”¹⁰⁴ relying on *Mebust v. Mayco Mfg Co.*, 8 Wn. App. 359, 506 P.2d 326 (1973), and similar cases.¹⁰⁵ Counsel for the parties argued the issue of “whether or not defendants can rely on inadmissible records for purposes of collateral estoppel issue, as well as for the substance of their summary judgment motion”¹⁰⁶ Having considered the briefs and argument of the parties, the trial court understood quite clearly, “Our Supreme Court has said that the legislative enactment says that . . . it’s not evidence admissible at trial, the evidence in those records. It’s discoverable, but not admissible at trial”¹⁰⁷ and “not admissible at summary judgment.”¹⁰⁸ Based on Supreme Court precedent, the trial court held, “Consequently, I think that at this point what I’m going to do is I am going to grant the motion, and that will not be relied upon by the court . . . I will not rely on it for purposes of summary judgment.”¹⁰⁹ Defendants cannot now ask

¹⁰⁴ RP 19. The trial court clarified plaintiff’s motion stating, “Actually, that’s not the right motion What we’re doing is not considering it. It’s not admissible for the purposes of this hearing.”

¹⁰⁵ RP 26.

¹⁰⁶ *Id.*

¹⁰⁷ RP 20.

¹⁰⁸ RP 19.

¹⁰⁹ RP 27.

this Court to consider the L&I file and medical records that the trial court could not and did not consider.

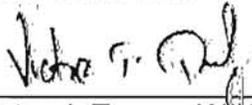
V. CONCLUSION

For the reasons set forth above, plaintiff Bonny Bolson requests that this Court reverse the summary judgment dismissal below and remand this matter for trial.

DATED this 18th day of April, 2013.

Respectfully submitted,

VREELAND LAW PLLC

By 

Victor J. Torres, WSBA No. 38781
victor@vreeland-law.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on the 18th day of April, 2013, I caused to be delivered a copy of the document to which this Certificate is attached to the attorney(s) of record in the manner indicated below:

Washington State Court of Appeals	<input checked="" type="checkbox"/>	Electronic Filing
Division Two	<input type="checkbox"/>	Regular U.S. Mail
950 Broadway, Suite 300	<input type="checkbox"/>	Overnight Mail
Tacoma, WA 98402-4454	<input type="checkbox"/>	Facsimile
	<input type="checkbox"/>	Email

Talis Merle Abolins, WSBA No. 21222	<input type="checkbox"/>	Electronic Filing
CAMPBELL, DILLE, BARNETT & SMITH, PLLC	<input type="checkbox"/>	Regular U.S. Mail
317 South Meridian	<input type="checkbox"/>	Overnight Mail
Puyallup, WA 98371-5913	<input type="checkbox"/>	Facsimile
Tel: (253) 848-3513	<input checked="" type="checkbox"/>	Email
Fax: (253) 845-4941		
<u>TalisA@cdb-law.com</u>		
<i>Attorneys for Defendants</i>		

DATED this 18th day of April, 2013.

By s/Natalie J. Leth
Natalie J. Leth, Senior Paralegal
Tel: (425) 623-1300
Fax: (425) 623-1310
Email: natalie@vreeland-law.com

VREELAND LAW OFFICE
April 18, 2013 - 10:47 AM

Transmittal Letter

Document Uploaded: 440733-Appellant's Brief.PDF

Case Name: BONNY M. BOLSON, Appellant, vs. HAYDEN G. WILLIAMS and DONITA C. WILLIAMS, individually and on behalf of the marital community composed of HAYDEN G. & DONITA C. WILLIAMS; WILLIAMS & SCHLOER, CPA'S, P.S., a Washington professional service corporation, Respondents

Court of Appeals Case Number: 44073-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Victor Torres - Email: zan@vreeland-law.com

A copy of this document has been emailed to the following addresses:

natalie@vreeland-law.com

victor@vreeland-law.com