Supreme Court No. 91880-5

Court of Appeals No. 71465-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL LAMONT,

Petitioner,

v.

DAVID M. SAVIO, BAOYE WU SAVIO, husband and wife and the marital community thereof; QUORUM REAL ESTATE PROPERTY MANAGEMENT, INCORPORATED, a Washington corporation; and JANE AND JOHN DOE OTHER ENTITIES,

Respondents.

PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....1

B. DECISION FOR EVIEW.....1

C. ISSUES PRESENTED FOR REVIEW.....1

D. STATEMENT OF THE CASE.....2

(1) Underlying Facts.....2

The stairs in Respondents house never were in compliance with any required codes

(2) The Stairs.....3

The stairs are an accident waiting to happen

(3) The Fall and Injury..... 6

Lamont falls upon the stairs and suffers skull, face and arm fractures and other injuries.

E. PROCEDURAL BACKGROUND..... 7

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED..... 8

The Court of Appeals decision conflicts with rulings from this Court as to when circumstantial evidence is sufficient for a case to go to a jury.

G. CONCLUSION.....17

TABLE OF AUTHORITIES

Cases

Abrams v. Seattle & Montana Railway Company, 27 Wash. 507,68 Pac. 78.....11

Annstrong v. Town of Cosmopolis, 32 Wash. 110, 72 Pac. 1038.....11

Anton v. Chicago, Milwaukee & 8t. Paul Railway Company, 92 Wash. 305, 159 Pac. 115.....11

Callahan v. Keystone Fireworks Mfg. Co., 72 Wn.2d 823, 829, 435 P.2d 626 (1967).....14

Douglas v. Freeman. 117 Wn.2d 242, 254-55,814 P.2d 1160 (1991)...14

Gardner v. Seymour, 27 Wn.2d 802, 808–09, 180 P.2d 564 (1947).....14

Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 636, 244 P.3d 924 (2010).....16

Jensen v. Schlenz, 89 Wash. 268, 154 Pac. 159.....11

Jock v. Columbia & Puget Sound Railroad Company, 53 Wash. 437, 102 Pac. 405.....11

Lichtenberg v. City of Seattle, 94 Wash. 391 1917).....1,9,10,11,12,16

Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 972 P.2d 475 (1999) 8, 9

Sroufe v. Moran Bros. Company, 28 Wash. 381, 68 Pac. 896, 58 L. R. A. 313, 92 Am. St. Rep. 847.....11

Sweeten v. Pacific Power & Light Company, 88 Wash. 679, 153 Pac...11 1054.....11

Statutes

Residential Landlord Tenant Act 9

Seattle Municipal Code § 22.206.130 2

A. IDENTITY OF PETITIONER

Daniel Lamont, the injured Plaintiff below, is the Petitioner, asking this court to accept review of the Court of Appeals Decision terminating review designated in Part B of this petition.

B. DECISION FOR REVIEW

Petitioner Lamont seeks review of the April 6, 2015 Decision by the Court of Appeals, Division I, and the Order Denying Motion for Reconsideration, in this case filed on June 3, 2015. The Court of Appeals Decision to be reviewed is reproduced in the Appendix to this Petition, as is the Order Denying Reconsideration.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in determining that Lamont's direct and circumstantial evidence of causation was inadequate in contradiction to this Court's holding in Lichtenberg v. City of Seattle, 94 Wash. 391 (1917) affirming a jury verdict with similar circumstantial evidence?

2. What amount of direct and circumstantial evidence, and expert testimony, is sufficient to avoid summary judgment?

D. STATEMENT OF THE CASE

(1) Underlying Facts

In 2002 Respondents Savios purchased a house at 3440 West Blaine Street ("Blaine house") in the Magnolia area of Seattle, Washington. CP 106. The Savios contracted with Respondent Quorum in 2002 to handle the renting of the Blaine house. CP 29, 106. The Savios have never occupied the Blaine house. From the date of their purchase the Blaine house has been a residential rental property. CP 106.

At no time during or prior to their ownership of the Blaine house have the Savios had the Blaine house inspected to see if it was in compliance with the applicable building codes. CP 107. At no time since managing the property has Quorum had the Blaine house inspected to see if it was in compliance with the applicable minimum building code standards. CP 150, 39-40.

The Blaine house was constructed in 1941. There are stairs in the Blaine house leading from the main floor to the lower level. CP 136. The stairs are not in compliance with either the 1937 building code that was in effect when the Blaine house was built in 1941 or the code in effect when the Blaine house was rented to Petitioner Daniel Lamont in April of 2012, Seattle Municipal Code § 22.206.130. CP 260:23 - 261:17 [Gill re: 1937 Code]; CP 197 ¶¶6, 7 [Gill re: 2012 Code]; CP 252-53 [1937

Code applicable in 1941]; CP 340 Section 617 [Certified 1937 Code]; CP 160 [SMC §22.206.130 in effect in 2012]

The lease entered into by the Savios and Lamont provides the following covenant to maintain and repair: "Landlord shall: (A) maintain premises and appurtenances in a sound and habitable condition." CP 91, CP 176.

2) The Stairs

After Petitioner Lamont obtained an order compelling an inspection of the Blaine house, CP 169-170, Joellen Gill, a certified human factors professional and certified safety professional, inspected the stairs along with a professional associate of Dr. Wilson C. "Toby" Hayes on April 29, 2013. Dr. Wilson C. "Toby" Hayes is an expert with more than 40 (forty) years of teaching, research and consulting experience in fields ranging across mechanical engineering, experimental mechanics, accident reconstruction, fall dynamics, injury biomechanics, human functional anatomy, and clinical orthopedics. CP 196, 202-204. Likewise the Respondents also had their own expert inspect the stairs at issue on April 29, 2013. CP 118. No opinions were ever offered by any expert for the Respondents.

Both Ms. Gill and Dr. Hayes found that the stairs violate numerous building code provisions, are dangerous and are an accident waiting to

happen. CP 202-207 ¶¶ 5-19; CP 202-209 ¶10. See photos of stairs. CP 136-138. The stairs are very steep, and significantly unequal in rise and run, especially between the first and second steps: that is, they are greatly out of compliance with recognized building codes and their noncompliance is in precisely the way that makes them unreasonably dangerous for a tenant, who would not have reason to appreciate the nature of the hazard they present. CP 195-201 ¶¶5-7, 12, 14, 19. Additionally the dangerousness of the stairs is exacerbated by loose carpeting particularly on the nose of the steps. CP 198 ¶10: CP 206-207 ¶¶7, 8, 9.

The reason such a stairway design is particularly hazardous is because of the propensity to overstep the target tread when descending. That is, because the riser heights are taller than permitted, the tendency is for our leading foot to strike the target tread with greater speed and force and also to strike the target tread further ahead (i.e. as our foot descends it also swings forward); because the tread depths are more shallow than permitted when the leading foot strikes the target tread it can overhang the front of the tread. If too much of the foot overhangs the tread then the tendency is for the foot to roll or slip off the tread nosing. CP 198 ¶9.

This tendency for the foot to roll or slip off the tread nosing is exacerbated by the loose carpet that was in place on the steps at the time

of Mr. Lamont's fall; the loose carpet would have facilitated the forward movement of Mr. Lamont's foot once it struck the tread in a forward position. CP 198 ¶10.

It is imperative that tread nosings be distinct so as to assist the user in foot placement and in clearly identifying the leading edge of a stair tread and landing (i.e. ASTM F-1637-95, NBS, etc.). However, the treads on which Mr. Lamont fell were all the same uniform carpet, effectively camouflaging the tread nosings. CP 199 ¶14. Such a condition was another contributing factor to the dangerous condition of the subject stairway that induced Mr. Lamont's fall. CP 199-200 ¶14. There is no documentation of how many "near misses" or incidents may have occurred on the stairs, either by Petitioner Lamont or prior tenants. CP 207.

Respondents Savios and Quorum argued below that the stairs at issue were originally constructed in 1941 and that the only applicable codes would be "the one in effect when the house was built in 1941", and "any such violation would need to be shown to substantially impair the health or safety of the tenant". CP 36. However, neither the Savios nor Quorum offered any evidence, expert declaration nor otherwise, that the stairs ever complied with **any** building codes.

Thus, the unrebutted evidence presented on summary judgment is

that the specific top two stairs upon which "directly caused" Petitioner Lamont's fall, CP 206:15-207:20, are "inherently dangerous", "grossly non-uniform", and fail to comply with the Seattle Building Code, including the 1937 code which was in effect in 1941: the time the Blaine house was constructed. CP 260:23-261:17; CP 197 ¶¶6, 7

(3) The Fall and Injury

Mr. Lamont fell as he was stepping from the first step down to the second step down. CP 146. P. 93; lines 1-12. He had descended a 7 1/4 inch riser onto a 10 inch tread depth. He then descended an 8-inch riser to an 8 3/4 inch tread depth. CP 197-198. ¶¶8-9.

The scientifically based and unrebutted expert opinion of Dr. Wilson C. Toby Hayes, presented to the court concludes that given the dimensions and conditions associated with the stairs in question, they were an "**accident waiting to happen**", and **"directly caused Mr. Lamont's fall"**. CP 206:15 – 207:20.

On the afternoon of August 3, 2012, at or about 3:00 pm, Petitioner Lamont began to descend the stairs. At the time of his descent Lamont's hands were free, he was not carrying anything, he had not taken any medications other than some Wellbutrin, had not consumed any alcoholic beverages, he was not suffering from any physical problems, and it was a beautiful sunny day. CP 146 P. 91:lines12-25; P. 92: lines 1-6.

Mr. Lamont testified in his deposition as follows:

> A. I take -- took a step down the stairs, and I – and I -- as I proceeded to take another step downstairs, I had this -- I had no footing. I was just in the air. I had this incredibly eerie sense of pitching head over heels through the air.
>
> Q. So you were conscious?
>
> A. I was quite conscious. I was walking into my house going downstairs.

CP 146 P. 93: lines 4-12.

Mr. Lamont suffered injuries that include 4 (four) fractures to his arm, 7 (seven) fractures to the skull, a severe concussion, and a brain injury. The full extent of the injuries is yet to be determined. CP 192-194; 172-173.

E. PROCEDURAL BACKGROUND

On January 29, 2013, Petitioner Dan Lamont filed this lawsuit in King County Superior Court against the Savios and Quorum. CP 1-12. Petitioner pled, *inter alia*, breach of contract, violations of the RLTA ("Residential Landlord Tenant Act") , negligence and nuisance, and breach of implied warranty of habitability. CP 4-9. The trial court entered two orders granting Respondents' Motion for Summary Judgment. The first Order was filed on December 18, 2013. CP 274-285. Petitioner filed a Motion for Reconsideration of that Order on December 30, 2013. CP 345-358. The motion was noted for January 8, 2014. CP 342-344. The court

subsequently filed a revised Order granting summary judgment on January 2, 2014. CP 359-361. Petitioner filed a renewed Motion for Reconsideration on January 13, 2014 to include the trial court's revised Order. This renewed motion was noted for January 22, 2014. CP 365-366. The trial court thereafter entered an Order on January 31, 2014 calling for Savios and Quorum to file a response within ten days, with a reply four days thereafter. CP 388. The response and reply were joined in the court file by February 14, 2014. CP 389; 487. There was never any ruling on the motions for reconsideration.

The Court of Appeals decided the case on reasoning not raised in the trial court. In essence the Court of Appeals affirmed summary judgment on the basis that the evidence did not make it more likely than not that Lamont fell when descending to the second step of the stairs upon which he fell. The Court of Appeals decision was entered on April 6, 2015 and a denial of Petitioner's Motion for Reconsideration was entered on June 3, 2015.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals analogized the facts of this case to those in Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 972 P.2d 475 (1999). In Marshall, the plaintiff brought suit for injuries allegedly sustained when

she fell from a treadmill. However the plaintiff had a complete memory lapse that lasted for two weeks due to her head injuries. Id.at 379. The plaintiff unequivocally testified that she completely lacked memory of the incident.

Thus the Court of Appeals found:

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

Id. at 379-380.

In contrast the evidence in Lamont's case is nothing like Marshall but rather is similar to and far stronger than the evidence supporting this Court's decision in Lichtenberg v. City of Seattle, 94 Wash. 391,162 P. 534 (1917) where this Court sustained a verdict in favor of the plaintiff in a fall down case. In Lichtenberg the plaintiff fell while alighting from a jitney bus. The circumstantial evidence of what caused her to fall is as follows:

> It appears that on the 11th day of November, 1915, Mrs. Lichtenberg [the Plaintiff] took passage in a jitney bus from Thirtieth and Jackson streets, in the city of Seattle, to the northwest comer of Third Avenue and Columbia street. At this comer there is a sewer intake set against the curb, and extending into the street about eight inches. This sewer intake is covered with an iron grating. The jitney bus in which Mrs. Lichtenberg was riding stopped at this corner of the street about three feet from the sidewalk and in front of

the iron grating. Mrs. Lichtenberg did not see the iron grating. It was too far for her to step from the running board of the automo[b]ile to the sidewalk, and she stepped down and upon the pavement. Her foot was caught in the broken iron grating. She fell upon the curb of the sidewalk, and broke her arm.

In describing how the accident happened she said: '

> I got out of the machine, and 1 felt something give way under my foot, and my shoe seemed to catch in something. I could not get it free and it, and it throwed me, and I don't remember very much for a few minutes. It kind of dazed me. The first thing I remember is of some one holding me up from the bank, under my arms.'

She then testified as follows:

> **'Q. Tell the jury about how far the automobile stopped**
> **away from the curb, if you know**.
>
> A. Well I don't know as I know exactly, but a know it was too far for me to step from the machine onto the sidewalk.
>
> **Q. Where did you step?**
>
> A. Down on the street.
>
> **Q. On the paved part of the street?**
>
> A. Yes, sir.
>
> **Q. What was the condition of the street as to there being**
> **running water there?**
>
> A. I know it was raining very hard, and the water seemed to be running in the street on the sides.

Q. Right down next to the gutter?

A. Yes, sir.'

The evidence shows that, when Mrs. Lichtenberg was picked up, she was lying upon the edge of the sidewalk, with her feet across this intake; that the grating over the intake was a cast-iron grating; and that one corner and one of the bars were broken off so as to leave quite a large hole in the iron grating.

It is argued by the appellant that there is no evidence to show that Mrs. Lichtenberg stepped upon this iron grating, and, if the iron grating was defective and out of repair, there is no evidence to show that that condition of the grating was the proximate cause of the injury; that the jury could not reach the conclusion that Mrs. Lichtenberg was injured upon this grating, without resorting to conjecture, guesswork, and surmise; and that for this reason the trial court should have directed a verdict in favor of the appellant, and should have granted a judgment notwithstanding the ver[dict] will not court has frequently held that juries will not be permitted to arrive at verdicts by conjecture. Jock v. Columbia & Puget Sound Railroad Company, 53 Wash. 437, 102 Pac. 405; Annstrong v. Town of Cosmopolis, 32 Wash. 110, 72 Pac. 1038; Anton v. Chicago, Milwaukee & 8t. Paul Railway Company, 92 Wash. 305, 159 Pac. 115. But it is also held that:

> 'Negligence, while never presumed, may nevertheless be proved, like any other fact, by circumstantial evidence.' Jensen v. Schlenz, 89 Wash. 268, 154 Pac. 159. See, also, Sweeten v. Pacific Power & Light Company, 88 Wash. 679, 153 Pac. 1054; Abrams v. Seattle & Montana Railway Company, 27 Wash. 507,68 Pac. 78; Sroufe v. Moran Bros. Company, 28 Wash. 381, 68 Pac. 896, 58 L. R. A. 313, 92 Am. St. Rep. 847.

We think the evidence and the circumstances shown in

> **this case take it out of the rule of conjecture. It is true the respondent Mrs. Lichtenberg, testified that she stepped upon the pavement, but it is apparent that she meant that she stepped down upon the street, which was paved. The automobile in which she was riding stopped about three feet from the curb of the sidewalk. It stopped in front of this iron grating. The distance was too far for her to step from the automobile upon the sidewalk, and she stepped down upon the street. She, no doubt, stepped from the car upon the iron grating.**
>
> The defective condition of this iron grating was not apparent to her. The testimony shows it was covered over with some papers and trash, which had washed into it. She says her foot caught in something, and she could not get it free, and it threw her. The fact that the iron grating was broken, the fact that the iron grating was between the automobile and the sidewalk, the fact that she stepped on something which apparently gave way under her foot, and caught her foot, and she could not get it free, and when she fell lay across the grating, we think, show almost conclusively that she stepped upon the defective iron grating which caused her injury. **We are of the opinion, therefore, that this case is not controlled by the rule of speculation and conjecture, but is controlled by the rule that the cause of the injury may be proved by circumstances**

Lichtenberg v. City of Seattle, 94 Wash. 391,392-94, 162 P. 534,535 (1917)(emphasis added).

The decision of this Court in Lichtenberg is necessarily based on a reasonable inference from the circumstantial evidence that the plaintiff stepped on a particular spot-the grating-that caused her to fall. Mr. Lamont's testimony is consistent with, more likely than not and "proved by the circumstances" of him having lost his footing as he stepped on a

second step and is in congruence with and similar to the testimony relied on as circumstantial evidence in Lichtenberg.

Mr. Lamont's testimony, in part, is as follows:

> Q. But there is a door there, I guess is what I ultimately wanted to verify. So the door is open.
>
> A. Uh-huh.
>
> Q. And what happens?
>
> A. I take -- took a step down the stairs, and I -- and I -- as I proceeded to take another step downstairs, I had this -- I had no footing. I was just in the air. I had this incredibly eerie sense of pitching head over heels through the air.

Dep. Lamont P. 93: lines 4-9. CP. 79.

Lamont's testimony is entirely consistent with the explanation by his experts of what happened and his description is entirely consistent with a more likely than not basis of how a person would describe placing their foot on a step and suddenly having a sensation of not having any footing.

The declarations of experts Toby Hayes and Joellen Gill describe the mechanism of how the defect in the stairs caused Petitioner Lamont's fall and show how the non-compliant and dangerous defects in the stairs are the cause of Lamont's fall and injuries.

> Mr. Lamont fell as he was stepping from the first step down to the second step down. He had just descended a *7 1/4* inch riser onto a 10 inch tread depth. He then descended an 8 inch riser onto an 8% inch tread depth. Both the 8 inch riser height and the 8 % inch tread depth violate the Seattle building code, as well as the other codes

and standards. ....

> The reason such a stairway design is particularly hazardous is because of the propensity to overstep the target tread when descending.

Gill Para 8 and 9 Pgs. 3-4. CP.198.

> When Mr. Lamont attempted to place his leading toe near the stair edge and began to shift his body's weight to that foot, the excessively short tread increased the likelihood of overstepping the nosing. Overstepping is known to produce falls due to the foot slipping or rotating over the edge of the tread nosing during weight acceptance or toe-off ... In short, when Mr. Lamont stepped onto the short and unstable surface of the stair tread, he lost his balance, resulting in a forward fall, consistent with the injuries sustained and his position of rest at the base of the stairs.

Hayes Para 9 Pgs. 5-6. CP. 206-207

Circumstantial evidence is sufficient if the evidence " 'affords room for [persons] of reasonable minds to conclude that there is a greater probability that the thing in question ... happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable.' "Callahan v. Keystone Fireworks Mfg. Co., 72 Wn.2d 823, 829, 435 P.2d 626 (1967) (quoting Gardner v. Seymour, 27 Wn.2d 802, 808–09, 180 P.2d 564 (1947)).

> "[A] verdict does not rest on speculation or conjecture when founded upon reasonable inferences drawn from circumstantial facts."

Douglas v. Freeman, 117 Wn.2d 242, 254-55,814 P.2d 1160 (1991).

While it is true that a jury cannot be allowed to speculate between several equally likely causes, if there is substantial evidence of negligence, a defendant cannot escape trial by speculating that something other than its own negligence was the cause of the plaintiff's injuries. Otherwise a defendant could escape trial by presenting speculation, as opposed to substantial evidence, that some other cause, besides its alleged negligence, could have been the cause of the injury.

Virtually any injurious event could be explained, through speculation, as possibly having been caused by some other reason than that offered by the plaintiff. For example, a defendant could escape trial despite substantial evidence that an automobile crash was caused by his or her failure to stop for a red light by speculating that the light might have been malfunctioning, despite the lack of any evidence in that regard, because traffic lights do, sometimes, malfunction and because the defendant sincerely believes he or she would have noticed if the light had been red. Similarly, a defendant could escape trial despite substantial evidence that an automobile crash was caused by improper road design by speculating that a phantom driver may have forced the plaintiff off the road, despite the lack of evidence that a phantom driver did so because drivers do, sometimes, force other drivers off the road and then disappear into the night. Likewise, it would be pure speculation to conclude that

Lamont fell for any other reason than as outlined above as there is no evidence to the contrary. The only evidence is Lamont's testimony, the scientific measurements, the configuration of his injuries, and the expert's opinions that the defect in the exact stairs was the "direct cause" of Mr. Lamont's injuries. Neither Quorum or Savio provided any expert opinions or any other evidence as to how Lamont fell.

Further, there is circumstantial evidence of a lack of contributory negligence. Lamont testified that and he was not on any non-prescription medication (he had taken Wellbutrin), no physical symptoms, nothing unusual, his hands were free and not carrying anything, no alcohol, and it was a normal beautiful sunny day. Dep. Lamont P. 91 :lines12-25; P. 92: lines 1-6. CP 146. While this absence of negligence does not provide proof of proximate cause, it is a part of the circumstantial evidence to be considered when looking at whether Mr. Lamont has met his burden. In other words the only evidence of Mr. Lamont's actions are that he was not acting in a way that caused or contributed to his fall.

In Lichtenberg there was no expert evidence that explained how the plaintiff fell but nevertheless this Court found the lay testimony and circumstantial evidence sufficient to go to the jury and affirm its verdict. Here there is a *beaucoup* expert testimony on behalf of Petitioner Lamont and nothing from the Respondents.

The Court of Appeals stated that:

> "Here Lamont can show that he fell down the stairs and that he was injured by the fall. He can establish at least an inference that one of the steps was defective and that such defects pose a risk of falling. Importantly, however, nothing on this record makes it more likely than not that the second step caused Lamont to fall. The evidence of causation is inadequate to withstand summary judgment." Slip opinion at 7.

Petitioner Lamont respectfully submits that the Court of Appeal's decision is contrary to the holdings of this Court and substitutes a speculative analysis as to why Lamont fell, disregarding the direct and circumstantial evidence of record thus usurping the province of the jury.[1]

G. CONCLUSION

The Court of Appeals decision if not reversed will result in an evisceration of case law standards about when circumstantial evidence is sufficient to present an issue of causation to a jury. The Court of Appeals decision affirming summary judgment should be reversed, and this case remanded for trial on the merits.

RESPECTFULLY SUBMITTED this 2nd day of July 2015.

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[1] In a footnote the Court of Appeals alludes to a potential assumption of the risk defense without addressing it. That would be error and overlook controlling case law from this Court including this Court's analysis in *Gregoire v. City of Oak Harbor,* 170 Wn.2d 628, 636, 244 P.3d 924 (2010).

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The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing pleading to be served via email on the following attorneys:

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DANIEL LAMONT, a single man, Appellant, v. DAVID M. SAVIO and BAOYE WU SAVIO, husband and wife and the marital community comprised thereof; QUORUM REAL ESTATE PROPERTY MANAGEMENT, INCORPORATED, a Washington corporation; and JANE and JOHN DOE OTHER ENTITES, Respondents.	)	No. 71465-1-I DIVISION ONE UNPUBLISHED OPINION FILED: April 6, 2015

APPELWICK, J. — Lamont appeals the summary judgment dismissal of his personal injury suit against his landlords, the Savios and Quorum Real Estate. Lamont was seriously injured after he fell down the stairs of his rented home. He does not demonstrate a prima facie claim that the stairs were the cause in fact of his fall. We affirm.

FACTS

In 2002, David and Baoye Wu Savio purchased a house in the Magnolia area of Seattle. The Savios lived overseas, so they hired Quorum Real Estate Property Management, Inc. to manage the house as a rental property. The house was built in 1941. There is a carpeted stairway that leads from the main floor to the basement level.

In April 2012, Daniel Lamont met with a broker from Quorum about renting the Magnolia house. Lamont and the broker did a walk-through of the property. Lamont traversed the main stairway at least once during the walk-through. On April 20, 2012, Daniel Lamont executed a lease to rent the Magnolia house.

Lamont moved in at the end of May 2012. He used the basement as a work area for his photography business. Lamont used the staircase "fairly frequently" to access the photography equipment and laundry area in the basement. Lamont noticed that the stairs were somewhat steep and narrow, and he described them as "a little funky."

On August 3, Lamont went to walk downstairs to work on a project. He took one step down the stairs and, as he proceeded to take a second step, he "had no footing. I was just in the air. I had this incredibly eerie sense of pitching head over heels through the air." This was the last thing Lamont remembered. He lay unconscious at the bottom of the stairs for one and a half to two hours. When he awoke, he drove himself to the emergency room. He suffered a concussion and several fractures to his arm and skull. He subsequently suffered headaches, dizziness, memory loss, fatigue, and problems concentrating and focusing.

On January 29, 2013, Lamont sued the Savios and Quorum, alleging breach of the rental agreement, violations of the Residential Landlord Tenant Act of 1973, ch. 59.18 RCW, negligence and nuisance, and breach of the implied warranty of habitability. On August 30, the Savios and Quorum moved for summary judgment. They argued that there was no evidence to support any of Lamont's claims. The trial court concluded that the defendants did not owe a duty to Lamont. It granted the defendants' motion and dismissed Lamont's suit on December 18, 2013.

Lamont appeals.

DISCUSSION

We review summary judgment orders de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310, 27 P.3d 600 (2001). Summary judgment is appropriate only where there are

no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). When considering the evidence, we draw reasonable inferences in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). If a plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, summary judgment is appropriate. Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 66, 837 P.2d 618 (1992). We may affirm on any basis supported by the record. State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

"The mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence." Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 377-78, 972 P.2d 475 (1999). To prove actionable negligence, a plaintiff must establish the existence of (1) a duty owed by the defendant to the plaintiff to conform to a certain standard of conduct; (2) a breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury. Cameron v. Murray, 151 Wn. App. 646, 651, 214 P.3d 150 (2009).

Proximate cause has two elements: cause in fact and legal causation. Daugert v. Pappas, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). Cause in fact is ordinarily a question for the jury. Baughn v. Honda Motor Co., Ltd., 107 Wn.2d 127, 142, 727 P.2d 655 (1986). However, when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of option, factual causation may become a question of law for the court. Id. The court will decide the question of factual causation as a matter of law only if the causal connection is so speculative and indirect that

reasonable minds could not differ. Moore v. Hagge, 158 Wn. App. 137, 148, 241 P.3d 787 (2010).

Circumstantial evidence is sufficient to establish a prima facie case of negligence if a reasonable person could conclude that there is a greater probability than not that the conduct relied upon was the proximate cause of the injury. Hernandez v. W. Farmers Ass'n, 76 Wn.2d 422, 425-26, 456 P.2d 1020 (1969). The nonmoving party may not rely on mere speculation or argumentative assertions that unresolved factual issues remain. Marshall, 94 Wn. App. at 377. A cause of action may be said to be speculative when, from a consideration of all of the facts, it is as likely that it happened from one cause as another. Rasmussen v. Bendotti, 107 Wn. App. 947, 959, 29 P.3d 56 (2001).

Here, the evidence before the trial court regarding Lamont's fall consisted of two expert declarations and Lamont's deposition. Lamont submitted declarations from Joellen Gill, a human factors and certified safety professional, and Dr. Toby Hayes, Ph.D., a biomechanics and bioengineering expert. The declarations established that the first step of the subject staircase had a run of 10 inches and the second had a run of 8 ¾ inches. The first step had a rise of 7 ¼ inches and the second had a rise of 8 inches. This showed that the first step complied with current Seattle Building Code requirements, but the second step did not. See SEATTLE MUNICIPAL CODE 22.206.130(A)(1) ("All stairs . . . shall have a minimum run of 10 inches and a maximum rise of 7 ¾ inches.").

Gill opined that the second stair's lack of compliance created an unreasonable hazard and put Lamont at risk for stairway falls. She explained that excessively steep steps such as these can cause a person to roll or slip off the edge of a noncompliant stair:

> The reason such a stairway design is particularly hazardous is because of the propensity to overstep the target tread when descending. That is, because the riser heights are taller than permitted, the tendency is for our leading foot to strike the target tread with greater speed and force and also to strike the target tread further ahead [and] because the tread depths are more shallow than permitted when the leading foot strikes the target tread it can overhang the front of the tread. If too much of the foot overhangs the tread then the tendency is for the foot to roll or slip off the tread nosing.

Gill stated that this defect caused Lamont to fall as he was stepping from the first to second step. Gill also observed that the stairs were covered in loose carpeting, which exacerbated the tendency for Lamont's foot to roll or slip off the tread nosing

Dr. Hayes's declaration reiterated that Lamont's contact with the defective second step caused his fall:

> When Mr. Lamont attempted to place his leading toe near the stair edge and began to shift his body's weight to that foot, the excessively short tread increased the likelihood of overstepping the nosing. Overstepping is known to produce falls due to the foot slipping or rotating over the edge of the tread nosing during weight acceptance or toe-off. In addition, the loose carpeting created an unstable surface on which the ball of his foot was placed.

Dr. Hayes concluded that "when Mr. Lamont stepped onto the short and unstable surface of the stair tread, he lost his balance, resulting in a forward fall."

Accordingly, Lamont's theory of causation depends on his foot hitting the tread of the second stair and that tread's defect causing the fall. But, Lamont's own testimony does not put him on the second step, which the experts say was defective and caused his fall. In his deposition, Lamont repeatedly stated that he made contact with the first stair and then became airborne:

> I take - - took a step down the stairs, and I - - and I - - as I proceeded to take another step downstairs, I had this - - I had no footing. I was just in the air. I had this incredibly eerie sense of pitching head over heels through the air.

Lamont said that he "was aware of coming in and taking a step down the stairs, and then I was aware of a very, very disconcerting feeling that my feet were above my head and this was not good." Lamont had been up and down the stairs many times before and said, "It didn't seem like anything was happening differently. I just was not able - - I put a foot down to - - and I didn't have footing." Counsel acknowledged that "it sounded like you got a first foot down on the first step but from there there was just air?" Lamont replied, "Yeah. I was just pitching - - that's all I recall is that - - that I started down the stairs and then I was airborne." Lamont did not recall anything further.

To survive summary judgment, Lamont must establish specific and material facts tending to show that it is more probable than not that the defective second step caused him to fall. See Hiatt, 120 Wn.2d at 66; Rasmussen, 107 Wn. App. at 959. But, his deposition testimony does not suggest that he made contact with the second step. If Lamont failed to make contact with the second step, neither loose carpet on the step nor overstepping and slipping off the step—as opined by his experts—could have caused the fall. His testimony does not create an inference that the step's defect was the reason he failed to make contact with it or the reason he fell.

This is analogous to Marshall, where the plaintiff was able to provide only a speculative theory of proximate cause. 94 Wn. App. at 380. Marshall was injured while exercising on a treadmill at her health club. Id. at 375. She alleged that the treadmill started at an unexpectedly high speed and threw her off. Id. However, due to her injury, she did not actually remember how the accident happened. Id. at 375-76. The Court of Appeals found that summary judgment was proper, because "Marshall provides no

evidence that she was thrown from the machine, what caused her to be thrown from the machine, or how she was injured." Id. at 379-80.

Here, Lamont can show that he fell down the stairs and that he was injured by the fall. He can establish at least an inference that one of the steps was defective and that such defects pose a risk of falling. Importantly, however, nothing on this record makes it more likely than not that the second step caused Lamont to fall. The evidence of causation is inadequate to withstand summary judgment.[1]

We need not address the bases upon which Lamont asserts that the defendants owed him a duty. We need not address the defendants' challenge to Lamont's expert declarations.

We affirm.

Applewick, J.

WE CONCUR:

Trickey, J.

Leach, J.

[1] We note that Division Three of this court recently affirmed summary judgment where the plaintiff assumed the risk of injury on a stairway that did not comply with building code, because she appreciated the risk and voluntarily used the stairs. Jessee v. City Council of Dayton, 173 Wn. App. 410, 415-16, 293 P.3d 1290 (2013). However, the parties do not brief this case. We likewise do not address it.

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

DANIEL LAMONT, a single man, Appellant, v. DAVID M. SAVIO and BAOYE WU SAVIO, husband and wife and the marital community comprised thereof; QUORUM REAL ESTATE PROPERTY MANAGEMENT, INCORPORATED, a Washington corporation; and JANE and JOHN DOE OTHER ENTITES, Respondents.	)	No. 71465-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Daniel Lamont, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED, that the motion for reconsideration is denied.

DATED this 3rd day of June, 2015.

Appelwick J
Judge