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NO. 64403-3-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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Farmers Insurance Company of Washington  
as subrogee for Paul Moldon,

Plaintiff/Appellant

v.

D Square Energy Systems, Inc., a Washington Corporation et al.,

Defendant/Respondent

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**BRIEF OF APPELLANT  
FARMERS INSURANCE COMPANY OF WASHINGTON  
AS SUBROGEE FOR PAUL MOLDON**

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## I. SUMMARY OF THE CASE

Cedar siding stacked near the 800 plus degree exhaust emitted from a generator exhaust pipe started a fire that caused millions of dollars in damage to the Moldon's home. Farmers Insurance Company of Washington (Farmers) paid for the loss, then brought a subrogation action against several entities including respondent D Square Energy Systems Inc. (D Square) which serviced the generator two months before the catastrophic fire but failed to warn the Moldons about the danger of stacking cedar siding near the generator and of failing to have the manufacturer's recommended 3 feet of air space around the generator, which was only 9 inches from the house and 3 inches from the garage.

The trial court denied D Square's first motion for summary judgment, holding that D Square had a duty to warn the Moldons of obvious hazards. D Square moved for summary judgment again a year later, arguing that the cedar woodpile, admittedly less than 3 feet from the generator, was not an obvious hazard at the time of the D Square service visit. The court granted D Square's second motion despite conflicting evidence about the cedar siding and the cause of the fire and despite the fact that the cedar siding was not the only potential hazard D Square should have pointed out to the homeowners. The trial court held as a matter of law that there was not a hazardous condition triggering a duty to warn. Farmers contends on appeal that the trial court erred in deciding disputed factual issues, ignoring other bases for D Square's negligence, and allowing improper expert opinion testimony.

## II. ASSIGNMENTS OF ERROR

**First assignment of error:** The trial court erred in granting D Square's motion for summary judgment and dismissing Moldon's claim against D Square.

**Second assignment of error:** The trial court erred in ignoring its prior holding that D Square had a duty to warn and that the Magnum manual was evidence of that duty.

**Third assignment of error:** The trial court erred in resolving factual issues on summary judgment instead of making all inferences in favor of the non-moving party.

**Fourth assignment of error:** The trial court erred in dismissing all claims against D Square based on its presumed finding that the cedar woodpile was not a hazardous condition because there were other bases for finding that D Square violated the applicable standard of care.

**Fifth assignment of error:** The trial court erred in denying the motion to strike paragraph 12 of Richard Carman's declaration.

**Sixth assignment of error:** The trial court erred in considering expert opinion testimony based on speculation and conjecture.

## III. ISSUES ASSOCIATED WITH ASSIGNMENTS OF ERROR

**Issues related to assignments of error one through four:**

**Issue One:** Whether there is a question of fact precluding summary judgment on whether there was a hazardous condition at the time of D Square's service call when D Square admits that the Magnum generator was not 3 feet from all surfaces as required by the installation manual, that the cedar siding was not more than 3 feet from the generator, and there is evidence that the fire could have been prevented if the manufacturer's warnings had been followed?

**Issue Two:** Whether there is a question of fact as to whether D Square knew, or should have known, that the cedar siding near the generator exhaust vent at the time of its service visit, two months before a major fire, violated the manufacturer's set-back requirements and constituted a fire hazard?

**Issue Three:** Whether there are disputed issues of material fact precluding summary judgment on whether cedar siding piled too close to a generator constitutes a hazardous condition when there is conflicting testimony about the location and condition of the siding prior to the fire?

**Issue Four:** Whether there is at minimum a question of fact as to whether D Square, having assumed a duty to warn of hazardous conditions, was negligent in failing to require that its technicians be familiar with UL 2200 standards and the manufacturer's requirements prior to servicing the Moldons' generator?

**Issue related to fifth and sixth assignments of error:**

**Issue Five:** Whether expert opinion testimony that only an expert trained in ignition sources, ignition temperatures, and combustibles could recognize the danger of stacking wood too close to a hot exhaust pipe and that a generator maintenance technician would not have such training, lacks foundation, is based on speculation and conjecture, and is not a proper subject for expert testimony?

**IV. STATEMENT OF THE CASE**

**A. Events leading up to the fire**

Paul and Laurel Moldon's Bainbridge Island home was custom built by and for them. CP 205. They moved into the home some time in late 2002. CP 142. There was some cedar siding left over after the construction which Paul thought could be useful for future repairs, so he asked that it be saved. CP 250. He did not remember giving any further directions about where to store the siding or how to stack it. CP 250. Paul Moldon cannot walk and therefore did not frequent the area where the generator is located. CP 316. He remembered "seeing some cedar at the end of the dog run," which is next to the generator, but didn't know how long it had been there and couldn't specifically recall how it was stacked. He testified "I know that it would have been stacked nice, **so I'll just assume that's how it was.**" (emphasis added) CP 154 line 8.

Laurel remembered that there was a stack of wood at the end of the dog run near the generator at least since they moved into the house in October, 2002, although she did not know what kind of wood it was. CP 142, 143. When asked how the wood was stacked, Laurel answered “I don’t have an idea.” CP 144, lines 8-9.

Paul testified that he bought a back-up generator and had it installed because he had heard a generator would be necessary due to frequent power outages on Bainbridge Island. CP 206-7. Neither of the Moldons had any knowledge about or experience with generators before buying the generator at issue in this litigation. CP 221, line 8; CP 245. Paul testified that he wanted one that was “maintenance free, trouble free, and automatic. So that I would have to do nothing.” CP 221, lines 9-10. The Moldons bought a Magnum MG12Q12 kw natural gas/LP gas generator (“the generator”) after Paul heard a commercial on the radio about Magnum generators. Complaint 2.10; 206-207. Paul was not sure who installed the generator, but he himself was not involved in the installation and did not even give instructions on where it should be placed because he “wasn’t able to walk around to see the area and...knew nothing of generators.” CP 245, lines 24-5. Magnum’s CR 30(b)(6) witness, Dave McAllister, testified that the MG12Q was designed to minimize noise, and that the generator’s exhaust pipe, unlike those on most

generators, pointed down at the ground as part of the sound attenuation design. CP 780.

There was a power outage on Bainbridge beginning early in the morning on Christmas day, 2005. The generator was running all day. When the power stopped the Moldons went to check on the generator and discovered the fire at around 5 p.m. CP 480. A report by Independent Forensics, Inc. stated:

The warm exhaust from the generator was hot enough to ignite the cedar siding stacked near the generator...

22. The area of first ignition is shown in Photo No. 28. This was taken of the East end of the generator. This end of the generator housed the muffler and the exhaust system. The exhaust was vented down. There were signs of short pieces of cedar siding being stacked in this area....

...

25. The origin of this fire was at or below the east end of the generator. There had been some short pieces of siding stored on the exterior of the garage. A set (127 total) of pictures were obtained from the Fire chief... There were several that were taken very early in the fire investigation. They show smoke and steam still coming from the small pieces of siding on the east side of the generator. This is the origin of the fire.

...

This fire was the result of the ignition of pieces of cedar siding being ignited by exhaust from the generator. **The cedar siding had been stacked too close to the east end of the generator where the exhaust is vented.**

(emphasis added) CP 482-484. Two other fire investigators, John Shouman and Paul Way, also concluded that the fire was the result of the cedar siding being stacked too close to the exhaust gas.. CP 194, CP 886.

**B. The generator and D Square's maintenance contract**

The generator exhaust pipe on the MG12Q is directed toward the ground, unlike most generators. It was designed that way as part of the noise attenuation system and for aesthetic purposes. CP 826. A person standing in front of the generator and looking down would not be able to see the exhaust pipe. CP 841. The exhaust is so hot that the Magnum installation and service manual (the Magnum manual) warns that “hot parts can cause severe injury or death.” CP 306. The Magnum manual also warns that “The Magnum Power 12KW standby generator was not designed as a do-it-yourself project. Only qualified professionals should install the generator...” CP 155. Another prominent warning reads: “[d]uring operation, **the exhaust system will reach temperatures that can ignite combustible materials.** ...” (emphasis added). CP 306. The manual requires “3 feet of clearance around the entire generator for maintenance, service, & exhaust gases. The location must provide adequate airflow for engine and generator cooling.” CP 155. The three foot clearance or safety zone around the generator is intended as a fire prevention measure, even according to D Square's expert. CP 685. The

exhaust temperature increases in relation to the number of appliances being operated and the length of operation of the generator until it reaches the saturation point. CP 824.

The generator was on a concrete flooring but was only about 3 inches from the garage wall and 9 inches from the house, CP 299, contrary to the manufacturer's installation instructions. CP 29. The ignition temperature of the adjacent wall was between 450 and 500 degrees, similar to the ignition temperature of cedar. CP 875. Further, there was cedar siding stacked next to the generator, or under D Square's theory, 18 inches from it, rather than the required three feet. CP 482-4; CP 683.

Magnum's (30)(b)(6) witness Dave McAllister testified that the Q model purchased by the Moldons "has more opportunity for heavier debris" (including cedar scraps) to get under the unit near the exhaust than other models, adding that it "[d]epends on environmental conditions." CP 832-3. If materials such as cedar siding are placed in the vicinity of the generator, debris can be trapped under the exhaust pipe. CP 832-3. "This is why it is important to warn the owner to keep the unit clear of debris." CP 826. Magnum expects companies hired to inspect and service its generators to read the manual and follow its

instructions, particularly if they had not previously serviced a Magnum generator. CP 840.

Don Dunavent is the vice-president and operations manager of D Square. D Square sells, services, and maintains backup generators for commercial, industrial and residential applications. CP 29. D Square sent a junior service technician, Tim Cislo, to handle the Moldons' service request. D Square subsequently solicited an on-going service contract with the Moldons, CP 761, even though D Square did not sell Magnum generators, had never previously serviced one, and its technicians were not expected or required to read the Magnum installation and service manual. Although his company had been selling and servicing generators for many years, Mr. Dunavent had never seen a generator with the exhaust pointed toward the ground before inspecting the Magnum generator after the fire. CP 772.

Mr. Dunavent knew that manufacturer's manuals contain information about setbacks from the building and that different generators require different setbacks. "...some can be right up against the house others need five feet." CP 458. The amount of setback required relates to fire safety. Units that have not passed a "burn test" require a greater setback. CP 459.

As part of servicing a generator, D Square checks the overall appearance of the generator and controls, including leaks, loose wires, and debris. CP 55. In response to an interrogatory, D Square stated:

If we see an obvious hazard we will bring it to the owner's attention and hope the owner will remedy the hazard.

CP 66. Mr. Dunavent explained what he meant by "obvious hazard:"

Well, we've seen over the years people stack lawn chairs on generators, hoses, you know, all kinds of--if they've got them too close to doors or windows you know, if we didn't install it and we see that it's installed next to a, a bedroom window, we're going to say something that, you know, this is probably not a good idea because if this is--that generator runs for any length of time it puts out, you know, carbon dioxide--carbon monoxide.

Q. So it could involve either personal safety issues or fire issues or even electrical issues if it was obvious?

A. If it's obvious. It's awfully hard for us to predict what a generator's going to do...

CP 66.

The Generator Maintenance Service record which is filled out at the end of each service call contains a space for just such a recommendation, as well a line for the customer's signature. CP 55. Mr. Dunavent testified that the technicians are instructed to get the customer to sign the sheet "So they can go over with the customer what they found, what they saw ..." CP 460. Even though the "Reliability Inspection" portion of the service checklist includes checking for debris, Mr. Dunavent testified that "debris" refers only to checking for debris inside

the machine, information D Square does not pass on to its customers. CP 66.

Tim Cislo did the maintenance service call on the Moldons' generator on October 25, 2005. CP 119-120. He had never serviced a Magnum generator before that day and did not know what UL 2200 of NFPA 70 meant or referred to. CP 472. The Generator Maintenance Service Record report he prepared for that service call shows that the exhaust system was checked, and the cleanliness of the system was serviced. CP 55. The section for comments and recommendations was blank but the customer's signature was obtained. CP 55. Although Mr. Cislo had never serviced a Magnum generator before, CP 472, he did not refer to the manual before servicing the Moldons' generator, or before having them sign the report with the blank recommendations section. CP 138-39.

Mr. Dunavent testified that, although Mr. Cislo was a junior technician, he was qualified to do a routine service call on generators with Kohler or Briggs engines without going to "Magnum's school." CP 61-62. Even though this was the first Magnum generator D Square had ever serviced, Mr. Dunavent did not require or expect his technician to consult the Magnum manual. Mr. Dunavent explained the failure to consult the manual as follows:

We'd never seen that generator before. That meant we would have had to go to the job, say "we don't know this generator; we're going to go back and get a manual for it," and go through it and figure out what Magnum wants us to do. And that's, that's typically not what's done because there's probably--I mean, we see hundreds of manufacturers, what we call packagers.

CP 138-139. The decision to ignore the manufacturer's manual was apparently a business decision based on a desire to save time and accomplish service calls as quickly as possible.

Mr. Cislo testified in his deposition that he noticed two woodpiles when he did the October service call, one on each side of the generator.

CP 473. The generator vents to the right and the cedar siding was on the right side of the generator. However, Mr. Cislo could not recall the type of wood on the right side, whether it was covered by a tarp, how high it was stacked, whether all of the bundles were taped with blue tape, or any other details about the cedar siding. CP 303. He acknowledged that he didn't "remember much about that side." CP 303. He had to "worm his way" past the generator "to get the stinking bolts off," CP 475, so he assumed the siding was not touching the generator or he would have had to move it. He didn't know which woodpile was closer to the generator, but remembered putting his tools on the woodpile on the left side (away from the exhaust) which he described as "pretty close" to the generator. He was unable to estimate the distance from the generator exhaust pipe to

the siding. CP 476. He returned to the scene after the fire and noticed that the wood was “all over” compared to where it was when he did the October service visit. CP 474.

UL 2200, which has been adopted in Washington, sets standards for stationary generators like the one at issue here. See UL 2200 1.1 (requirements cover stationary engine generator assemblies rated 600 volts or less). Mr. Dunavent assumed the Magnum generator was built to UL 2200 standards, and testified there would be “no problem” with stacking cedar close to a generator that complied with UL 2200 standards. CP 767. However, the Magnum generator installed at the Moldons’ home did not comply with UL 2200 requirements regarding maximum exhaust temperature and the design of the box and grate according to Paul Way, an electrical engineer with substantial experience.<sup>1</sup> CP 853; CP 881-882. Mr. Way estimated that the exhaust leaving the pipe would have been 500-700 degrees, exceeding UL 2200 standards. CP 882, lines 1-2. The surface on which a generator is mounted and serviced, and adjacent surfaces, are not allowed to exceed 194 degrees Fahrenheit. CP 883. Surfaces adjacent to the exhaust where it discharged “certainly...would

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<sup>1</sup> Magnum’s CR 30(b)(6) witness David McAllister testified that he did not know whether or not the generator complied with UL 2200, was not familiar with NFPA 70, but did testify that the generator “is not UL listed.” CP 802-803.

have been in excess of 194 degrees F” according to Mr. Way. CP 883, lines 11-14.

If Mr. Dunavent had required that his technicians consult the applicable service or installation manuals for the generators they contracted to service, Mr. Cislo would have been aware that Magnum’s installation manual warned that the generator should be at least three feet from all surfaces, not three inches from the garage or 18 inches or less from the cedar siding. A UL 2200 compliant generator has a UL 2200 sticker. Had Mr. Cislo known what UL 2200 was and checked for UL certification on the generator, he would have known that the generator was not UL 2200 compliant and that he should be more cautious about debris and other fire hazards.

D Square’s own expert, retained for this litigation, testified that the manufacturer’s set-back requirements are “in case of fire.” CP 685. Had Mr. Cislo consulted the manual, he would have known that the exhaust could be hot enough to cause injury or death, and could cause fires if near combustibles such as cedar siding, garages, and houses. Armed with the knowledge of UL 2200 requirements and the manufacturer’s directions and warnings, Mr. Cislo could have warned the Moldons of the fire hazard of combustibles within 3 feet of the generator, thus preventing the Christmas day fire.

**C. Procedural history**

Farmers, the Moldons' insurer, paid for the fire damage, then filed a subrogation action alleging negligence by multiple defendants including D Square. CP 7. D Square filed a motion under CR 12(b)(6) or, in the alternative, for summary judgment in August 2008. CP 12-21. D Square argued that it "had no duty to warn the homeowner of a non-dangerous condition near a generator it serviced" and that "there is no evidence the condition that caused the loss existed when the unit was serviced two months earlier." CP 13. The trial court denied the motion, interlineating on the order that

The court concluded as a matter of law that the defendant assumed a duty to warn of obvious danger/hazards and that the manual also is evidence of the duty required and whether that duty was fulfilled is a question of fact...

CP 178. The Court did not find that this was the only duty owed to the Moldons, only that D Square had assumed a duty to warn of obvious danger/hazards. In the context of this case, this means that D Square's technicians were required to warn homeowners of visible dangers observed by the technician during the course of a service call, as Mr. Dunavent testified his technicians were expect to do. The Court was not stating that there was a duty to warn of hidden dangers, such as faulty wiring inside the generator that could not be seen during a routine service

call. However, what is “obvious” to a trained service professional is not necessarily “obvious” to a homeowner who is relying on that professional for information and advice, as was illustrated by Paul Moldon’s testimony that he knew nothing about generators and did not even know that they had an exhaust pipe or that they could be hot. CP 183-84.

D Square’s subsequent motion for reconsideration was also denied. CP 96-97. A year later, D Square brought a second motion for summary judgment, again arguing that “there is no evidence an obvious danger/hazardous condition existed when the unit was serviced, and thus no duty to warn.” CP 107. D Square argued that the cedar siding was “safely stacked” 18 inches from the exhaust pipe on the day of the service visit, and was not an “obvious danger” at that time. It was only when the “safely stacked” pile collapsed and slid toward the generator that there was a dangerous condition. D Square assumed, without evidence, that this hypothetical collapse occurred after the service visit and failed to address how a woodpile that collapses and causes a multi-million dollar fire could ever be deemed to be “safely stacked.”

The motion was supported primarily by a declaration from D Square’s expert, Richard Carman. Mr. Carman first visited the scene two months after the fire, CP 122, and based all of his opinions on measurements taken that day, assuming contrary to logic and the evidence

that everything was still in the same place it had occupied prior to the fire and the related fire suppression efforts. He apparently ignored Mr. Cislo's testimony that the woodpile was "all over the place" after the fire as compared to its appearance on the day of his service visit.

Mr. Carman described his observations and measurements at the scene. He saw a pile of scrap cedar bound into bundles held with blue masking tape to the east of the generator. CP 122 at ¶5. The wood was stacked two bundles high on a plastic pallet. He opined that the wood was originally stacked about 18 inches from the east edge of the generator, CP 123, although he never saw the siding before the fire and admitted he did not know whether and how much the fire-fighting efforts might have disturbed the stacks of cedar.

Based on his post-fire observations, Mr. Carman opined:

The pile had collapsed east to west, the blue tape on some of the bundles had come undone, and some of the pieces of wood had slid underneath the east end of the generator, which was the side where the generator exhaust was. ....

Over the course of December 25, 2005, the hot exhaust gas, directed straight down onto some wood, eventually ignited the cedar pieces laying directly underneath the exhaust pipe. This was the origin of the fire.

CP 123. He added

It is also my opinion on a more probable than not basis that the cedar would never have caught on fire had not some of the cedar bundles come undone and slid underneath the exhaust. The exhaust vented straight down to the ground. The bundles were too far from the exhaust to ever catch on fire because the temperature from the exhaust would have dissipated well below the ignition temperature of the cedar before reaching the bundles.

12. To foresee that the cedar siding--**taped and neatly stacked a safe distance from the exhaust**--would collapse toward the generator, slide all the way under the generator to be directly under the exhaust, and ignite would require specific training in ignition sources, ignition temperatures, and combustibles generally found only in experts such as myself. A generator service technician performing basis maintenance would not have such training.

(emphasis added) CP 124-125. In his deposition, Mr. Carman said he “was able to determine” that the edge of the pallet was 18 inches from the generator. CP 683. He assumed all of the wood was stacked on the pallet because “of the way that the wood was positioned when I viewed it after the fire, it appeared to me that the wood had been stacked up on the pallet. And as it collapsed, it just collapsed to the left, like a stack of cards...” CP 685. Other than this assumption, Mr. Carman offered no evidence that all of the cedar siding was on the pallet before the fire, or even that the wood was on the plastic pallet before the fire at all. Mr. Carman gave no basis for his assumption that the location of the cedar siding two months

after a catastrophic fire was the same as the location of the siding before the fire.

Mr. Carman testified that the woodpile collapsed because the tape failed as a result of “the elements” but admitted he had no physical evidence that it was the elements rather than the fire suppression efforts that caused the tape to fail, leading to the alleged collapse. CP 641. He admitted that heat could cause the tape to fail, CP 644, leaving open the possibility that the tape on the bundles broke as a result of the fire and the ‘failed’ bundles were therefore not the cause of the fire. Although his entire theory was based on the collapsing woodpile, he did not know the size of the pieces of wood or of the bundles, the number of bundles, or how high it was stacked, although he said “I can only assume it was stacked too high.” CP 633.

Mr. Carman did not know when the cedar siding was bundled up and put near the generator, CP 633, or when or why the wood pile collapsed. CP 633. He nonetheless testified that the siding collapsed before the fire without providing any empirical evidence supporting that conclusion. CP 634. His testimony was based on the circular reasoning that the cedar siding must have fallen before the fire department arrived, and couldn’t have been disrupted by fire-fighting efforts, because in his

opinion “the wood was ignited by the muffler...it had to have fallen before the fire department got there.” CP 641.

Mr. Carman admitted that he couldn't determine the distance between the point where the cedar came to rest after the collapse and the generator “because as the wood burned, it would begin to disintegrate and fall downward by gravity. You could only estimate where it was at the time it was ignited.” CP. He estimated “it was most likely within four to five inches from the end of the muffler.” CP 636. He placed the point of origin of the fire underneath the muffler on the east shroud of the generator. CP 638. Based on photographs that he took at the scene, he acknowledged that the woodpile appeared to be perpendicular to the house. CP 643. Consequently, in order for his theory to work, “not only would the wood have to fall and tumble 27 inches to fall beneath the generator, but it would also have to twist and turn parallel to the generator...” CP 643.

Mr. Carman admitted the generator was only 9 inches from the south wall of the house rather than the three<sup>2</sup> feet recommended by the manufacturer. CP 299. He testified that the set-back recommendation is

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<sup>2</sup> Mr. Carman actually testified that the manufacturer required a 5 foot set back, and his subsequent testimony on the topic therefore refers to 5 feet. The Magnum manual actually states that a 3 foot setback is required. Defendant will therefore use the 3 feet figure set out in the Magnum manual rather than Mr. Carman's 5 feet, which is believed to be an error on his part.

made “in case the generator...were to become involved in a fire, it would not be within five feet of another combustible material....” CP 686.

John Shouman was retained by Farmers to investigate the fire shortly after it occurred. Mr. Shouman observed a bundle of wood “approximately at the end of the generator, going out even further to the east. It appeared there were several bundles of wood.” CP 170. He wasn’t there during the actual fire suppression efforts, but testified that “I don’t believe those bundles had moved much.” CP 170. The exhaust could have ignited the cedar bundles even if they were a foot away from where the exhaust vented. CP 171. The exhaust temperatures “would be very hot where it discharges from the exhaust.” CP 172. In a past fire Mr. Shouman investigated, an exhaust pipe 18 inches away from combustibles started a fire. CP 172. The exhaust from the Moldons’ generator, which was probably 800-900 degrees,

would start attacking that wood, even if it were a foot or who knows how far away, but it’s going to start heating up that wood. It’s going to start drying it off, and it’s going to start pyrolyzing that wood. And so at some point, that wood went into the flame state, and that may have taken that whole day to do that.

Q. Could it have taken less than a day to have done it?

A. If conditions were--the conditions were right, yes.

CP 174. Mr. Carman's testimony was further contradicted by Mr.

Shouman's declaration which stated in part:

During the course of my investigation, I determined there were several piles of wood located on the side of the house where the generator was located **These piles were stacked directly adjacent to the right side of the generator. ...**

The right side of the generator, under the diagonal enclosure, is where the exhaust exits the generator. **The exhaust is pointed straight down to where the wood was located at the time of the fire.** The fire started when hot gases from the generator ignited the wood pieces under the generator's exhaust enclosures.

(emphasis added) CP 194.

A third expert, electrical engineer Paul Way, testified that the generator did not comply with UL 2200 and that the exhaust was hot enough to cause the fire:

The generator exhaust was hot, the generator enclosure and exhaust didn't comply with UL 2200, the generator exhaust was hot enough to ignite combustibles that were close by, the generator enclosure and exhaust system could have been designed to dramatically reduce discharge exhaust temperature.

CP 886. When asked whether the fire could have been avoided if the generator had been installed and maintained in compliance with the Magnum manual, Mr. Way answered:

If the generator had been three feet away from the wall of the house and if all combustible materials had been kept away from the generator then it's unlikely this fire would

have happened, and that is one thing that is mentioned in the [Magnum] manual.

CP 876. Mr. Carman also testified that the fire would not have happened had the manufacturer's safety clearance zone been in place. CP 208.

Even though there was conflicting expert and factual evidence about the cause of the fire, with two expert reports stating that the wood stacked adjacent to the generator caught fire from the exhaust vs. Mr. Carman's opinion that the wood was a "safe distance" from the generator and must have collapsed towards the generator because it was improperly stacked (after over two years in the same location without collapsing), the Court granted D Square's second motion for summary judgment, apparently finding there was no hazardous condition on October 25 as a matter of law. This appeal follows.

## V. ARGUMENT

### A. Standard of review on summary judgment

The standard of review of an order of summary judgment is de novo. The appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004). On review, as in the court below, all facts and inferences must be viewed in the light most favorable to the non-moving party. *Herron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 170, 736 P.2d 249 (1987). A

court may grant summary judgment if the pleadings, affidavits, and depositions establish there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hisle*, 151 Wash.2d at 861, 93 P.3d 108. The burden is on the moving party--D Square-- to prove that there is no genuine issue of material fact that could influence the outcome of a trial. *Hartley . v. State*, 103 Wash.2d 768, 774, 698 P.2d 77 (1985). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982); *Barrie . v. Hosts of Am., Inc.*, 94 Wash.2d 640, 618 P.2d 96 (1980)

Summary judgment is inappropriate “if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 810 P.2d 4 (1991) (quoting) *Mostron v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). While the existence of duty is a question of law, breach and proximate cause are questions of fact for the jury to decide. *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999). Once it is determined, as it was in this case, that a legal duty exists, it is generally the jury’s function to decide the issue of foreseeability. *Bernethy v. Walt Failor’s Inc.*, 97 Wn. 2d 929, 933, 653 P.2d 280 (1982). Breach and proximate cause may be determined as a matter of law only where

reasonable minds cannot differ. *Hertog*, 138 Wn.2d at 275. It has long been held:

It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, et cetera, a summary judgment would not be warranted.

*Preston v. Duncan*, 55 Wash.2d 678, 681-82, 349 P.2d 605 (1960)

(quoted in) *Gerimonte v. Case*, 42 Wash.App. 611, 616, 712 P.2d 876, 879 (1986).

Here, the trial court erred in resolving disputed factual questions about the cause and origin of the fire and the location of the cedar siding in favor of the moving party and granting D Square's motion, impliedly finding as a matter of law that highly combustible cedar siding stacked within the 3 feet perimeter of safety recommended by the manufacturer, did not constitute an open or obvious hazard and ignoring other potential bases for D Square's liability.

**ISSUE ONE: The trial court erred in granting summary judgment because there were disputes of material fact, the cedar siding was not the only "obvious hazard," and there were other bases for finding that D Square was negligent**

A year after the court ruled that D Square had assumed a duty to warn, D Square resurrected its motion, this time arguing that "there is no

testimony or evidence showing that the wood stacked two feet away from the exhaust was an ‘obvious danger/hazard’ when Mr. Cislo serviced the generator.” CP 104. D Square argued it was entitled to dismissal because no expert had testified that the wood could ignite at a distance of two feet, and its own retained expert had opined that the wood “was not a hazard at that location.” CP 104-5. During oral argument, counsel specifically stated “We ask the Court to grant, as a matter of law, that this wood pile was not an obvious risk.” RP at 10, lines 14-15.

The court erred in granting this request for three reasons. First, there were disputed factual questions which should not have been decided by the court as a matter of law on summary judgment; second, because the wood pile was not the only possible “obvious hazard” which could give rise to a duty to warn; and third, because there were other potential bases for finding negligence by D Square. These issues are discussed separately below.

**B. D Square had the burden of establishing that there was no negligence, not just that the cedar siding was not a hazardous condition**

D Square argued that it was entitled to summary judgment because there was no evidence that the cedar siding near the generator was an obvious danger or hazard on October 25, the day of the service call. This argument is not only incorrect, it reverses the burden on summary

judgment. The Moldons were not required to prove that the woodpile was hazardous, it was D Square's burden to establish that, under the undisputed facts, there were no obvious hazards triggering a duty to warn and that it did not breach any other duty owed to the Moldons. *Hartley v. State*, 103 Wash.2d 768, 774, 698 P.2d 77 (1985). This, D Square failed to do.

Evidence and expert testimony established that having combustibles such as the cedar siding within 3 feet of the generator was a dangerous condition, one which a properly trained technician would have recognized. And the siding was not the only combustible within the 3 foot safety zone: the garage was 3 inches and the house 9 inches from the generator. D Square's own expert testified that a service technician could have easily seen that the generator was only 9 inches from the house. CP 639. And Mr. Dunavent testified that his technicians warn customers about such safety hazards as "piling lawn chairs" and other items on their generators, or when the generator is in a dangerous location. Here, both situations applied: there were combustibles within the fire safety zone and the generator was in a dangerous location, close to structures. Had D Square warned the Moldons about these dangers, the generator could have been relocated and the fire would never have occurred. CP 208.

D Square was not entitled to summary judgment even if it had been able to establish that the cedar siding stacked by the generator was not a fire hazard because there were other potential bases for liability: failure to warn that the generator was too close to the house and the garage; failure to consult the Magnum manual before servicing a Magnum generator for the first time; ignorance of the set-back requirements for a Magnum generator; failing to train and/or require its technician to be familiar with UL 2200 standards and to be able to determine if a generator complied with those standards; failure to do even a basic safety inspection of the generator; and entering into a service contract to maintain a generator knowing that it lacked knowledge and experience with that type of generator and would be doing nothing to gain the requisite experience.

Experts testified that this fire would not have happened had D Square warned the Moldons that having combustibles within 3 feet of the generator was a fire hazard. Paul testified he expected that D Square would tell him if anything needed to be done regarding the generator. CP 315. Had he received the proper information, he could have immediately had the cedar siding moved farther from the generator, and had the generator itself re-sited to provide the 3 foot clearance. However, D Square's failure to tell him of the problems that a reasonable competent generator technician should and could have observed deprived him of that

opportunity. The safety or lack thereof of the cedar siding was not the only basis for liability.

**C. There was conflicting evidence about the location of the cedar siding and about the cause and origin of the fire**

Richard Carman did not visit the fire scene until two months after the fire. CP 122. At that time he saw a pile of scrap cedar east of the generator, bound into bundles held together with blue masking tape, and stacked two bundles high on a plastic pallet. CP 122-3. Based on his observations of the location of the pallet and the bundles of wood in February, 2006, Mr. Carman concluded that “the wood was originally stacked about 18 inches from the east edge of the generator on the plastic pallet.” CP 123 at ¶6. He then concluded that the cedar “collapsed east to west, the blue tape on some of the bundles had come undone, and some of the pieces of wood had slid underneath the east end of the generator” causing the fire. CP 123 at ¶6-7.

Mr. Carman’s “observations” two months after a catastrophic fire which required significant fire-fighting efforts to extinguish, are not evidence of where the cedar siding was located before the fire. There is no dispute that cedar siding was stored in the vicinity of the generator, but there is a significant factual dispute about precisely where the siding was located.

The Independent Forensics, Inc. report stated:

This fire was the result of the ignition of pieces of cedar siding being ignited by exhaust from the generator. The cedar siding had been stacked too close to the east end of the generator where the exhaust is vented.

CP 484. The report also noted that “Pyrolysis of wood, especially cedar, is a known fact in fire investigation. It is used by many people as kindling to start a fire.” CP484. John Shouman also contradicted Mr. Carman’s testimony:

During the course of my investigation, I determined there were several piles of wood located on the side of the house where the generator was located. **These piles were stacked directly adjacent to the right side of the generator. ...**

The right side of the generator, under the diagonal enclosure, is where the exhaust exits the generator. **The exhaust is pointed straight down to where the wood was located at the time of the fire.** The fire started when hot gases from the generator ignited the wood pieces under the generator’s exhaust enclosures.

(emphasis added) CP 194.

These two reports clearly contradict Mr. Carman’s collapsing woodpile theory. Mr. Shouman specifically states that the cedar was “stacked directly adjacent to the right side of the generator.” He did not state that it was 18 inches away on a plastic pallet, then migrated in a twisting, turning fashion to the generator as Mr. Carman posits. Both Mr. Shouman and Independent Forensics concluded that the fire was caused by pyrolysis of a highly flammable material stored too close to the generator.

The trial court was not entitled to weigh the merits of the competing theories or to resolve factual disputes. *Barker v. Advanced Silicon Materials, LLC, (ASIM)*, 131 Wash.App. 616, 624, 128 P.3d 633, 637 (2006). Instead, he should have taken the facts in the light most favorable to the non-moving party and denied the motion. As Karl Tegland summarized in 4 Wash. Prac., Rules Practice CR 56 (5th ed):

The court does not weigh credibility in deciding a motion for summary judgment. If the facts as presented by the parties would require the court to weigh credibility on any material issue, a genuine issue of fact exists and summary judgment will normally be denied.

Conflicting affidavits present the classic example. **If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied.** See, e.g., *Riley v. Andres*, 107 Wn.App. 391, 27 P.3d 618 (2001); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 431 P.2d 216 (1967).

(emphasis added). Given the conflict between Mr. Carman's theory that the cedar slid from the woodpile to the generator versus the two reports stating that the cedar was stacked too close to the generator, the court was presented with a conflict on material facts and should have denied the motion. "The trial court may not replace the jury by weighing facts or deciding factual issues." *Babcock v. State*, 116 Wash.2d 596, 598-99, 809 P.2d 143 (1991). The summary judgment should be reversed.

**D. There was a question of fact about whether the cedar siding was “safely stacked” prior to the service visit**

D Square’s argument that the siding was not a hazardous condition on October 25 is based on Mr. Carman’s assertion that a “safely stacked” woodpile within 18 inches of a generator exhaust pipe emitting 800 degree gases is not an open or obvious danger even though the manufacturer recommends a safety zone of 3 feet from all combustibles. A logical extension of D Square’s argument is that a “dangerously stacked” woodpile in the same place would present an obvious danger. A precariously balanced stack of cedar siding could be expected to topple towards the generator, resulting in a fire --at least under Mr. Carman’s analysis. Thus, D Square’s argument that it had no duty to warn because a “safely stacked” woodpile is not an obvious danger, requires evidence that Mr. Cislo knew that the woodpile was “safely stacked.” Without that knowledge, Mr. Cislo would have had no reason to believe that having highly flammable cedar within the 3 foot safety zone was anything other than the major fire hazard it ultimately proved itself to be.

Unfortunately for D Square, the record is devoid of evidence that Mr. Cislo knew that the woodpile was “safely stacked.” Indeed, Mr. Cislo’s own testimony makes clear that he knew nothing about the stability of the woodpile next to the generator. When asked how the wood

was stacked, he responded “I couldn’t tell you that for sure.” CP 150. Mr. Cislo recalled little about the woodpile. He did not know how far it was from the generator, CP 150 or whether the woodpile on the right was farther from the generator than the woodpile on the left (which he described as “quite close” to the generator, CP 149). He did not know how many bundles of wood were secured by tape, what kind of wood was in the pile, if the woodpile was covered by a tarp, or how high the wood was stacked. He did not say he checked the stability of the woodpile and determined it was safe to leave it within 18 inches of an 800 degree exhaust pipe.

The only logical conclusion, taking all facts and inferences in favor of the non-moving party, is that Mr. Cislo did not check the woodpile for stability and had no idea whether or not it was “neatly stacked.”<sup>3</sup> It is apparent from Mr. Cislo’s testimony that he did not know if the wood was stacked at all.

The failure to ascertain whether the woodpile was secure, given the proximity of the cedar siding to the generator, was negligence. Further, since Mr. Cislo had no reason to believe the woodpile was “safely

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<sup>3</sup> The Moldons are using the phrase “neatly stacked” because it is the term used by D Square and Mr. Carman. Obviously, however, “neatly stacked” is not synonymous with “safely stacked” and “a stable stack.” A pile of objects could appear to be “neat” without being well balanced.

stacked,” the woodpile was an open and obvious danger using Mr. Carman’s analysis that an unstable woodpile could collapse toward the generator, become trapped, and start a fire. D Square breached the duty to warn the homeowners of that hazard.

**E. D Square is not entitled to an inference that the cedar siding collapsed after October 25, 2005.**

The timing of the alleged collapse of the woodpile presents another question of fact which should not have been resolved on summary judgment. Assuming arguendo that the woodpile did collapse as postulated by Mr. Carman, rather than accepting the opposing opinions that the cedar was stacked adjacent to the generator (another set of disputed facts), it is integral to D Square’s argument that the collapse happened after the service call. If the collapse happened before the service call then, under D Square’s reasoning, the cedar would have been a hazardous condition.

D Square is not entitled to an inference that the collapse was after October 25, 2005. Mr. Carman testified that he had no idea when the woodpile collapsed, but added that it “was sometime prior to the fire starting.” It could have been any time from “seconds before” the fire back to the day the wood was originally stacked. CP 633. Even his endpoint of “sometime prior to the fire starting” was based on nothing more than the

circular argument that he believed cedar from the woodpile fell to within 4 or 5 inches of the generator exhaust pipe and started the fire, thus the woodpile must have fallen before the fire or there would have been no fire. Another possibility, however, is that cedar was stored close enough to the 800 degree generator exhaust to pyrolize the wood and start a fire as the other reports stated, and that the cedar Mr. Carman saw scattered in the general area two months after the fire was displaced during the fire fighting efforts or during clean-up efforts after the fire. Mr. Cislo's memory that he was able to "worm his way around" the generator to undo the bolts does not mean that the woodpile was neatly or safely stacked or that it had not yet collapsed, only that the collapse did not completely block access to the generator.

If the woodpile had already collapsed at the time of D Square's service call, it was a hazardous condition at that time using D Square's own analysis, and Mr. Cislo should have warned the Moldons.

Given that D Square's own expert could not say whether or not the alleged collapsed occurred months or even years before October 25, and resolving all inferences in favor of the non-moving party, the trial court should have found that any collapse of the woodpile occurred between October, 2002 when it was originally stacked and October 24, 2005, the day before the service call. Instead the trial court must have inferred that

the woodpile collapsed between October 26, 2005 and December 25, 2005 in reaching the conclusion that the woodpile was not a hazardous condition. The trial court should not have resolved this factual issue at all. Resolving it in favor of D Square was reversible error.

**F. The cedar siding was not the only potential hazard requiring a warning and failing to warn about the siding was not the only possible basis for finding D Square was negligent**

D Square's argument glosses over various disputed facts in the case and ignores an obvious truth: in denying the first motion and holding that D Square had assumed a duty to warn, the trial court did not hold that D Square had no other duties, nor did the court limit the universe of potential hazards to the cedar siding located near the generator. This omission was pointed out to the trial court during oral argument.

I would note that the Court interlineated the last order to say that D Square assumed, as a matter of law, the duty to warn of open and obvious hazard.

I didn't read that order to say that the Court didn't see any other duty for D Square, only that it [D Square] has assumed, in addition to all other reasonable duties, the duty to warn of hazards.

RP 12. The location of the woodpile was not the only hazardous condition about which D Square should have warned the Moldons. The generator was also only 9 inches from the house and only 3 inches from

the garage at the closest points. These were violations of the 3 foot clearance that should have been allowed for the hot exhaust, and potential safety hazards that D Square failed to explain to the Moldons.

Once the trial court found that there was a duty to warn, the nature and scope of that duty were questions of fact for the jury to decide.

*Bernethy v. Walt Failor's, Inc.*, 97 Wash.2d 929, 653 P.2d 280 (1982).

(“the jury's function is to decide the foreseeable range of danger thus limiting the scope of that duty”).

In *Seeberger v. Burlington Northern R. Co.*, 138 Wash.2d 815, 823, 982 P.2d 1149, 1153 (1999), the court explained:

foreseeability is a question of fact for the jury unless the circumstances of the injury “are so highly extraordinary or improbable as to be wholly beyond the range of expectability.” *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wash.2d 316, 323, 255 P.2d 360 (1953); accord *Reynolds v. Hicks*, 134 Wash.2d 491, 951 P.2d 761 (1998). “[T]he harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.” *Maltman v. Sauer*, 84 Wash.2d 975, 981, 530 P.2d 254 (1975).

The *Seeberger* court rejected BN’s argument that there was no evidence of foreseeability when the plaintiff had been doing the task without injury for 20 years and testified he did not believe the task was dangerous, stating:

**The test of foreseeability is an objective test**, and whether Seeberger himself foresaw the risk is not the issue. *Ayers*

*v. Johnson & Johnson Baby Prods. Co.*, 117 Wash.2d 747, 764, 818 P.2d 1337 (1991) (“[F]oreseeability is a matter of what the actor knew or should have known under the circumstances; it turns on what a reasonable person would have anticipated.”).

(emphasis added). *Seeberger* at 823.

The “circumstances of the injury” here are not “so highly extraordinary or improbable” as to be unforeseeable. To the contrary, it could easily have been predicted that leaving highly combustible materials within the safety zone would lead to a fire. It could also be predicted that failing to warn a homeowner that the generator was too close to the house and garage could lead to serious exacerbation of any fire started by the generator. D Square had a duty to warn of obvious dangers. It was obvious by visual inspection that the generator was too close to the permanent structures and that the cedar was too close to the generator.

The applicable test is not whether Mr. Dunavent or Mr. Cisco actually knew that violating the 3 foot safety zone could cause a fire, although they should have known this. The test is objective: whether a reasonably prudent service technician would have known of the danger and taken action. This is a question of fact which cannot be decided on summary judgment.

D Square is liable for negligence, not only for failing to warn, but for failing to require that its technicians be familiar with applicable service

manuals and setback requirements. Mr. Dunavent knew that different generators required different setbacks and that this information could be found in the manufacturer's installation manuals. He knew that some generators could be next to the house while others might have to be as far as 5 feet away. If he had given this information to Mr. Cislo, or required that Mr. Cislo read the installation manual before servicing a new model and make of generator, Mr. Cislo would have had the information necessary to warn the Moldons of the fire hazards presented by having the generator so close to permanent structures and cedar siding. D Square is liable for offering to provide a service, then having the service performed by a technician lacking basic, important knowledge.

Mr. Dunavent's reason for failing to require that Mr. Cislo look at the manual or have any familiarity with setback requirements for the Magnum generator was simply that it would require extra time to obtain and review the manual. D Square made a business decision to expedite service calls by allowing technicians to service models they had never seen without checking the applicable manual and without knowledge of the manufacturer's requirements and warnings. Mr. Cislo did not even know what UL 2200 was so he, unlike Mr. Dunavent, could not have thought it was safe to have debris near a generator because it was UL 2200 compliant.

The average homeowner would not have extensive information about UL 2200 and varying setback requirements. Paul Moldon certainly did not have it, as D Square's counsel pointed out at length in her opposition to Moldons' motion to strike, stating:

Mr. Moldon testified in his first deposition that he had no familiarity with emergency generators. He never owned one, or ran one, or lived in a house where there was one...

Moldon had no familiarity with any kind of a home appliance that had an exhaust...He never thought about the possibility that the generator exhaust could be very hot, except "it probably has some heat."...He did not know the wood could catch on fire if it was stacked near the generator..."I didn't know it was --I didn't know that there was a danger."

In his second deposition Mr. Moldon against [sic] made clear that he had no familiarity with generators, or how they were constructed, or where their exhaust pipes were, or how hot they could get.

...When asked directly if he thought it was common sense that a generator exhaust could be hot enough to start a fire he responded, "Actually I don't know." He also admitted "I don't know how hot exhausts come off of a generator. I don't know if maybe it doesn't get cooled off within two or three inches.

(citations omitted) CP 183-84. Given his complete lack of information about generators, Paul Moldon hired D Square to service the generator and relied on D Square's expertise to tell him if there were any problems. D Square led the Moldons to believe that it was doing a full inspection--not just an oil change--by having them sign the service checklist which included a notation that the generator was cleaned, and had a box for

recommendations. Paul Moldon testified that he expected he would be told of any problems, or “why would they have that there?”

Having undertaken to provide a service, it was incumbent on D Square to perform it with due care. See *Brown v. MacPherson's, Inc.* 86 Wash.2d 293, 299, 545 P.2d 13, 18 (1975) and cases cited. Failing to act with due care, causing harm, is a basis for awarding damages. *Folsom v. Burger King*, 135 Wash.2d 658, 676, 958 P.2d 301, 311 (1998). Whether D Square increased the harm to the Moldons by undertaking a duty to warn, by holding out that they were doing a full service check-up, including recommendations if needed, and by failing even to read the Magnum manual or have any knowledge of the required setbacks for the Magnum Q generator, are all potential bases for finding D Square negligent. The trial court erred in taking these questions, and the issues of foreseeability and proximate cause, from the jury. The summary judgment should be reversed and this case remanded for further proceedings in the trial court.

**ISSUE TWO: Whether expert opinion testimony that only an expert trained in ignition sources, ignition temperatures, and combustibles could recognize the danger of stacking wood too close to a hot exhaust pipe and that a generator maintenance technician would not have such training, lacks foundation, is based on speculation and conjecture, and is not a proper subject for expert testimony?**

The trial court also erred in denying the motion to strike paragraph 12 of Richard Carman's declaration which stated:

12. To foresee that the cedar siding--taped and neatly stacked a safe distance from the exhaust--would collapse toward the generator, slide all the way under the generator to be directly under the exhaust, and ignite would require specific training in ignition sources, ignition temperatures, and combustibles generally found only in experts such as myself. A generator service technician performing basis maintenance would not have such training.

CP 124-125. The motion to strike paragraph 12 for lack of foundation and because it dealt with matters within common understanding was denied. CP 699. The standard of review on appeal for evidentiary rulings made in conjunction with a summary judgment motion is de novo. *Cotton v. Kronenberg*, 111 Wash.App. 258, 264, 44 P.3d 878, 881 (2002) *rev. denied* 148 Wash.2d 1011 (2003).

First, it should be noted that the statement that the cedar siding was "taped and neatly stacked a safe distance from the exhaust" is not a statement of fact but of Mr. Carman's opinion. As is argued above, there are conflicting opinions about whether the wood was "neatly stacked a safe distance from the exhaust," as Mr. Way testified that the woodpile was unstable. Further, it is unclear how a woodpile that allegedly collapsed into the path of 800 degree exhaust from the generator starting a

fire that caused millions of dollars in damage can be assumed to have been “a safe distance from the exhaust.” Clearly it was not.

Second, paragraph 12 does not meet the standard for admissibility of expert opinions set by ER 702 and ER 703.

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ER 702. **“But the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise.”** *State v. Farr Lenzini*, 93 Wash.App. 453, 461, 970 P.2d 313 (1999).

(emphasis added) *Esparza v. Skyreach Equipment, Inc.*, 103 Wash.App. 916, 924, 15 P.3d 188, 193 (2000) *rev. denied* 144 Wash.2d 1004, 29 P.3d 718 (2001). There is no evidence that Mr. Carman is a human factors expert, an expert in training generator technicians or in repairing generators, or that he has any other special experience or training qualifying him to opine about what a generator technician would or would not know about woodpiles. Mr. Carman may be qualified to give opinions about the cause and origin of fires, but he is not qualified to testify about the knowledge of generator technicians or the expected behavior of stacks of cedar siding. His opinions on this topic are therefore not helpful to the trier of fact and should have been excluded. *Esparza* at 924.

In addition, the issue is not what the average generator technician actually knows, but what such a technician should know. As discussed above, foreseeability is a question of fact for the finder of fact. It is for the jury, not Mr. Carman, to determine based on the evidence whether the reasonably prudent technician should have sufficient knowledge about setback requirements and combustibles to foresee that cedar stacked inside the 3 foot safety zone, however neat the stack might be, is a fire hazard.

The “behavior” of stacks of objects is not an arcane subject requiring expert knowledge beyond the ken of common folk. People stack all kinds of objects all the time, from books to firewood to canned goods to boxes. It is well within the province of the average layperson to understand that stacked objects can fall or that stacking combustibles near a fire source is hazardous. Because the content of paragraph 12 is not beyond the common understanding of the jury, the paragraph should have been excluded. *State v. Smissaert*, 41 Wn. App. 812, 706 647 (1985)

Further, the relevant issue for the summary judgment motion was not whether an average person would understand that the cedar pile could be unstable and tip closer to the exhaust vent, or could be knocked over by animals or otherwise moved. The relevant issue was whether a generator service technician should have known that it was unsafe to store combustibles within 18 inches of an 800 degree heat source. A generator

service technician should have sufficient knowledge about combustibles to realize that cedar burns and leaving it within the “safety zone” is a fire hazard.

It does not require specialized knowledge of “ignition sources, ignition temperatures and combustibles” to know that cedar shingles burn. As the Independent Forensics report noted, cedar is commonly used as kindling. It is not necessary to know the precise temperature at which wood burns to know that subjecting cedar to 800 degree heat is dangerous. There is no evidence that Mr. Cislo was unaware of this basic concept. To the contrary, he testified that if he had seen wood debris under the exhaust he would have removed it and told the homeowner “it wasn’t a good idea.” CP 650. This testimony indicates that Mr Cislo was aware that wood burns. It is up to the finder of fact, not Mr. Carman, to determine whether a person knowing that wood near the generator is a hazard, would also know that wood 18 inches away is a potential hazard, particularly when the manufacturer recommends double that amount of clearance.

Paragraph 12 does not meet the requirements of ER 702 and ER 703 and should have been excluded.

## **VI. CONCLUSION**

D Square framed its second summary judgment motion in a deceptively simple manner, describing the “sole issue to be decided” as

whether it had a duty to warn about a non-dangerous condition.” The trial court was correct in answering that question “no,” but erred in granting summary judgment because that was not the real issue to be decided. The question that should have been posed by D Square was whether a generator service technician should know the manufacturer’s safety specifications when undertaking a service contract, including the warning that there should be a 3 foot safety zone free of all combustibles, and warn the homeowner that there are combustibles--including the house and garage--inside that 3 foot safety zone? The answer to that question is clearly “yes.”

The facts here are not undisputed. There is differing testimony on the specifics of the cause and origin of the fire. It was for a jury, not the judge, to resolve these factual issues. The trial court erred in not finding all facts in favor of the Moldons as the non-moving party and in making unwarranted inferences in favor of D Square. Further, D Square was potentially liable in a number of ways, not only for failing to warn about the cedar siding. D Square should also have warned about the house and garage, and was also negligent in failing to train its technician to recognize the danger, in failing to require that the technician read the manual and familiarize himself with the equipment he was servicing, and in presenting itself as a service company that would make recommendations, then

failing to provide the Moldons with essential information that could have prevented this costly fire.

The Moldons ask that paragraph 12 of the Carman declaration be stricken, that the order granting summary judgment be reversed, and that this case be remanded for further proceedings in the trial court.

DATED this day of July, 2010.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the state of Washington that on this day I faxed, mailed, served a copy *via email* of this document to all counsel of record.

*C. J. [Signature]*  
Dated: *7/7/10* @ Seattle, WA