

No. 47582-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DAVID J. CULLERTON AND CASSANDRA MAHLMEISTER,

Appellants,

v.

COMMUNITY ACTION COUNCIL OF LEWIS, MASON, AND
THURSTON COUNTIES

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case arises out of a fire, resulting in the destruction of plaintiff/appellant David Cullerton's ("Cullerton") mobile home.

Cullerton alleged that respondent Community Action Council Of Lewis, Mason, And Thurston Counties ("CAC") improperly used flexible ventilation ducting attached to a clothes dryer, which supposedly allowed the build-up of lint, triggering a fire which originated inside the duct.

CAC's expert, Michael M. Fitz, a registered professional engineer; a certified fire investigator; and a certified fire protection specialist, with 30 years' experience in forensic engineering involving fires, concluded on a more probable than not basis that there is no data, documentation or other information to indicate that the dryer was the cause of the fire; that the fire was not caused by CAC's weatherization work and installation of the dryer venting system; and that CAC's installation of the dryer vent pipe comported with applicable installation instructions. Fitz further observed that the ducting appeared to be burned from the outside, consistent with the conclusion that the fire was not an internal dryer fire.

While Cullerton offered a wealth of speculation as to the cause of the fire, he lacked personal knowledge of the fire and admitted he lacked relevant expertise. At the court hearing, Cullerton candidly conceded,

“[w]hether it’s [the ducting] burned from the outside in or the inside out, I don’t know.” RP 16:3-4 (page:line).

Cullerton relied on a letter by electrician Walter (Bill) Heil that flexible ducting was used in the installation of the dryer “contrary to the manufacturer’s warnings not to use flexible duct.” Yet, the applicable installation instructions, placed into evidence by Cullerton, specifically provide for the use of flexible ducting. Further, Heil’s letter offered no professional opinion as to the cause of the fire.

Cullerton also relied on an unsigned, unsworn report by Chris Norton, prepared for the Mason County Fire District #5, concluding that the ignition source for the fire was heat from the dryer. Norton did not identify any negligent actions or omissions by CAC, much less conclude that they caused the fire.

The trial court correctly granted CAC’s motion for summary judgment, ruling that, even considering the Heil letter and Norton report, each of which should be found to be inadmissible, Cullerton failed to present evidence as to the proximate cause of the fire.

Cullerton then separately filed three motions: (1) Plaintiff’s Motion to Reconsider Summary Judgment; (2) Rule 60(b)(3) Relief From Judgment Or Order; and (3) Plaintiff’s Supplemental Motion To Newly

Discovered Evidence And To Vacate Judgment. The trial court did not abuse its discretion in denying those motions.

II. ASSIGNMENT OF ERROR

Did the trial court correctly grant summary judgment in favor of CAC, and dismissing Cullerton's Complaint, ruling as a matter of law that Cullerton had failed to present admissible evidence that CAC's allegedly negligent actions were the proximate cause of the house fire? And did the trial court properly exercise its discretion in denying Cullerton's three motions to set aside the judgment?

III. COUNTER-STATEMENT OF THE CASE

This case arises out of a fire, resulting in the destruction of Cullerton's mobile home on June 9, 2011. The mobile home was built around 1980. CP 197. It was given to Cullerton as a gift in approximately 2008 or 2009.¹ CP 198.

Shortly before the mobile home was gifted to Cullerton, "the electrical box blew up in the house." CP 195. Cullerton's father replaced the electrical box. *Id.* Cullerton asked his landlord to pay "around

¹ Because Cullerton alone owned the mobile home destroyed by the fire, and because he took the lead in the litigation, for convenience, we refer to Mr. Cullerton and his co-plaintiff and appellant, Cassandra Mahlmeister, collectively as Cullerton, except where clarity requires differentiation between their actions.

[\$]2,500” to reimburse his father. Rather than pay for the work, the landlord gifted the mobile home to Cullerton. CP 195-96.

CAC is a nonprofit whose organization focuses on meeting the needs of low-income individuals and families through a variety of programs. CP 243, 236. One of CAC’s programs involves the application of energy efficiency measures to a home. These may include air sealing measures such as weather-stripping and caulking, insulation measures to ceiling, wall and floor areas and related-repair measures. Plaintiffs’ claims in this case arise out of CAC’s providing such services to Cullerton’s mobile home. CP 236-37, ¶¶ 3.8, 3.12.

It is undisputed that CAC conducted a weatherization program inspection of Cullerton’s mobile home and that CAC employees and independent contractors provided services for Cullerton following the inspection. *Id.* CAC provided weatherization and other repairs to the mobile home during early 2011. This work included insulation of the floor, vapor barrier installation, insulated piping, plumbing repairs, installation of a new furnace, duct sealing, ventilation fans, gutters, weather-stripping and replacement of the dryer vent. CP 213, ¶ 8.

A. The Complaint’s Allegations.

In their Complaint, Plaintiffs allege that,

[t]he fire traveled out from the ventilation duct in the rear of the dryer, burnt through the flexible aluminum foil ventilation hose and then up the void space between the dryer and laundry room wall then spread upward and outward eventually burning through the roof then rapidly spread throughout the rest of the mobile home.

CP 245, ¶3.13. Plaintiffs allege the fire was the result of CAC's negligence. CP 246, ¶¶4.3, 4.4. In essence, as explained below, Cullerton's theory is that CAC improperly used flexible ventilation ducting, which supposedly allowed the build-up of lint, triggering a fire which originated inside the duct on June 9, 2011, less than five months after CAC's work. CP 245, ¶ 3.13. The fire consumed Cullerton's mobile home.

B. CAC's Expert Concluded CAC's Work Did Not Cause The Fire.

CAC's expert, Michael Fitz, submitted a declaration detailing his findings and the bases for them. Fitz is a registered professional engineer; a certified fire investigator; and a certified fire protection specialist, with 30 years' experience in forensic engineering involving fires. CP 212, ¶ 2; *see also* ¶¶ 3-4 for additional information regarding his experience and qualifications. Fitz reached three key professional opinions, on a more probable than not basis, as follows:

1. There is no data, documentation or other information to indicate that the dryer was the cause of the fire. CP 213, ¶ 6.

2. The fire was not caused by CAC's weatherization work and installation of the dryer venting system. CP 213, ¶ 7.

3. CAC's installation of the dryer vent pipe comported with General Electric's guidelines for electric dryers (the dryer was manufactured by GE). CP 213, ¶ 6; 217, ¶ 21.

Fitz's investigation was conducted in accordance with the National Fire Protection Association ("NFPA") "Guide for Fire and Explosion Investigations." CP 214, ¶ 10. NFPA procedures for investigating fires are well-accepted as the norm in the field of fire investigations. *Id.*

While Cullerton claimed that a lint build-up might have caused the fire, there was no indication of fire, smoke or hot gasses being forced thru the venting, indicating it was not an internal dryer fire. CP 217, ¶ 24. To the contrary, Fitz found that the flexible transition ducting appeared to be melted/burned from the outside, not from the inside. *Id.*, ¶ 26.

Fitz further observed there were no reported problems or complaints with the dryer, indicating the vent system was probably not plugged. CP 217, ¶ 22. In addition, modern dryers are designed to operate with plugged or restricted vents without causing a fire. CP 217, ¶ 23.

Fitz also found that the clothes in the dryer burned after the dryer stopped. CP 218, ¶ 27. This is based on the clean patterns on the lower

inside parts of the drum and the uncharred clothes in the drum below the burned top surface of clothing. *Id.*

The appearance of the exterior surfaces of the dryer and the interior surfaces including the outside of the drum were consistent with an exterior fire approaching the dryer. CP 218, ¶ 30.

Fitz further concluded that the fire did not appear to be a dryer fire based on the completely unburned bottom of the dryer. *Id.*

Fitz identified heavy damage to the area behind the dryer and in the wall, in the area of the cord and receptacle. *Id.*, ¶ 31. The dryer was installed by Home Depot employees in 2009 or 2010, before CAC's involvement in its weatherization project. CP 207-08. And Cullerton has conceded he wired the dryer, not CAC. CP 184:22-23.

C. Cullerton's And Mahlmeister's Deposition Testimony As To The Cause Of The Fire.

At his deposition, Cullerton testified as follows as to the cause of the fire:

Q. What is your contention as to the cause of the fire?

A. My contention?

Q. Yes.

A. Is that Community Action Council is the cause of the fire when they did the work to my mobile home.

Q. What specifically did they do wrong?

A. I believe that when they installed the lint ductwork for the dryer, that, in doing that, there was a lint buildup, and that's what caused the fire.

Q. And what's the basis for that belief?

A. That belief would be that installing a lint ductwork 40 feet – almost 40 feet long is just –that's just too much, I believe. That's just my personal belief.

* * *

Q. So how much is excessive here?

A. I thought what they had was excessive. I don't know how much is too much or how much is not enough. Again, I'm not an expert.

Q. And where do you believe the – or what is it that you believe caused lint to back up and to cause this fire?

A. The excessive length of tubing that they had.

Q. Which tubing? Above or below the floor?

A. It could have been either/or. I don't know. It could have been a combination of.

CP 200-01; 203.

Cullerton was not present to observe the start of the fire, as he was at work at the time of the fire. CP 199. Cullerton is a high school graduate. CP 194. He has no experience with electrical work. CP 196-97. And he testified he is "not an expert" regarding ductwork. CP 203:11.

Cullerton and Mahlmeister resided in the mobile home.

Mahlmeister testified that she was home at the time of the fire and that,

when she went to investigate a noise, she observed flames coming from behind the clothes dryer. CP 206. But she has no personal knowledge as to the cause of the fire. Her belief as to the cause of the fire is based on a statement by a fire investigator. CP 209. She “loved” CAC’s work until the fire. CP 209-10.

D. Cullerton’s Evidence.

1. The First Heil Letter does not offer an opinion regarding the cause of the fire.

In response to CAC’s motion for summary judgment, Cullerton submitted a letter from electrician Walter (Bill) Heil (the “First Heil Letter”). CP 113-14. Heil attests the contents of his letter “to be true to the best of my ability and expertise.” CP 114. Nowhere in his letter does Heil offer a professional opinion as to the cause of the fire, much less an opinion on a more probable than not basis that the fire originated inside the flexible ducting and that the use of flexible ducting proximately caused the fire. At the court hearing, Cullerton candidly conceded, “[w]hether it’s burned from the outside in or the inside out, I don’t know.” RP 16:3-4.

The First Heil Letter asserts, without explanation, that, “[f]lexible duct was used in this installation contrary to the manufacturer’s warnings not to use flexible duct.” CP 114. Actually, the General Electric “Installation Instructions” submitted into evidence by Cullerton recognize that “it may be necessary to connect the dryer to the house using a flexible

metal (foil-type) duct” and authorize its use up to “8 feet.” CP 121.

Neither Heil nor anyone else presented evidence that the length of the flexible duct exceeded eight feet. To the contrary, based on his analysis of a CAC sketch of the proposed work and a written work order, Fitz assumed the total length of the flexible duct was five feet. CP 216-17, ¶¶ 20-21.

2. The unsigned Norton fire report does not identify any negligent actions or omissions by CAC.

Cullerton also relied on an unsigned, unsworn report by Chris Norton, prepared for the Mason County Fire District #5. CP 101-03. It concludes,

The ignition source for this fire is most probably heat from the dryer.

The first material ignited was the easily ignitable combustible material (lint)

Based on the information currently available, it is my opinion that this fire is ACCIDENTAL.

CP 102 (capitals in original.) Norton did not identify any negligent actions or omissions by CAC, much less conclude that they caused the fire. Where the report form inquires as to “Human Factors Contributing” to the fire, Norton stated, “None.” CP 103.

It is not actually clear whose opinion is set forth in the Norton report. While the report states that it is Chris Norton’s report, at the top of

the first page, the form indicates the report was “[c]ompleted” and “[r]eviewed” by Norma King. CP 101. And it is signed by neither Norton nor King. A separate copy of this report, bearing a different date, was attached to Cullerton’s subsequent pleading styled “Rule 60(b)(3) Relief From Judgment Or Order,” which copy appears to be signed by “Supervisor (Assistant Chief – Fire Marshal Michael D. Patti)”. CP 72. That copy of the Norton report indicates it was completed and reviewed by Patti, not King. CP 69. No explanation has been offered for the discrepancies in the report, and no proffer was made as to who actually authored the report. Nor was it submitted through a declaration of an individual purporting to have personal knowledge of the report or its origins. Indeed, Cullerton submitted into the record below an email from a Mason County representative indicating that, “Mr. Norton was not a volunteer at the county during the time of your house fire, and was not working under our immediate direction.” CP 56.

Through his briefing, Cullerton sought to interject his own speculations as to the cause of the fire, explaining that, “[s]ince the fire Mr. Cullerton has researched the proper installation of dryer exhaust systems and the different types of materials used....” CP 181. However, Cullerton, who has no stated expertise, conceded that, “Mr. Cullertons only knowledge of the cause and origin of the fire comes from the fire

expert whom actually investigated the fire scene...Chris Norton.” CP 182:24-26.

E. The Trial Court’s Rulings.

1. The trial court’s order granting CAC summary judgment after considering all of the evidence offered by Cullerton.

By order entered February 23, 2015, the Mason County Superior Court, the Honorable Amber L. Finlay presiding, granted CAC’s motion for summary judgment, ruling that Cullerton failed to present evidence as to the proximate cause of the fire. CP 90-91. The trial court ordered Cullerton’s Complaint to be dismissed with prejudice. CP 91. The order reflects that the trial court considered all of the evidence submitted by Cullerton. *Id.*

In its reply memorandum in support of its motion for summary judgment and at the hearing, CAC argued that the First Heil Letter and the Norton report were inadmissible. CP 94-96; RP 4-7. The trial court indicated that it reviewed Cullerton’s submissions notwithstanding that “technically they are not in proper form.” RP 20:6-7.

The trial court further indicated that, although the Norton report “is supposed to be in the form where it’s under the penalty of perjury,...the Court went ahead and looked at it anyway, realizing that it doesn’t comport with the rules of evidence.” RP 20:11-17. The trial court further

“assume[d] for the sake of argument that Mr. Norton qualifies as an expert.” RP 20:18-19. Analyzing the Norton report, the Court said,

He indicates the ignition source for the fire is most probably heat from the dryer. And the first material ignited was lint. He doesn't say in here that it[s] cause [w]as a result of the installation of the dryer. He doesn't say it was caused by the foil ducting. There's nothing in the report that indicates that whatsoever.

RP 21:9-14.

The trial court then examined the First Heil Letter. RP 21:17. The court concluded Heil was an expert. RP 21:21. The court noted Heil's conclusion that flexible ducting was used, contrary to the manufacturer's warnings not to use flexible ducting. RP 22:1-12.

The trial court then reviewed the manufacturer's instructions and noted that “they don't indicate that you can't use” flexible ducting. RP 22:3-5. Indeed, the General Electric installation instructions specifically identify “flexible metal (foil type) UL listed transition duct” and “flexible (semi-rigid) UL listed transition duct” among “MATERIALS YOU WILL NEED.” CP 117 (capitals in original).

The trial court then noted that there was no evidence that the CAC installers had used more flexible ducting than the recommended maximum length. RP 22:12-14. Further, the court observed, “there's nothing in his

report that indicates that...the fire was caused in the foil ducting.” RP 22:20-21.

The trial court then granted CAC’s summary judgment motion on the ground that there was no evidence that any actions or omissions by CAC were the proximate cause of the fire. RP 23:6-9.

2. The trial court denied Cullerton’s three subsequent motions.

Cullerton then moved for reconsideration on February 27, 2015. CP 81-89. In his motion, he made a wide array of arguments, including that

- “substantial justice” had not been achieved;
- that the court should vacate the judgment because “he was unrepresented by counsel, ‘through no fault of his own,’ and therefore ‘unable to properly respond to the summary judgment;”
- “the defendant...had no clear and convincing evidence in their favor;” and that
- Cullerton “was not afforded the right to complete or much less perform any type of discovery.”

CP 83, 85, 87.

Cullerton also filed, on March 4, 2015, a motion styled “Rule 60(b)(3) Relief From Judgment Or Order” to which he attached a hodge-podge of documents, including emails, handwritten notes, and photographs, as well as a second letter from electrician Walter (Bill) Heil (the “Second Heil Letter”). CP 51-80; 77-78. The Second Heil Letter, attached to as Exhibit C to Cullerton’s motion, expressed, for the first time,

the opinion that the fire was caused by excessive amounts of lint build-up caused by the contractor’s failure to follow the manufacturer’s installation recommendations.

CP 78. *Compare* the First Heil Letter. CP 113-14. This new opinion renews the earlier unfounded assertion that, “[f]lexible duct was used in this installation contrary to the manufacturer’s warnings not to use flexible duct.” CP 114.

At a subsequent hearing conducted on Cullerton’s motions on March 16, 2015, Cullerton made an oral request for a continuance on the ground that he was pursuing newly discovered evidence. RP 32:1-17. The basis of his request was that he had been “repeatedly lied to by [Fire] Chief Patti...as far as current contact information for Chris Norton.” RP 30:9-10. He explained his intent to obtain an affidavit from Norton “that would state and prove that the fire started in the ductwork due to the

negligence of CAC” and, specifically, that “that ductwork was too long.”

RP 30:12-14.

The trial court granted Cullerton’s request and another hearing was scheduled for April 20, 2015. RP 40:1-13.

In the interim, Cullerton filed a third motion styled Plaintiff’s Supplemental Motion to Newly Discovered Evidence and To Vacate Judgment (“Supplemental Motion”) on April 6, 2015. CP 16-39. There, Cullerton argued he was entitled to a “new trial” because of a number of claimed irregularities in the proceedings. First, he argued irregularity “due to not having counsel.” CP 17:26-18:2. He also argued the summary judgment was “void” because “Mahlmeister stopped taken her medication for her bipolar disorder” before her deposition. CP 18:21-23. Cullerton also asserted a third irregularity on the ground that the trial court denied him “access to discovery material and to depose by written questions....” CP 18:25-26.

In his Supplemental Motion, Cullerton conceded he has “No Newly Discovered Evidence,” explaining that he had been unable to contact Norton, from whom he had hoped to obtain an affidavit regarding the fire investigation. CP 19:16-18.

The trial court convened another hearing on May 8, 2015, at which time it orally denied Cullerton’s motion for reconsideration. RP 50:5-6.

The trial court found that “the use of the flexible duct was permitted.” RP 48:23-24. The trial court also found that, even ignoring that the Norton report “is not in the proper form, and it is technically hearsay,” it did not address “whether or not the conduct of CAC was the proximate cause of the fire.” RP 48:16-21. The trial court also addressed Cullerton’s Supplemental Motion, finding no irregularities in the proceedings and effectively denying that motion. RP 49-50.

On May 11, 2015, Cullerton filed his Notice of Appeal to this Court. CP 5-6.

On May 19, 2015, the trial court entered an Order denying Plaintiffs’ Supplemental Motion To Newly Discovered Evidence And To Vacate Judgment. CP 3-4.

IV. ARGUMENT

A. Summary Of Argument.

In this action for negligence, the trial court correctly granted summary judgment dismissing the claim based on the absence of any evidence supporting an inference that CAC’s allegedly negligent work was the proximate cause of the fire. The only admissible evidence is that the cause of the fire was not related to CAC’s installation of the dryer venting system in the mobile home. Even if the Court considers Cullerton’s inadmissible “expert” evidence offered in response to CAC’s

motion for summary judgment – the First Heil Letter and the Norton report, no evidence was offered that CAC’s alleged negligence was the proximate cause of the fire.

Finally, the trial court correctly denied Cullerton’s motion for reconsideration and motions to vacate the judgment because there was no irregularity in the proceedings and because no newly discovered evidence was presented which by due diligence could not have been discovered prior to entry of judgment and, accordingly, the trial court did not abuse its discretion.

B. The Standard Governing This Appeal.

Civil Rule 56 authorizes summary judgment when the pleadings, depositions, answers to interrogatories, and admissions, together with the declarations, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Atherton Condo. Assoc. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). “The purpose of summary judgment is to avoid a useless trial where there is no genuine issue of any material fact.” *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). The initial burden is on the moving party to show that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper. *Id.* Once the moving party satisfies its burden, the nonmoving party must

present evidence that demonstrates that facts are in dispute. *Baldwin v. Sisters of Providence in Wash. Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). When the motion is supported by evidentiary materials, the nonmoving party must allege specific facts sufficient to raise a genuine issue for trial, and may not rest on mere allegations in the pleading. *LaPlante*, 85 Wn.2d. at 158. If the nonmoving party fails to controvert facts in support of a motion for summary judgment, those facts “are considered to have been established.” *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989) (citation omitted).

If a plaintiff’s response “fails to make a showing sufficient to establish the existence of an element essential to his case,” then a defendant’s motion for summary judgment should be granted. *Atherton*, 115 Wn.2d at 516; *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986)).

The United States Supreme Court has held that Rule 56:

mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof...

Celotex., 477 U.S. at 322. *Celotex* has been adopted by our Supreme Court. *Young*, 112 Wn.2d at 226. In response to a motion for summary

judgment, the party bearing the burden of proof must present evidence supporting each element essential to those claims on which it will bear the burden of proof. *Young*, Wn.2d at 225

An order granting summary judgment is reviewed de novo. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92, 993 P.2d 259 (2000). All facts submitted and all reasonable inferences from them are considered in the light most favorable to the nonmoving party. *Id.* at 93.

Cullerton also appeals from the denial of his motion for reconsideration and to vacate the lower court's grant of summary judgment. The Court of Appeals reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). "A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons." *Id.* (citation omitted).

C. The Court Should Affirm The Trial Court's Dismissal On Summary Judgment Of Cullerton's Negligence Claim Because No Evidence Was Presented Showing CAC's Actions Proximately Caused The Fire.

The only claim asserted by Cullerton is a claim for negligence. CP 245-46. The elements of negligence are (1) duty, (2) breach, (3) proximate cause, and (4) damages. *See Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002). The trial court correctly granted

summary judgment dismissing the claim based on the absence of any evidence supporting an inference that CAC's allegedly negligent work was the proximate cause of the fire.

Cullerton had the burden of presenting a *prima facie* case that CAC's use of foil ductwork was the proximate cause of the fire. He cannot meet that burden based solely on groundless speculation. *See Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) ("the plaintiff's showing of proximate cause must be based on more than mere conjecture or speculation"); *Browne v. McDonnell Douglas Corp.*, 698 F.2d 370, 371 (9th Cir. 1982) ("where proximate cause is at issue, the nonmoving party will not have met its burden if the evidence merely suggests the possibility that proximate cause exists, or if causation is a matter of speculation") (citation omitted). Because no evidence was presented to the trial court, much less properly admissible evidence, to support Cullerton's argument, the Court should affirm the trial court's grant of summary judgment.

Fitz, CAC's expert, found that the flexible transition ducting appeared to be melted and burned from the outside, not from the inside. CP 217, ¶ 26. This is contrary to Cullerton's theory that the use of this duct allowed the build-up of lint, which combusted within the duct. Cullerton offered no evidence to controvert Fitz's specific findings with

respect to the proximate cause of the fire. Thus, the only admissible evidence is that the cause of the fire was not related to CAC's installation of the dryer venting system in the mobile home. CP 213, ¶¶ 6-7. Accordingly, the Court should affirm the lower court's entry of summary judgment dismissing Cullerton's Complaint.

- 1. Cullerton has no personal knowledge that CAC's alleged negligence caused the fire and his opinions and speculation were incompetent and unsupported by the record.**

In his briefing before the trial court, Cullerton conceded that, "Mr. Cullertons only knowledge of the cause and origin of the fire comes from the fire expert whom actually investigated the fire scene...Chris Norton." CP 182:24-26. Cullerton has no personal knowledge of the cause of the fire. In addition, again by his own admission, Cullerton is "not an expert" regarding ductwork. CP 203:11.

Despite Cullerton's concessions that he lacks personal knowledge and lacks relevant expertise, in his pleadings and argument below and before this Court, Culleton has repeatedly presented, as fact, speculation as to the cause of the fire lacking any factual support. As Cullerton is not an expert, he cannot create an actionable issue of fact merely by asserting baseless opinions that CAC's actions caused the fire.

For example, at the hearing on CAC's motion for summary judgment, Cullerton argued that the "ductwork was too long." RP 30:13-14. Yet, at his deposition, he acknowledged, "I don't know how much is too much or how much is not enough. Again, I'm not an expert." CP 203:8-11. Similarly, Cullerton's theory was that the length of the duct, and the use of flexible metal ducting, allowed the build-up of lint, which combusted within the duct. CP 200:20-201:1; CP 245, ¶3.13. Yet, Cullerton conceded at oral argument that, "[w]hether it's burned from the outside in or the inside out, I don't know." RP 16:3-4.

Cullerton also renews his argument advanced below, without record citation, that CAC "ignored the manufacturers instructions;..." in using flexible metal ducting.² Br. 20. Thus, he contends, CAC breached a duty to install the ductwork properly "by using the foil transition duct,..." Br. 23. As the trial court correctly explained, the General Electric installation instructions specifically authorize the use of the foil flexible duct at issue in this case. RP 22:1-5; CP 117.

² Cullerton also asserts, again without citation to the record, that CAC was "warned several times of the risk that was involved" in its installation of the duct-work. Br. 20. There is nothing in the record indicating that CAC was "warned" of risks associated with its duct-work, and this unsupported contention should be ignored. To the extent that these supposed warnings are contained in the General Electric instructions, the trial court correctly found that there was no evidence CAC failed to comply with those instructions regarding ducting. RP 22:3-14.

Cullerton further argues to this Court that CAC breached a duty to install the ductwork properly “by...not insulating the ductwork that ran in the crawl space of the home,...” Br. 23. Whether or not CAC should have installed insulation in the crawl space is a red herring as no evidence was presented to the trial court that the lack of insulation in ductwork was the cause of the fire. Indeed, if the lack of insulation caused a build-up of lint that then combusted, the fire would have originated from within the duct. Yet, as noted above, Cullerton does not even have an opinion as to whether the fire started inside or outside of the duct. RP 16:3-4.

In short, Cullerton’s own admissions and the applicable installation instructions establish the baselessness of his arguments on appeal.

2. The only competent evidence is that CAC’s alleged negligence did not cause the fire.

The only competent evidence is that CAC’s alleged negligence did not cause the fire. CAC’s expert, Fitz, with 24 years’ experience as a Certified Fire and Explosion Investigator with the National Association of Fire Investigators, found that the flexible transition ducting appeared to be melted/burned from the outside, not from the inside. CP 212, ¶ 4; CP 217, ¶ 26. If one were to accept Cullerton’s theory that the use of this duct allowed the build-up of lint which then combusted, the fire would have emanated from inside the ducting. Cullerton does not claim the fire

emanated from inside the duct, conceding, “[w]hether it’s burned from the outside in or the inside out, I don’t know.” RP 16:3-4.

Not only did Fitz conclude that the fire originated outside the ducting, but he concluded, on a more probable than not basis, that the fire was unrelated to CAC’s work. CP 213, ¶ 7. Fitz’s conclusions are well-supported by detailed factual observations. CP 213-219. On this appeal, Cullerton now asserts that it was an abuse of the trial court’s discretion to consider the Fitz declaration, arguing the factual basis for his opinions are not set forth in the declaration. Br. 12-13. A review of that declaration belies Cullerton’s assertion. CP 213-219. Ultimately, however, the issue is irrelevant because Cullerton had the burden of presenting admissible evidence that CAC’s claimed negligence proximately caused the fire. He failed to meet that burden.

3. The Norton report is inadmissible hearsay. Even if it were admissible, it does not support Cullerton’s theory of proximate cause.

The unsigned Norton report is inadmissible for a variety of reasons. Even if it were admissible, the trial court correctly found that it does not raise an issue of fact as to whether CAC’s actions were the proximate cause of the fire.

The Norton report is inadmissible and should not be considered by the Court for four independent reasons. First, it is unclear who prepared

the report and whose report it purports to be. Second, the record contains opinions that are inadmissible hearsay under ER 803(a)(8) and RCW 5.44.040. Third, it does not offer evidence of negligence by CAC, concluding that, “it is my opinion that this fire is ACCIDENTAL.” (Capitals in original.) Fourth, it is not certified.

a. The Norton report does not satisfy the “public record” hearsay exception in ER 803(a)(8).

Under RCW 5.44.040, certain properly authenticated public records are admissible as exceptions to the hearsay rule, pursuant to ER 803(a)(8). The Norton report is not among the categories of documents deemed admissible under the public records rule. That statute, titled “Certified copies of public records as evidence,” provides as follows:

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

RCW 5.44.040.

The report relied on by Cullerton is not certified and not the type of record deemed admissible under holdings applying RCW 5.44.040.

Certification would at least establish that the report was prepared by or for Norton. As our Supreme Court held in *In re Connick*, 144 Wn.2d 442, 458, 28 P.3d 729 (2001), “It is beyond question that all parties

appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents. This court will in future cases accept no less.” Here, it is not clear that Norton ever saw the report, much less prepared it, as the form indicates the report was “[c]ompleted” and “[r]eviewed” by Norma King. CP 101. And it is signed by neither Norton nor King. Nor was it submitted through a declaration of an individual purporting to have personal knowledge of the report. And an email submitted by Cullerton indicates Norton was not a volunteer at the time of the fire. CP 56. Thus, the report is rank hearsay.

Further, the report is not the kind of report deemed an admissible public record. “To be admissible, the public document must[]contain facts rather than conclusions that involve judgment, discretion or the expression of opinion” *State v. Chapman*, 98 Wn. App. 888, 891, 991 P.2d 126 (2000). Accordingly, the Supreme Court held in *In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004) that, “[a]lthough public records are a statutory exception to the hearsay rule, the record cannot be based on ‘conclusions involving the exercise of judgment or discretion or the expression of an opinion.’” *Id.* at 13 n.5, quoting *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941). Here, the Norton report was offered for precisely the prohibited purpose of presenting Norton’s supposed opinions, made in the exercise of his judgment.

b. The Norton report does not offer a professional opinion that CAC's alleged negligence proximately caused the fire.

Even if the Norton report were admissible, it does not offer a professional opinion that CAC was negligent, much less that its alleged negligence proximately caused the fire. Where the report form inquires as to "Human Factors Contributing" to the fire, Norton stated, "None." CP 103. Nowhere does the report implicate the quality of CAC's work, much less suggest that CAC's work was the proximate cause of the fire. CP 102.

4. The First Heil Letter is inadmissible. Even if it were admissible, it offers no evidence that CAC's alleged negligence proximately caused the fire.

The other expert opinion relied upon by Cullerton in response to CAC's motion for summary judgment was the First Heil Letter. CP 113-14. As with the Norton report, that letter is inadmissible and, even if it were admissible, it offers no evidence that the fire was proximately caused by CAC's alleged negligence.

The First Heil Letter is by an electrician who claims no expertise in fire investigations. His declaration is inadmissible. Affidavits made in opposition to a motion for summary judgment "must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. Expert

testimony must be based on the facts of the case and not on speculation or conjecture.” *Davies v. Holy Family Hosp.*, 144 Wn. App. at 493, 183 P.3d 283 (2008) (citation omitted). “Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.” *Id.* (citation omitted).

Heil attests the contents of his letter “to be true to the best of my ability and expertise,” but there is no indication he has any expertise with respect to fire causation. CP 114. Further, his key assertion, that the “[f]lexible duct was used in this installation contrary to the manufacturer’s warnings not to use flexible duct,” is unsupported by any reference to the claimed warning. CP 114. As the trial court correctly found, the applicable manufacturer’s instructions, entered into the record by Cullerton, flatly contradict Heil, specifically providing for the use of flexible duct. CP 117, 121; RP 22:3-11.

Even if the Court considers it, the First Heil Letter was insufficient to forestall summary judgment. Nowhere in his letter does Heil offer a professional opinion as to the cause of the fire, much less an opinion on a more probable than not basis that the fire originated inside the flexible ducting and that the use of flexible ducting or the lack of insulation of the duct proximately caused the fire. At the court hearing, Cullerton candidly conceded he did not know whether the fire originated within the duct. RP

16:3-4 (“[w]hether it’s burned from the outside in or the inside out, I don’t know.”)

The bulk of Heil’s observations relate to the wiring of the dryer, which makes sense, as he is an electrician. But Cullerton conceded he wired the dryer, not CAC. 184:22-23.

D. The Trial Court Did Not Abuse Its Discretion In Denying Cullerton’s Motion For Reconsideration.

Cullerton argues that the trial court improperly denied his motion for reconsideration. Br. 15-17. Cullerton ignores the applicable legal standard, which requires a showing that the trial court’s decision was manifestly unreasonable or rests upon untenable grounds. *Davies v. Holy Family Hosp.*, 144 Wn. App. at 483, 497, 183 P.3d 283 (2008). The denial of Cullerton’s motion for reconsideration was not manifestly unreasonable and did not rest on untenable grounds.

Cullerton fails to identify which of the nine different grounds set forth in CR 59 he believes governed his motion for reconsideration. However, he does argue that the trial court wrongly failed to give weight to the Second Heil Letter. Br. 15. Before the trial court, Cullerton referred to that document as “newly discovered evidence” and it was presented to the trial court as part of a motion brought under CR 60(b)(3) to vacate the judgment “based upon newly-discovered evidence which, by

due diligence, could not have been discovered in time....” CP 53:4-6, 10; CP 77-78. The Second Heil Letter was not newly discovered evidence. It simply was a second, untimely and deficient effort at overcoming deficiencies in the First Heil Letter after the trial court entered judgment dismissing the Complaint.

Cullerton also argues that he was deprived of the opportunity to obtain additional evidence pursuant to CR 56(f). Br. 17. However, no formal request for a continuance was made and, in any event, despite three motions to set aside the judgment, Cullerton conceded that he had “No Newly Discovered Evidence,” despite his efforts to procure additional evidence. CP 19:8. Moreover, the trial court granted Cullerton’s request for a continuance, made in an oral motion pursuant to CR 56(f) at the initial hearing on his motion for reconsideration. The trial court granted him an additional month to seek to obtain new evidence. RP 29-39.

V. CONCLUSION

Because there is no evidence that Respondent CAC’s installation of ductwork for Cullerton’s dryer was negligent and that CAC’s alleged negligence proximately caused the fire that destroyed Cullerton’s mobile home, the Court should affirm the trial court’s entry of summary judgment dismissing Cullerton’s Complaint.

The trial court's denial of Cullerton's motion for reconsideration was not manifestly unreasonable and did not rest upon untenable grounds. Accordingly, the trial court did not abuse its discretion in denying Cullerton's motion for reconsideration.

RESPECTFULLY SUBMITTED this 1st day of March, 2016.

KELLER ROHRBACK L.L.P.

By 

Rob J. Crichton, WSBA #20471
Attorneys for Respondent

KELLER ROHRBACK LLP

March 01, 2016 - 11:58 AM

Transmittal Letter

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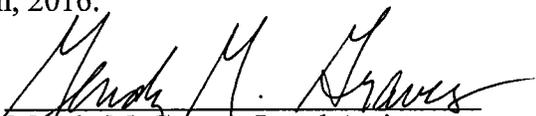
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