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No. 980357

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

In re:

JAMES F. BEHLA,

Respondent/Appellant,

v.

R.J. JUNG, LLC, a Washington Limited Liability Company; JENNIFER JUNG and JOHN DOE JUNG, and the marital community thereof,

Petitioners/Appellees.

Appeal from the Court of Appeals, Division III of the State of Washington
Court of Appeals Case No. 362761

ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

Mr. Behla agrees with the statement of the case as recited by Division III in the *Opinion* published as *Behla v. R.J. Jung, LLC*, ____ *Wn.App.* ____, 453 P.3d 729 (2019), (hereinafter, "*Opinion*").

R.J. Jung is mistaken in asserting that the facts on appeal are undisputed. Mr. Behla has specific objections to inaccuracies in R.J. Jung's recitation of the case, which are identified in *Appendix A*, attached.

II. ARGUMENT

R.J. Jung claims that the *Opinion* initiated a "massive and significant change"[1] to Washington law, but the accuracy of this characterization does not withstand careful scrutiny. In its *Opinion*, the Court of Appeals confirmed yet again that the jury is the appropriate finder of fact with respect to causation, which has long been established Washington law.[2] Unsurprisingly, it is R.J. Jung, not the Court of Appeals, who urges an interpretation that would represent a "massive and significant change" to Washington law.

A. In its representation of well-settled Washington law, R.J. Jung improperly conflates two distinct circumstances: "speculation" in the *absence of evidence* and a theory that has a "speculative" relationship to *existing evidence*.

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[1] *Petition for Review*, pg. 9.

[2] *Opinion*, pg. 18; citing, *Martini v. Post*, 178 Wn.App. 153, 164, 313 P.3d 473 (2013)("Cause in fact usually presents a question for the trier of fact and is generally not susceptible to summary judgment."); *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985)("In most instances, the question of cause in fact is for the jury."); *Estate of Borden ex rel. Anderson v. State, Department of Corrections*, 122 Wn.App. 227, 242, 95 P.3d 764 (2004)(finding that the plaintiff can survive a motion to dismiss if he presents "some competent evidence of factual causation" that precludes jury speculation).

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As the *Opinion* noted, many decisions in Washington law rest on the meaning of "conjecture" or "speculation," which are synonyms[3] and used interchangeably in this brief. In a summary judgment setting, a *speculative theory* has a weak rational relationship to *existing evidence*, and an unsupported theory relies on *speculation* in the *absence of evidence*. This difference is important because R.J. Jung strategically equivocates the case law related to both when, in fact, they are distinct situations governed by different principles.

Claims of "speculation" in the absence of evidence can be effectively resolved by a review of the plaintiff's evidence, which is a task appropriately assigned to the trial judge and is the acknowledged purpose of a summary judgment motion.[4] Such an inquiry is binary in nature (either a party has produced evidence or he has not), and it involves no weighing of the evidence by the finder of fact.[5] In contrast, claims that a party's *theory* is "too speculative" are evaluated pursuant to a preponderance of the evidence (a "more likely than not" standard), which is addressed by the finder of fact at trial.

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[3] *Opinion*, pg. 6.

[4] The purpose of summary judgment "is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960)(quoting Whitaker v. Coleman, 115 F.2d 305, 307 (1940)).

[5] "Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105, 68 U.S.L.W. 4480 (2000), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 91 L.Ed. 202, 54 U.S.L.W. 4755 (1986).

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The continuing failure to recognize this distinction plagues the *Petition for Review* throughout its argument. In formulating issues, R.J. Jung asks: "Is it a task for the court or the jury to determine whether the cause that plaintiff proffers for his injury is based on speculation?" This formulation is too vague to be meaningfully analyzed because it addresses two different situations that receive two different answers without distinguishing between them. It is the task of the *judge* to determine whether a theory rests on speculation in the *absence of existing evidence*. It is the task of the *jury* to determine whether a theory's *relationship to the existing evidence* is too tenuous to be persuasive.

This confusion pervades R.J. Jung's citation to authority, too; the references provided primarily relate to theories based on speculation in the *absence of evidence*, not speculative theories from *existing evidence*.

R.J. Jung claims that Washington law forbids parties from presenting speculative theories of causation, quoting: "[M]ere speculation will not suffice to defeat summary judgment."[6] This recitation is not especially helpful without further context; taken alone, it is unclear to what "speculation" refers. Does it reference whether evidence actually exists or whether the proffered theory has a sufficiently strong relationship to the existing evidence? Reference to context is instructive; the complete sentence reads: "In addition, the standard requires the production *of evidence*; mere speculation will not suffice to defeat summary

[6] *Petition for Review*, pg. 9; citing, Cornwell v. Microsoft Corp., 192 Wn.2d 403, 420, 430 P.3d 229 (2018).

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judgment."[7] This sentence is immediately followed by:

> 'It is frequently impossible for a plaintiff ... to discover **direct evidence** contradicting someone's contention that he did not know something.'[8] Instead, **as long as '[a] reasonable jury could infer from [a plaintiff's] evidence'** that the plaintiff's protected activity was a substantial factor in the adverse employment decision, **that plaintiff has satisfied his or her burden of establishing a prima facie case** of retaliation."[9]

Despite the fact that R.J. Jung has referenced employment case law rather than personal injury case law, the cited reasoning arrives at the precise conclusion reached by the Court of Appeals when it determined that where "a reasonable juror could conclude that the black cable more likely than not caused the fall," Mr. Behla should be found to have met his burden and the question of causation should go to the jury.[10]

The *Opinion*, therefore, did not deviate from Washington law, and its reasoning is confirmed by R.J. Jung's own cited authority.

B. In its representation of well-settled Washington law, R.J. Jung fails to recognize that speculation by a jury is fundamentally different than a speculative theory offered by a plaintiff.

R.J. Jung undertakes another subtle conflation by equivocating the speculative theory of a party (which cannot be meaningfully avoided) with the speculation of a jury (which cannot be permitted); he argues that it is only when a plaintiff's theory is "*too*" weak or "*too*" speculative that a judge is entitled to

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[7] Cornwell v. Microsoft Corp., 192 Wn.2d 403, 420, 430 P.3d 229 (2018)(internal cites omitted).
[8] *Id* (internal cites omitted).
[9] *Id* (internal cites omitted).
[10] *Opinion*, pg. 19.

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supersede the finder of fact and conclude that a plaintiff is unlikely to prove her case and therefore is prevented from proceeding to trial.[11] This begs the question, of course: how speculative is *too* speculative? Or, more to the point, to what degree can a party ever prove the strength of her case prior to trial in *any* instance? There is no method to "prove" a case other than by trial; this is true no matter how compelling evidence may appear at summary judgment or how much evidence has been produced for that purpose. It is therefore fundamentally absurd to suggest that a party must prove her theory before she is entitled to prove her theory; one cannot do *before* trial what can, by its very definition, only be accomplished *at* trial.

Not surprisingly, therefore, a theory based on a tenuous relationship to existing evidence presents no meaningful jurisprudential problem (as the *Opinion* thoroughly explains). A party is entitled to argue his theory of the case from the evidence in his possession. If the asserted reasoning is too remote, the jury will not find it persuasive based on the existing evidence. Washington law does not require plaintiffs to make impressive or sophisticated arguments. All litigants are entitled to put their theories to the proof as best they can, regardless of whether such efforts ring persuasive to judicial ears. If a litigant chooses to try a lackluster case, he may lose, but it remains the birthright of every human being to gamble his energies and resources as he

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[11] *Petition for Review*, pgs. 12-14.

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will, and he is at his own discretion to weigh risk against reward and calculate his odds. The job of a judge is to ensure that there is evidence to be evaluated, not to ensure that the parties maintain equal chances at trial. Evaluation of the evidence is the jury's job, and it is presumed to do it properly.

Where the jurisprudential problem arises is when the *absence of evidence* calls for speculation *by the jury*. Where neither the plaintiff nor the defendant can provide evidence to support their alternative theories of causation, the case must be dismissed on the basis that comparison of the theories would require speculation *by the jury*, which is impermissible.[12]

The jury's job at trial is to determine which of the theories offered is, more likely than not, correct. This necessarily involves comparison of the theories through the evaluation of relevant evidence. In the *presence of evidence*, a jury is not incapacitated by the presentation of a speculative theory (it is presumed that a jury will weigh the evidence and appropriately conclude whether a theory's relationship to the evidence is overly tenuous). Where there is an *absence of evidence*, however, a jury cannot meaningfully evaluate *any* theory; therefore, any outcome is necessarily arbitrary.[13]

The logic at work is illustrated through the metaphor of simple multiplication. Any number multiplied by zero becomes zero; therefore, every number, no matter how small or how large, has *an equal likelihood* of

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[12] *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947).
[13] *Frescoln v. Puget Sound Traction, Light & Power Co.*, 90 Wn. 59, 63, 155 P. 395 (1916).

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becoming zero when it is multiplied by zero. Similarly, where there is zero evidence to evaluate multiple theories of causation, all theories are *equally likely* because they are all *equally unsupported by evidence*. In such instances, a jury has no contribution to make.

It is in such instances and such instances *only* that the job of the judge is to prevent the jury from being assigned an impossible task. This is because *speculation by a jury* in the *absence of evidence* cannot produce justice. Such circumstances are rare, however, and stand in stark contrast to the evaluation of *speculative theories by the parties* in the *presence of existing evidence*, which is precisely a jury's intended employment.

This distinction seems straightforward enough; however, it is at this juncture that R.J. Jung becomes particularly artful in attempting to muddy the water. Through the strict adherence to a tortured interpretation of common words and experiences, it is argued that because Mr. Behla did not see the cord or maintain concentrated eye contact with it as he tripped over it and fell, he therefore cannot "know" whether he tripped over the cord or something else (or even whether he "tripped" at all), and as a result there can be "no evidence" for the jury to evaluate in order to consider whether Mr. Behla's theory is more or less likely than R.J. Jung's collection of alternative tales. This sophistry relies on a bizarre understanding of how people are traditionally understood to trip on things, and it sends the court down an overwrought epistemological rabbit hole regarding how anyone can ever "know" anything at all; the minutiae

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of such pedantry are then debated until the beleaguered jurist finds himself, like Pontius Pilate, questioning the very existence of "truth" and washing his hands of the entire undertaking. As the *Opinion* notes, such esoteric flights of fancy are the regrettable result when parties are obligated to prove their cases by semantics to the satisfaction of a judge when Washington law intends cases to be tried by evidence to the common sense of a jury.

The Court of Appeals resolved this manufactured confusion by aptly recognizing that the case at hand does not invite the speculation of the jury because it does not involve an absence of evidence (notwithstanding the imaginative interpretive stylings of R.J. Jung); therefore, a rule that governs the absence of evidence is irrelevant. Contrary to R.J. Jung's urgent protestations, the Court of Appeals did not criticize the rule and then refuse to follow it; rather, it criticized the rule and then (appropriately) found it inapplicable to the facts of the present case.

The *Opinion* did not deviate from Washington law when it declined to follow an irrelevant rule.

Instead, the Court of Appeals reviewed the entirety of the evidence presented by Mr. Behla (which suggested that his proffered theory could have accurately described the cause of his injury *and* rationally ruled out the alternative theories proffered by R.J. Jung) and determined that because "a reasonable juror could conclude that the black cable more likely than not caused the fall," Mr. Behla presented an issue of fact that requires trial.

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Therefore, the *Opinion* did not deviate from Washington law when it determined that Mr. Behla was entitled to try his case to a jury.

III. CONCLUSION

R.J. Jung's alarm regarding the casting off of over a century of governing Washington case law amounts to merely sound and fury as each panicked citation to authority reveals itself to be unauthoritative,[14] inapplicable,[15] or consistent with the *Opinion*.[16] A review of each well-founded conclusion in the *Opinion* demonstrates that the grievances of R.J. Jung are, in equal measure, signifying nothing as he fails entirely to demonstrate his claims.

Because the *Opinion* does not conflict with case law from this Court or with decisions from other divisions of the Court of Appeals, this Court need not undertake further consideration pursuant to RAP 13.4.

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[14] *Arntz v. City of Seattle*, 77504-9-I, 2019 WL 931841 (Wan. Ct. App. Feb. 25, 2019).
[15] *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947); *Frescoln v. Puget Sound Traction, Light & Power Co.*, 90 Wn. 59, 63, 155 P. 395 (1916); *Halder v. Dep't of Labor & Indus.*, 44 Wn.2d 537, 543, 268 P.2d 1020 (1954); *Jankelson v. Sisters of Charity of House of Providence in Territory of Wash.*, 17 Wn.2d 631, 643, 136 P.2d 720 (1943); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 379, 972 P.2d 475 (1999); *Schneider v. Rowell's Inc.*, 5 Wn.App. 165, 167-68, 487 P.2d 253 (1971); *Whitehouse v. Bryant Lumber & Shingle Co.*, 50 Wn. 563, 565-66, 97 P. 751 (1908); *Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 276, 373 P.2d 764 (1962).
[16] *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 420, 430 P.3d 229 (2018); *HBH v. State*, 197 Wn.App. 77, 93, 387 P.3d 1093 (2016); *HBH v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018); *Hoover v. Warner*, 189 Wn.App. 509, 522, 358, P.3d 1174 (2015); *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968); *Sluman v. State*, 192 Wn.2d 1005, 430 P.3d 254 (2018); *Martin v. Gonzaga Univ.*, 191 Wn. 2d 712, 722, 425 P.3d 837 (2018); *Seven Gables Corp. v. Mgm/Ua Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 191 Wn.2d 182, 191, 421 P.3d 925 (2018); *Miller v. Likins*, 109 Wn.App. 140, 145, 34 P.3d 835, 837 (2001); *Sanches v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1982);

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APPENDIX A

Inaccuracy #1: On page 2 of the *Petition for Review,* R.J. Jung states: "... plaintiff fell while groping in the dark in search for a light switch through the planks of a wall of the rented shed."

This is inaccurate and has never previously been alleged by R.J. Jung. As indicated in the *Opinion*, Mr. Behla unsuccessfully attempted to activate the light switch in the wall, after which he walked back toward his bus to check the locks and was then in the act of walking from the bus back to the shed when he fell. (*Opinion,* pg. 3.) The facts as asserted by R.J. Jung (for the first time) would have resulted in Mr. Behla having fallen in a location other than where he fell, which has never previously been disputed.

Inaccuracy #2: On page 2 of the *Petition for Review,* R.J. Jung describes the area where Mr. Behla fell as "uneven gravel and concrete slabs."

This is inaccurate. There is no evidence to suggests that the gravel was "uneven," and there were not multiple concrete slabs. There was one concrete slab in the threshold of the doorway to the shed, which Mr. Behla described: "The door – they call it the doorstep. It's not a step, it's just a slab." (CP 55.)

Inaccuracy #3: On page 3 of the *Petition for Review,* R.J. Jung states that: "[Behla] did not feel [the cable] touch his foot prior to falling..."

The record does not support the assertion that Mr. Behla did not recall his foot ever touching the cord. To the contrary, when R.J. Jung's counsel questioned Mr. Behla as to whether his foot had been "tangled in the cord," he

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indicated that it had not, but that "[his] foot caught on it." (CP 27.) Confusion regarding Mr. Behla's testimony appears to have been introduced two years later when, in a second deposition, R.J. Jung's attorney mischaracterized Mr. Behla's previous testimony as part of a question, saying, "my understanding is that you didn't recall the cord touching your foot in the fall," after which she asked him whether his "memory [had] changed on that issue," to which Mr. Behla replied that the nothing new had come to mind. (CP 34.) Mr. Behla did not confirm her mischaracterization of his previous testimony; rather, he confirmed that his recollection had not changed from *his* previous testimony – which was that his foot had not gotten tangled in the cord but rather had caught on it. The statement that Mr. Behla did not "recall[] his foot ever touching the cord," is an argumentative statement made only by R.J. Jung's attorney; it does not reflect Mr. Behla's testimony or admissible evidence.

Inaccuracy #4: On page 3 of the *Petition for Review*, R.J. Jung states that "[Behla] does not recall stumbling or tripping."

This is inaccurate. Mr. Behla *never* testified that he did not recall what caused him to fall. To the contrary, he repeatedly testified to his recollection that his fall was caused by tripping, and, specifically, by tripping on the extension cord. (See, e.g.: "And that was that cable that was on the ground now laying in front of the door that **I tripped over**." (CP 52; emphasis added.) "I woke up on the ground and went back and looked to see what **I had tripped over**..." (CP 53; emphasis added.) "... some of it was high enough in the air

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for my foot to catch on it and pitch me headfirst into the edge of the building." (CP 55; emphasis added.) "I think **my foot caught it**, and it pitched me forward..." (CP 27; emphasis added.) "**I tripped** over the cable here..." (CP 55; emphasis added.) "I turned, and **I tripped** and hit the thing there and this concrete slab was my landing pad." (CP 56; emphasis added.))

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January 31, 2020, arrangements for delivery of a true and correct copy of the foregoing to the following individuals were made in the manner indicated:

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