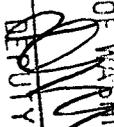


No. 47582-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
Feb 1
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STATE OF WASHINGTON
BY  NEVITY

COMMUNITY ACTION COUNCIL ET. AL, Respondent,

v.

DAVID CULLERTON, Pro Se Appellant,

BRIEF OF
OF APPELLANT

David Cullerton, Pro Se
Appellant

PO Box 1601 Hoodspport, WA 98548
(360)877-9517,

P.M 1-28-2016

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(Assignment Of Error #8)

II. STATEMENT OF THE CASE

Community Action Council of Lewis, Mason and Thurston Counties (hereinafter referred to as CAC), approved and started a weatherization project on David Cullerton's

and Cassandra Mahlmeister's, (Plaintiff's/Appellants), home at 23522 N. U.S. Hwy 101 in Hoodspport, WA on or about January 3, 2011. CP-111. On January 13, 2011, CAC installed the ductwork, (venting system), for a brand new dryer that was delivered by Home Depot which included the Manufactures installation instructions, CP- 117-124, that were given to CAC by Mr. Cullerton. A description of the occurrence's, (more detailed time line can be seen at), CP- 244-245

On June 8, 2011 the Mason County Fire and Rescue #5, Fire Investigator Chris Norton was requested to respond to the scene of a structure fire located at the above address, the Cullerton Home, by the Hoodspport Fire Chief Stephanie McDougall to conduct a Cause and Origin Investigation. CP-69. After interviewing both Mr. Cullerton and Ms. Mahlmeister at the Super 8 Hotel on January 10, 2011. A synopsis of the interviews can be read at CP-69-70. Following the examination of burn patterns and vector analyses within the scene and witness statements and information currently available Mr. Norton concluded that the origin and cause of the fire was, "that the ignition source for this fire is most probably heat from the dryer." "The first material ignited was the easily ignitable combustible material (lint)." CP-70. Mr.Cullerton picked up the report at Mason 5 District Office. Assistant Chief-Fire Marshal Michael D. Patti initialed that report. CP-72.

On May 16, 2014 the appellants' former attorney Mr. Charles W. Lane, IV, filed a complaint for damages with the Mason County Superior Court of Washington. Under case number 14-2-00270-3. CP 242-247. On 06-13-21014, a notice of appearance

on behalf of Community Action Council of Lewis, Mason and Thurston Counties et.al was filed. On September 26, 2014 CAC's council Mr. Rob Crichton took depositions. While Mr. Cullerton was being deposed when their attorney Mr. Charles William Lane IV informed all parties that he would no longer be representing the plaintiffs giving no reason for his withdraw. 10-17-2014 attorney's lien in the amount of \$2000.00, (Two Thousand Dollars), was filed in the Mason County Superior Court and on that same day 10-17-2014 Charles William Lane IV filed a notice of intent to withdraw. On 10-29-2014, Notice Of Issue, was filed. Action Pla's. Mtn. To Vacate Judgment. On 10-30-2014, Motion to Enforce Settlement Agreement was filed. On 11-19-2014, Motion Hearing, to vacate settlement agreement for \$5,000.00, (Five Thousand Dollars), was granted. On 11-26-2014 Judge Amber L. Finlay, Ex-Parte Action with Order, signed Order Denying Motion/petition. From 11-26-2014 thru 01-20-2015, both parties filed various motions such as Motion to Allow Access to Documents, Motions Re Volunteer Mediator, and Motion to Depose Witnesses, Request for a 12-person Jury Demand, the last motion filed by Mr. Cullerton was Motion/petition To Allow Access To Discovery Materials. On 01-22-2015, Attorney Mr. Crichton filed a Motion For Summary Judgment/def's along with the Declaration Of Michael Fitz, CAC's expert. On that same day 01-22-2015 Declaration of Rob Crichton and Proposed Order/findings was also filed in the Mason County Superior Court. On 02-23-2015, Order Granting Motion/petition For Summary Judgment was entered. On 02-27-2015, Motion for Reconsideration was filed. On 03-04-2015, Mr. Cullerton filed Motion for Relief from Judgment or Order. On

03-16-2015 the trial court heard oral arguments and at that hearing Mr. Cullerton asked for another continuance due to newly discovered evidence and heard argument from Mr. Crichton on the second affidavit of Mr. Heil that was filed with the court as an exhibit to the motion. Motion Hearing Confirmed 3-25-15@9:22/david/ph-pt 04-20-2015MT
Action Court's Decision @ 3:00 Pm.

III. ARGUMENT

Though the facts are dissimilar from the instant case the analysis employed in *Keck v. Collins*, 184 Wn.2d 358; 357 P.3d 1080; 2015, maybe helpful here. Mr. Cullerton acting *Pro se* respectfully asks this Court to make that decision on what is the proper standard of review and to apply the correct standard of review.

Standard of Review: An order striking untimely evidence at summary judgment requires a *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P .2d 1036 (1997) analysis and is reviewed for abuse of discretion under *Keck v. Collins*, 184 Wn. 2d 358. Under the circumstances of this case should the standard of review be De novo under *Folsom V. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Mr. Cullerton is aware of the Burnet analysis. However, the facts of the *Keck v. Collins*, 184 Wn. 2d, case is different in that Cullerton asked for a continuance at the summary judgment hearing.

That request was denied. RP at 23. Under de novo review, the Court of Appeals in *Keck v. Collins* determined that the trial court should have excused the late filing or granted a continuance to consider the third affidavit. *!d.* at 89. In the instant case the trial court should have granted Cullerton's request for a continuance under CR 56(f) so

another affidavit could've been obtained. It was not until the March 16, 2015 hearing on a motion to reconsider that Cullerton presented the second affidavit.

1. The Trial Court erred in Granting Summary Judgment in favor of CAC when there were issues of material fact. (Assignment of error #1).

In ruling on the motion, the court's function is to determine whether a genuine issue of material fact exists; it is not to resolve an existing factual issue. *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn. 2d 20, 337 P.2d 1052 (1959). Cullerton believes that the first affidavit brings up the question of whether or not issues of material facts do exist. CAC's defense of the cord and receptacle being the cause of the fire was addressed in Heil's first affidavit that proved that the wiring was correct and could not have produced enough heat to cause a fire. In addition, the dryer as being the cause of the fire was addressed in Mr. Fitz's affidavit as not being a dryer fire. Which leaves only one other possibility that the fire must have started in the ductwork due to lint build up. In addition, the lint build-up had to have been caused by the faulty installation of the ductwork that CAC performed during the weatherization project. CP 111 Dated 1/13/11. Both sides had not completed discovery and the trial was months away so no prejudice would come to CAC in the granting of a continuance as the court had found. RP at 39. A trial court's denial of a *CR 56(f)* motion for a continuance are reviewed for an abuse of discretion. See *Clarke v. Office of Attorney Gen.*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006), *Mossman v. Rowley*, 154 Wn. App. 735, 742, 229 P.3d 812 (2009). "A court abuses its

discretion when it bases its decision on unreasonable or untenable grounds." Clarke, 133 Wn. App. at 777 (citing *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111(1999)). The trial court had already decided that a continuance was not going to be granted for any reason but for Cullerton to have the reports certified. RP at 38 Line 16, which is denying Cullerton his due process rights under the U.S. Constitution, and the Washington State Constitution, Article I Section 3. The court also found that the report was lacking in establishing a proximate cause. However both affidavit's from Heil was not lacking proximate cause. CP 77-78. *An act from which an injury results as a natural, direct, uninterrupted consequence and without which the injury would not have occurred.* Proximate cause is the primary cause of an injury. It is not necessarily the closest cause in time or space nor the first event that sets in motion a sequence of events leading to an injury. Proximate cause produces particular, foreseeable consequences without the intervention of any independent or unforeseeable cause. It is also known as legal cause. To help determine the proximate cause of an injury in Negligence or other tort cases, courts have devised the "but for" or "sine qua non" rule, which considers whether the injury would not have occurred but for the defendant's negligent act. Proximate cause. (n.d.) *West's Encyclopedia of American Law, edition 2.* (2008).

- 2. Cullerton argues the trial court improperly admitted the expert testimony Of Fitz's affidavit because there is no factual bases for his opinion.(Assignment of error #2).**

Standard of review is abuse of discretion. Discretion is not abused unless the decision is arbitrary, manifestly unreasonable, or based upon untenable grounds. The court based their decision on the affidavit submitted by CAC.

An affidavit based upon “information and belief” is insufficient. The Fitz report, CAC’s expert, gives nothing but guesses as to what caused the fire and another guess as to where the fire originated. Once he realized that the electrical connection could not be the source of the fire then he attacked another issue. Which was the question of whether or not the fire started in the ductwork as Cullerton opined since day one. ER 705, allowing an expert to express an opinion without first explaining the basis for that opinion, does not apply to summary judgment proceeding. In a summary judgment proceeding, if an expert’s opinion is offered in the form of an affidavit or declaration, the factual basis for that opinion must also be explained in the same document. If it is not, the expert's opinion will not be considered. Anderson Hay & Grain Co., Inc. v. United Dominion Industries, Inc., 119 Wash. App. 249, 76 P.3d 1205 (Div. 3(2003). Tegland and Ende, 15A Washington Practice: Washington Handbook on Civil Procedure § 69.7 (2009 2010ed.)Baker, 34 Washington Practice: Washington Summary Judgment and Related Termination Motions § 5:29 (2009-2010 ed.) CAC’s affidavit should not have been considered in the instant case. Evidence Rules (ER) 702 and 703 governs the admissibility of expert testimony. The determination of the admissibility of expert testimony is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. See, e.g., State v. Stenson, 132 Wn.2d 668, 715, 940 P.2d 1239

(1997), cert, denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. Testimony that will assist the trier of fact to understand the evidence or to determine a fact is to be admitted. *ER 702*. It is an abuse of discretion for a court to admit expert testimony that lacks an adequate foundation. *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993). The Fitz report lacks any foundation whatsoever. CP 133-141 and is rife with contradictions.

CR 56 (g) states in part: (g) "Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay..."

An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury." *Group Health Coop. Of Puget Sound, Inc. V. Department Of Rev.*, 106 Wn.2d 391, 400, 722 P.2d 787 (1986); *Prentice Packing & Storage Co. V. United Pac. INS. CO.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940) ("the opinions of expert witnesses are of no weight unless founded upon facts in the case. In the instant case the Fitz report being based on nothing but assumptions should not have survived summary judgment. Fitz's cause of the fire was the condition of the dryer cord, and the receptacle that he gave no facts to support that either one was the cause of the fire. CP 140. And he also confirms that the fire didn't start in the dryer or that it was the cause of the fire. CP 140. The law demands that verdicts rest upon testimony, and not upon conjecture and speculation"); *5A K. Tegland, Wash. Prac.*

Evidence 297 (1989). Mr. Fitz based his opinion on nothing more than sheer speculation, CP 140 at lines 18-24. Fitz states in his report that “the length and condition of the dryer cord was not documented in the photographs nor was the cord disconnected from the house receptacle. These are two areas that can cause a fire in the rear of the dryer”. Then Fitz states that “*There is no indication of a cord connection problem inside the dryer, however the dryer cord was improperly connected.*” Mr. Heil has addressed these concerns in his affidavit. CP 113-114. Mr. Fitz states at CP 140 lines 21-22 “*Because of the lack of documentation and detailed electrical inspection, I cannot rule out a failure of the cord or the receptacle as a cause of this fire.*” Key word is lack of documentation in his findings, and let me point out that Mr. Fitz does not hold any type of electrical certification as required by the State of Washington to do any type of electrical work and or inspection. As far as Fitz’s statement about the detailed electrical inspection at line CP 140 line 22 is a false and misleading statement to the court. There was no detailed electrical inspection! Mr. Fitz gives absolutely no basis for his opinion. The Fitz affidavit should not have been considered and a sanction imposed. Again, Mr. Fitz has no electrical certification or license to make the finding that he does starting at CP 140 lines 25-26 and the statement continues on to CP 141 lines 1-3.

These possibilities are nothing but mere speculations and conjectures, which are insufficient to prevail on a motion for summary judgment. The facts or the basis for that conclusion is nowhere in their motion for summary judgment. The Fitz report has no facts to support his conclusion as read in his report at CP-140 Lines 12 -26 and CP-141

lines 1-8. In his report, he concluded that it “... *is not a dryer fire...*” and that it is from “...*an exterior approaching fire*”. Mr. Norton states: CP-70 origin and cause paragraph that; the fire “...*burnt through the flexible Aluminum foil ventilation hose. Then up the void space between the dryer and the laundry room wall and then spread upward...*” which is the exact area where the cord and receptacle was located, which would explain the heavy damage to the “...*cord and receptacle...*” CP-140 at lines 20-21 and the entire wall where the fire grew after existing the ductwork, which is behind the dryer. It is an abuse of discretion for a court to admit expert testimony that lacks an adequate foundation. *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993).

3. The Trial Court Erred in Denying Cullerton’s Motion For Reconsideration Of Summary Judgment.
(Assignment of error #3)

Mr. Cullerton presented the second Heil affidavit at the March 16, 2015 motion to reconsider and motion for relief from judgment and order. RP at 25-40. The second affidavit was not given the weight that the Court should have given it because that raised issues of material fact as did the first affidavit. RP at 7 line 12. As long as the expert's affidavit testimony, if believed, could sustain a verdict, the trial court should give the plaintiff an opportunity to supply more detail if the court determines more detail would be desirable. See *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1317 (1985). However, Mr. Cullerton was cut short in his explanation for the request that was denied. RP at 23 Lines

14-19. Mr. Cullerton has had to represent himself and help Ms. Mahlmeister. Throughout the proceedings, the Trial Court reprimands Cullerton.

THE COURT: "There are rules that everybody who comes into court is required to follow".

MR. CULLERTON: "Yes" THE COURT: "And the reason why everyone's required to follow them is so that everybody- -so the game is - -everything is fair." (Emphasis Added).

*CR 56 (f) states in part "... may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." He believes that the wording in CR 56(f) where it states "...as is just." Means the court may allow a continuance to obtain affidavits so all is "... just" (**fair**), as the trial court had told Cullerton. (Emphasis added).*

The "purpose [of summary judgment] is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) (quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940)). The plaintiff's argued this at the Summary Judgment Hearing. In *Brecht v. North Creek Law Firm*, A Professional Corporation Ps; Mark Lamb And Jane Doe Lamb,

In Summary Judgment - Review - Standard of Review. A summary judgment is reviewed de novo. The reviewing court conducts review by applying the standard of

CR 56(c) and by viewing the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. In deciding this issue, the test that the Court should apply is whether there is any evidence or reasonable inference from the evidence

that the respondent was negligent. *Bidlake v. Youell, Inc.*, 51 Wn. (2d) 59, 315 P. (2d) 644 (1957); *Pearsall v. Paltas*, 48 Wn. (2d) 78, 291 P. (2d) 414 (1955). Oct. 1960]

4. The trial court improperly required a greater degree of specificity of fire investigator Norton and Mr. Heil's affidavits in connection with the summary judgment hearing.
(Assignment of error #4)

The trial court found that the affidavits at the summary judgment hearing were lacking specific facts to withstand summary judgment. As stated by Mr. Cullerton that his request for a continuance at the summary judgment hearing he was cut short in his explanation for the continuance. RP at 29 Lines 21-24. Mr. Cullerton states the *CR 56 (f)* rule in asking for the continuance at the March 16, 2015 hearing. RP at 29 14-20. *CR 56 (e)* should not be interpreted to require more specificity than the governing law.

In Sanders v. Woods, 121 Wn. App. 593, 600, 89 P.3d 312 (2004).

5. Did the trial court err in admitting the Mason County fire investigation report and the first affidavits of Mr. Heil. (Assignment of error #5)

Evidence - Opinion Evidence - Expert Testimony - Review - Standard of Review.
The admission of expert testimony is a matter addressed to the discretion of the trial court and is reviewed under the abuse of discretion standard. CAC objected to the admission of the Mason 5 Fire investigation report. In addition, an objection was made to Mr. Heil's

affidavit's calling them hearsay also. The fire report and the affidavits are admissible under the following rules. Under RCW 9A.04.110 (24) "Signature" includes any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto". The person having control over the report signed the fire report and the affiant signed the affidavits. Respectively. CP 72, 78, 114. *ER 803(a) (8)* and *RCW 5.4.040*. Records offered under that exception to hearsay rule must contain facts, not conclusions or opinions involving the exercise of judgment. Division Two has ruled that: [N]ot every public record is automatically admissible under [this] statute...: In order to be admissible, a report or document, prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion. The subject matter must relate to facts, which are of a public nature; it must be retained for the benefit of the public. Moreover, there must be express statutory authority to compile the report.

"[A]uthentication may be satisfied when the party challenging the document originally provided it through discovery." *In!l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 748-49, 87 P.3d 774 (2004) In the instant case Cullerton provided these documents to CAC through discovery which they had completed all of their request.

The report and/or the affidavits would also be admissible under *ER 904 (a) (6)*. Which States: "A document not specifically covered by any of the foregoing provisions

but relating to a material fact and having equivalent circumstantial guaranties of trustworthiness, the admission of which would serve the interests of justice.”

The trial judge even commented on the fire report stating the following:

The Court: “And even though Mr. Norton’s – the Court can say that it is a fire report – the Court has no reason to believe that that it’s not a fire report” RP at 20 lines 10-11 -- “...let’s just assume for the sake of argument that Mr. Norton qualifies as an expert.” RP at 20 lines 18-19.

6. The Trial Court erred in granting Summary Judgment on Cullerton’s proof of negligence and the trial courts finding of facts of CAC’s negligence. (Assignment Of Error #6).

Black Law Dictionary defines *negligence* as: neg·li·gence: (law) *n.*

1. The state or quality of being negligent.

2. A negligent act or a failure to act.

3. *Law*

a. *Failure to use the degree of care appropriate to the circumstances, resulting in an unintended injury to another.*

b. *An act or omission showing such lack of care.*

”Negligence, in law, especially tort law, the breach of an obligation (duty) to act with care, or the failure to act as a reasonable and prudent person would under similar circumstances...For a plaintiff to recover damages, this action or failure must be the “proximate cause” of an injury, and actual loss must occur.” “Most negligent acts are inadvertent; between them and fully intentional acts lie forms of conduct variously termed *willful, wanton, or reckless*. Deliberate judgments that are dangerously careless (e.g., faulty building design) may, however, be considered acts of negligence. It is usually the function of a jury to determine whether negligence occurred. Moreover, the obligation

of the plaintiff to demonstrate the defendants' negligence by a preponderance of the evidence, which Cullerton proved under that standard.

The trial court stated in its decision: RP at 19: The Court: All right. In order to find someone negligent, the Court has to determine that there is a duty, there's a breach of that duty, and that the breach of that duty is what caused the damage."

The Trial Judges findings of fact proved just that. Therefore, summary judgment was inappropriate.

In the instant case the design and the installation of the dryer ductwork is considered as being a building design. There is no doubt that CAC acted in a conduct that was *willful, wanton, or reckless* due to their deliberate judgment's that were dangerously careless. When CAC installed the dryer ductwork, CP 111, they ignored the manufactures instructions; and they were warned several times of the risk that was involved because it was so important to install the ductwork correctly so there would be a minimal amount of lint build-up in the venting system. CAC knows that matters of common knowledge warn an installer that, if his work is done negligently, someone is likely to be injured, and faced with this warning, he assumes a duty to others to do the work with reasonable care and diligence, for the breach of which the law imposes a liability, which is based upon negligence. The manufactures instructions warned the installer not to run the ductwork a certain amount of feet according to the chart.CP119. CAC did not comply with that installation instruction. CP 77-78, See also CP 203 - Lines 14-17. CAC could have run

the ductwork 8' one-way or 6' out the other side of the home. CP 175-177¹. Which the instructions also warned them to “not terminate exhaust in a chimney, a wall...crawl space...or any other concealed space of a building. The lint could create a fire hazard.” CP 120. The instructions continue to warn the installer that”...longer ducts can accumulate lint, creating a potential fire hazard. ”CAC could have minimized the effects of lint build-up by running it out the sides of the home. CAC should have taken the position of an ordinary man that practices the following care that an ordinary man would have taken. Ordinary care means that degree of care, which a man of ordinary prudence would exercise under the particular circumstances”. The Court found that they had not followed the instructions. RP at 22. The trial court erred and should have found that CAC was negligent and proceeded to trial.

7. The declarations Cullerton submitted in opposition to the motion for summary judgment raised genuine issues of material fact and precluded summary judgment. (Assignment of error #7)

¹ Mr. Cullerton drew these illustrations through the request of his former attorney’s investigator because Cullerton questioned why CAC did not run the ductwork a shorter distance. If CAC had run the ductwork out either side of the home, the distance would have decreased significantly. CP 175 depicts how the ductwork was incorrectly installed by CAC, the length was approx. 25’. In addition, CP 176 depicts the amount of ductwork 6’ that should have been used if CAC had run it in the easterly direction; CP 177 Shows that only 8’ of ductwork should have been used if CAC had run it in the westerly direction.

The evidence clearly showed that the plans and specifications were ignored causing lint build-up in the ductwork, which then caused the fire. Mason County's fire investigator, Chris Norton, of Mason 5 reports that "the ignition source for this fire is most probably heat from the dryer", the first material ignited was the easily ignitable combustible material (lint)", CP-102. CAC's expert testified, "*There is lint buildup in the horizontal ducting that should be cleaned*". CP 139 at line 15. (Emphasis added). Cullerton's expert Mr. Heil states "*...reviewing the photo of the exiting duct closest to the outside wall cap, the lint build-up is significant for a system installed only 4 months prior*", as seen in CP 158. (Emphasis added).

The burn patterns show that the lint was engulfed by fire as seen in, CP 156. Mr. Heil's declaration also confirms this fact. If the end of the ductwork is covered in as much lint as is depicted in the photos, CP 158, then the amount of lint nearer to the dryer had to have been more than the amount found at the termination end of the ductwork as seen in CP 158. That is the reason the fire started where it did and why there is no lint in the ducting after the fire as seen in CP 161, The gas, burn, and smoke patterns can be seen in the photo of the ductwork, contrary to what Mr. Fitz claims in his affidavit at CP 139 lines14-17. Mr. Cullerton has claimed that the lint build-up has been significant throughout the entire ductwork system, although there are areas within the ductwork that would have more build-up than other areas as stated by Mr. Heil. CP 77. 4th paragraph.

The court found fact that the manufactures instructions were not followed. RP at 22 lines15-25, RP at 23 lines1-3. CAC had a duty to install the ductwork properly and this

duty was breached by using the foil transition duct, and not insulating the ductwork that ran in the crawl space of the home, which are findings of fact by the trial court. RP at 20-23. This breach of duty was the sole and proximate cause of the fire resulting in the damage of the Cullerton home. CAC cannot claim that they did not know the consequences would occur because of their negligence, because of the fact that they were warned throughout the instructions. These acts were reckless, and a blatant disregard to follow the instructions therefore CAC is negligent. As stated in *Lewis v. Scott*, 54 Wn. 2d 851,858, In the instant case whether or not the wrongdoer did or did not foreseen the consequences of his original negligent act "...the wrongdoer cannot shelter himself from liability under the defense that the actual consequence was one that he did not know would occur as a result of his negligence." Quoting *Lewis v. Scott*, 54 Wn. 2d 851,858, 341 P.2d 488 (1959). Therefore, CAC cannot *shelter* themselves under that defense as stated in *Lewis v. Scott*, 54 Wn. 2d 851,858, 341 P.2d 488 (1959). The trial Court's failure to dismiss CAC's motion in appellant's favor at the conclusion of the evidence. Appellant's motion to dismiss "...summary judgment must be considered in the light of well-established rules for reviewing such motions..." In *Bleyhl v. Tea Garden Products Co.*, 30 Wn. (2d) 447, 191 P. (2d) 851 (1948). Both the Appellant and Our State Supreme Court have held that such motions admit the truth of the evidence of the party against whom the motion is made and all inferences that reasonably can be drawn therefrom, and require that the evidence be interpreted most strongly against the moving party and in the light most favorable to the opposing party. Another rule as definitely settled is that in a judicial ruling upon any of

such motions no element of discretion is involved, and the motion can be granted only when it can be held as a matter of law that there is no evidence nor reasonable inference from evidence to sustain a granting of the Summary Judgment. Therefore, it would require a dismissal of CAC's motion for summary judgment. *RCW 7.24.060* Refusal of declaration where judgment would not terminate controversy. The Court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy-giving rise to the proceeding. In the instant case, there is substantial evidence in the record to believe that an ordinary man would ponder the Superior Courts decision on Summary Judgment. Reasonable inferences can be drawn from the affidavits of Mr. Norton and Mr. Heil, Mr. Fitz-submitted by CAC, which, if resolved in favor of Cullerton, would raise an issue of fact. For example Mr. Fitz's affidavits states, "[t]here is lint buildup in the horizontal ducting that should be cleaned." CP 139. It could be reasonably inferred from this statement that even if an appropriate installation is prescribed and administered, and the injury could have occurred without negligence, the injury nonetheless could have been caused by negligence. Since it is this Court's duty to draw all reasonable inferences in favor of the nonmoving party, they should have concluded that the injury was caused by the negligence of CAC, and therefore summary judgment for the defendant was inappropriate.

A "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. CR 56; *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963); *Zedrick v. Kosenski*, 62 Wn.2d 50, 380 P.2d 870 (1963).

Mr. Cullerton's expert Mr. Heil submitted two declarations, CP 77-78, CP113-114; it has proven that the negligence of CAC was the cause of the fire. CP 77-78. In addition; the first affidavit proves that the fire was not caused by the cord or receptacle. CP 113-114. CAC was provided with the manufactures installation instructions, CP 116-124, which listed the correct way to install the ductwork, which also listed the warnings, of (4) four out of (8) eight pages gave notice of the risk of fire, death or serious injury if not followed. CP 115-124. Their installation fell far below the standard recommended by the manufacture. Which are findings of fact by the trial court. The Appellant Court must remand and allow the issue(s) to be decided by a jury.

8. The trial court erred in disregarding the expert testimony in the Form of reports and affidavits of Chris Norton and Mr. Heil, therefore The trial court entered a wrong judgment.
(Assignment Of Error #8)

Affidavits (or declarations) take the place of live testimony but are subject to essentially the same requirements that would apply if the affiant were present and testifying personally. *CR 56(e)* specifies that affidavits (or declarations) must be based upon personal knowledge. The affidavits that Cullerton submitted reveal issues of material facts. Such motions must be denied if the documents called to the attention of the trial Court reveal specific facts in support of the essential elements. If such facts are revealed, there are genuine issues of material fact precluding summary judgment. *Nina Firey, v. Tammie Myers, et al. Inc.*, 119 Wash. App. 249, 76 P.3d 1205 (Div. 3 2003). The Court may consider expert opinion should not be confused with the question of whether expert opinion

is sufficient to support (or defeat) a motion for summary judgment. If more time is needed then CR 56 would come into the Courts decision. As the Courts should be allowed to gather all of the evidence to view if necessary. So that litigants are not cut off of the right to trial . RP at 23 Lines14-16. It was not until March 16, 2015 that Cullerton presented the second Heil affidavit during his motion to reconsider and motion for relief from judgment and order. The Court stated the following, RP at 38 Lines 19-25 and RP at 39 Lines 6-21:

RP at 38: "...And the Court, when the Court gets a motion to reconsider- -and this will have to do with my ruling on the continuance..."

The Trial Court must be referring to the request that Cullerton asked for at the Summary Judgment hearing.

RP at 39: The Court: "...the court would grant a brief continuance...the court doesn't see prejudice to the Community Action Counsel for a brief continuance of a month to get that." "...this information you got today, the Court doesn't see that there is prejudice to CAC for a continuance of a month for the hearing."

If the court had granted the continuance at the summary judgement hearing Cullerton would have submitted the same evidence that he did at the motion to reconsider and motion to vacate judgment and order, and would have obtained any other relevant evidence such as the second Heil affidavit. There would have been no prejudice to CAC at that time either. In addition, Mr. Heil being a true and honest person, an upstanding member of the community would have on a more probable than not basis given the same statement at the first hearing of summary judgement as he did at the March 16, 2015 hearing. Contrary to what CAC stated at the May 8, 2015 hearing. CAC states that there is no new evidence concerning the second Heil affidavit. This affidavit proves that on a

more probable than not basis that CAC was negligent in installing the ductwork.

However, the trial court was not going to even consider granting the continuance at that time. Violating Mr. Cullerton's due process rights, that right being a right to a fair trial/proceeding in the instant case. The truth is that Mr. Cullerton is not a Licensed Attorney so he does not have the knowledge nor did he have the knowledge then to properly defend the case. This is why rule CR 56(f) is in place.

Under *CR 56 (f)*, "When Affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated...", See RP at 30 Lines 10-13: "... the party cannot present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Mr. Heils second declaration was not considered at that hearing nor was it even considered to be obtained as Mr. Cullerton was asking the Court to do just that at the hearing for summary judgment. He was cut-off by the Court. In addition, he was denied the continuance. RP at 8 Lines 5-24.

As Division II of this Court recently emphasized, "cases should be resolved on the merits rather than by default judgment." *Hyundai Motor America v. Magana*, 141 Wn. App. 495, 515, 170 P.3d 1165 (2007), rev. granted, 164 Wn.2d 1020, 195 P.3d 89 (2008). In the instant case, Cullerton's expert Mr. Heil gave his expert opinion regarding the wiring of the dryer that Mr. Cullerton performed and the basis for that opinion, which the

Court took into consideration, However the Court did not take into consideration the expert opinion of Mr. Heil's second affidavit. CP 77-78 this declaration and the basis of that opinion would have been sufficient to defeat a motion for summary judgment or to allow his motion for the relief from judgment and order to be granted. If the record contains evidence disclosing a genuine issue of material fact, the issue must go to trial.

There are genuine issues of material fact precluding summary judgment. Here, the declarations of Mr. Heil reveal genuine issues of material fact on the elements of negligence, duty, care, breach of that duty and proof of injury that CAC was negligent. Such elements would include doing work in conformance with the requirements of the manufactures instructions and in conformance with *24 CFR § 3280.708 Exhaust duct system and provisions for the future installation of a clothes dryer. (3) The exhaust duct shall not terminate beneath the manufactured home. (5) Moisture-lint exhaust duct and termination fittings shall be installed in accordance with the appliance manufacturer's printed instructions.* Therefore, doing work in a reasonable manner so to provide the intended product and to not cause any damage to the home. In addition, doing work in a reasonably timely manner, and following applicable code and industry regulations such as what is required by Labor and Industries and by the local building officials in executing the work. **Inferences are deductions or conclusions that with reason and common sense lead the jury to draw from facts, which have been established by the evidence in the case from the findings of fact by the trial court.**

In the instant case the fact that CAC did not properly install the ductwork throughout the entire system as the Court found as facts, RP at 21 Line 23 through RP at 23 line 16, "... and the lint build-up was significant in only four months of operating a brand new dryer." CP 77.

In Keck v. Collins, 325 P.3d 306 (2014) the trial court found that the affidavits submitted did not support the denial of the summary judgment, However the State Supreme Court reversed the decision of the Appellant Court and found that the affidavit's sufficed.

On appeal Davis v. Baugh Indus. Contractors, Inc., 159 Wn. 2d. 413, Jan. 2007 Our State Supreme Court looked at the common law doctrine of completion and acceptance. Finding that this doctrine is outmoded, incorrect, and harmful the Supreme Court reversed the superior court order granting summary judgment and remand for further proceedings.

Cullerton and Mahlmeister estimated the cost to replace the home and their belongings at \$ 154,652.00, or whatever the jury may award, these facts support the elements of breach and damages.

This Court should reverse the summary judgment orders and remand for trial. As Mr. Heil stated in his declaration. "It is my professional expert opinion that the Defendant Contractors in this case did not do their work to minimally acceptable industry standards and as a result Mr. Cullerton suffered damages..." CP 78.

IV. CONCLUSION

Appellant asks this Honorable Court to reverse the trial courts Summary Judgment order and remand for trial.

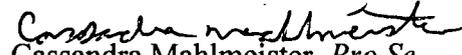
Dated this 28th day of January 2016.

Respectfully submitted

Signature



David Cullerton, Appellant, *Pro Se*



Cassandra Mahlmeister, *Pro Se*

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DIVISION II
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STATE OF WASHINGTON
BY  DEFENDANT

**WASHINGTON STATE COURT OF APPEALS
DIVISION II**

David Cullerton, ET., AL.,
Petitioner,
vs.
Community Action Council Of Lewis,
Mason, and, Thurston Counties, ET., AL.,
Respondent.

Court of Appeals NO.47582-1-II
Mason County Superior Court # 14-2-270-3

PROOF OF SERVICE

I certify under the penalty of perjury under the laws of the state of Washington that I am 18 years of age or older and I am not the Respondent, and that on January 28, 2016 I deposited three copies of the following documents:

x Appellants Brief Case # 87582-1-II

in the U.S. mail, postage prepaid, one first class addressed to the x Respondent, Mr. Rob Crichton at the last known mailing address of: 1201 Third Ave. Suite 3200 Seattle, WA 98101-3052 and to: Court of Appeals Tacoma, WA

Signed on January 28, 2016 at Shelton, Washington.
(Date) (Place)


Signature
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