No. 98035-7

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

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

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

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

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision is published at *Behla v. R.J. Jung, LLC*, ____ Wn App ____, 453 P.3d 729 (2019). A true and correct copy of the decision is provided as Appendix A and is referred to herein as the "Opinion."

III. ISSUES PRESENTED FOR APPEAL

A. 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?

B. Is summary judgment proper in a negligence case involving a trip and fall if the plaintiff's proffered cause of the fall is based on speculation?

IV. STATEMENT OF THE CASE

A. Factual and Procedural Background

This is a personal injury, premises liability, slip-and-fall negligence case. Plaintiff fell on defendants' property and brought suit against defendants for negligence. Plaintiff alleged that he tripped on an electrical cord that ran along the ground on defendants' property. After conducting discovery, including taking plaintiff's deposition, defendants

moved for summary judgment against plaintiff's claim on the grounds that plaintiff could not establish causation.

The facts relating to the issue on appeal are few, and are undisputed. Plaintiff rented a shed from defendants to store equipment for his business. Late in the evening of March 2, 2014, around 11:00 p.m., plaintiff fell while groping in the dark in search for a light switch through the planks of a wall of the rented shed. It had been snowing that evening and an inch of snow covered both uneven gravel and concrete slabs on the ground where plaintiff fell. Plaintiff testified that all he can remember is that he was walking, and the next thing he knew he was on the ground. He picked himself up and looked around. He found an electrical cable on the ground and surmised that it must have caused his fall. He did not see or feel the cable before he fell, and it was not touching him or wrapped around his foot after the fall. He nevertheless assumed that it must have been the cable that caused his fall.

Defendants moved for summary judgment on the issue of causation, arguing that the facts in the summary judgment record failed to establish *prima facie* evidence of causation even when construed in the light most favorable to plaintiff. Plaintiff's deposition testimony amounts to nothing more than speculation, opinion or conclusory statements. The

critical facts that defendants relied on in support of their motion for summary judgment were as follows:

- It was late. CP 23, line 24; CP 24, lines 4-7.
- It was dark. CP 23, lines 24-25 ("It was late in the evening and it was dark.")
- Plaintiff was not using a flashlight. CP 52 (page 31 of the depo transcript), lines 14-18.
- It was snowing. CP 17, lines 1-2
- There was an inch of snow on the ground. CP 23, lines 11-12.
- There were no witnesses.
- Plaintiff was walking on gravel and concrete, and the entire area had an inch of snow covering it. CP 32, lines 5-12; CP 23, lines 11-12 (there was an inch of snow on the ground).
- Plaintiff did not see the cord until *after* the fall. CP 51 (page 29 of the depo transcript), lines 17-19; CP 53 (page 34 of the depo transcript), lines 10-15 ("I never saw it until I woke up on the ground and went back and looked[.]").
- He did not feel it touch his foot prior to falling, and it was not touching his foot after his fall. CP 27, lines 16-18; CP 33, line 13-CP 34, line 3 ("I don't really recall anything").
- He does not recall stumbling or tripping. *Id*.

- He was walking, and the "next thing [he] knew [he] was lying on the ground." CP 26, lines 6-10.
- After the fall, plaintiff looked around and surmised that it must have been the cord that made him fall. CP 51 (page 29 of the depo transcript), lines 17-19; CP 53 (page 34 of the depo transcript), lines 10-15 ("I never saw it until I woke up on the ground and went back and looked[.]"); CP 27, line 18("I think my foot caught it[.]").

The trial court agreed with defendants that plaintiff's proffered cause was based on speculation and granted summary judgment. The Court of Appeals reversed, criticizing this Court's precedent and disregarding this Court's prior holdings. *See* Appendix.

In its opinion, the Court of Appeals identifies the rules from this Court on the issue. Indeed, it begins its opinion with a quotation from this Court:

> We have frequently said that, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred. *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947).

Behla v. R.J. Jung, LLC, 453 P.3d 729, 731 (2019) (found at Appendix, page 1).

The Court of Appeals described this as the stated rule. "We label this rule 'the stated rule.' Courts often quote and apply this stated rule." *Behla v. R.J. Jung, LLC*, 453 P.3d 729, 733 (2019). The Court of Appeals acknowledged that under Washington law, the rule precludes a jury from speculating, and acknowledged that under the rule, the trial court plays the function of gatekeeper and evaluates evidence to determine if the plaintiff's proffered cause relies on speculation. *Id.* It acknowledged that if the proffered cause rests on speculation, then the court must remove the suit from consideration from the jury. *Id.*

This has long been the rule in Washington. *See Gardner v. Seymour,* and the cases cited therein. But here, the Court of Appeals criticized the rule and refused to follow it. "We criticize the stated rule." *Behla v. R.J. Jung, LLC*, 453 P.3d 729, 733 (2019).

It offered more criticism of the established rule:

> The stated rule suffers from a more fundamental flaw. The rule assigns to the trial court and eventually an appeals court the task of discerning whether a plaintiff's offered cause depends on speculation. But we question whether the trial court or an appellate court is always a better decision maker than twelve representatives of the community when surmising if an alleged

> cause suffers from speculation. Judges receive no special training and have no peculiar insight into cause and effect in the physical world. We specialize in wordsmithing and sophistry, not applied physics and applied psychology.

Behla v. R.J. Jung, LLC, 453 P.3d 729, 733 (2019).

The Court of Appeals did not stop here. It went on to criticize the holdings from many cases from this Court and from other divisions of the Court of Appeals.

> Other rules of causation affirm and expand the stated rule probably even to cases when the defense does not identify other possible causes. The claimant cannot show that an accident happened in a certain way by simply showing that it might have happened in that way and without further showing that it could not reasonably have happened in any other way. *Gardner v. Seymour*, 27 Wash.2d 802, 810, 180 P.2d 564 (1947); *Whitehouse v. Bryant Lumber & Shingle Co*., 50 Wash. 563, 565-66, 97 P. 751 (1908). When more than one possible cause of an injury exists, plaintiff's evidence, whether direct or circumstantial, must reasonably exclude every hypothesis other than plaintiff's offered cause. *O'Donoghue v. Riggs*, 73 Wash.2d 814, 824, 440 P.2d 823 (1968). The facts relied on to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. *Schmidt v. Pioneer United Dairies*, 60 Wash.2d 271, 276, 373 P.2d 764 (1962).

* * *

> ¶21 We also question these additional rules. The jury usually determines what conclusions are reasonable. The better rule would be that the reviewing court determines if plaintiff's proffered cause is a reasonable conclusion rather than the only reasonable conclusion or the most reasonable conclusion.

Behla v. R.J. Jung, LLC, 453 P.3d 729, 734 (2019).

The Court of Appeals then refused to apply the established rule in this case. "We reject application of *Gardner v. Seymour*'s stated rule under the circumstances of James Behla's fall." *Behla v. R.J. Jung, LLC*, 453 P.3d 729, 737 (2019). It held that, contrary to well-established Washington precedent, it is a job for the jury to decide in the first instance whether plaintiff's proffered cause rests on speculation.

> First, if the plaintiff can rationally rule out other potential causes, the jury should decide if plaintiff's proffered cause constitutes the true cause of harm or rests in speculation. Second, if the plaintiff can show that his offered cause could have caused his injury, the jury should decide whether the plaintiff's proffered cause is based on speculation or if defendant's list of possible causes relies on speculation.

Behla v. R.J. Jung, LLC, 453 P.3d 729, 737 (2019).

Because the Court concluded that the jury should be the one who decides whether a proffered cause rests on speculation, and not the courts, it reversed and remanded.

V. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS HAS DISREGARDED DECADES OF THIS COURT'S PRECEDENT

The Court of Appeals criticized, and then refused to apply a well-established rule of Washington law that this Court has followed for well over a century. *See, e.g., Whitehouse v. Bryant Lumber & Shingle Mill Co*., 50 Wash. 563, 566, 97 P. 751 (1908), and cases cited therein. *See also Sanchez v. Haddix,* 95 Wn.2d 593, 599, 627 P.2d 1312 (1981) ("Where causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred."). But the Court of Appeals is bound by this Court, and if Washington law is to undergo such a massive change regarding the division of duties split between courts and juries, that change should come from this Court or the legislature, not from the Court of Appeals in a decision that disregards decades of this Court's precedent. This Court should accept review and

either reverse the Court of Appeals, or announce a massive and significant change in Washington law regarding causation and summary judgment.

While not specifically citing the *Gardner* decision, this Court has recently reaffirmed the rule that when a plaintiff's theory of causation rests on speculation, the matter is removed from consideration by the jury. "[M]ere speculation will not suffice to defeat summary judgment." *Cornwell v. Microsoft Corp*., 192 Wn.2d 403, 420, 430 P.3d 229 (2018).

The Court of Appeals holding here conflicts with this Court's prior precedent because this Court has held that it is for the court and not a jury to determine in the first instance if plaintiff's proffered causation theory rests on speculation, and if it does, the matter is removed from consideration by the jury. The Court of Appeals here ruled that the issue should go to the jury in the first instance.

The Court of Appeals decision here appears to also conflict with decisions from the other divisions of the Court of Appeals. For instance, in "*Arntz v. City of Seattle*, 77504-9-I, 2019 WL 931841, at *1 (Wash. Ct. App. Feb. 25, 2019) (unpublished), Division 1 affirmed a summary judgment dismissal in a case with facts nearly identical to the facts here. There, plaintiff alleged she tripped and fell on one of the city's manhole covers. When questioned at deposition, and asked how she fell, plaintiff testified:

> I only noticed suddenly I was on the ground.... At that point I did not yet know what had actually happened exactly." In response to asking how she was able to determine what caused her to fall, Arntz explained that "[a]fter I was on my legs again I looked back in order to see what had caused me to trip." Arntz testified she "only saw the sewer lid that had these hooks, and then I understood that that is what I must have tripped over."

Arntz v. City of Seattle, 77504-9-I, 2019 WL 931841, at *1 (Wash. Ct. App. Feb. 25, 2019).

And just like here, when plaintiff was sked whether she felt her foot catch on something before her fall, she answered in the same way that plaintiff here answered:

> When asked whether she felt her foot 'catch on anything or contact something hard,' Arntz said she did not "remember feeling [her] foot strike the edge of the manhole cover rim.' Arntz testified, '[I]t went so fast, I only remember I fell frontally forward onto my knees. And I then had to reorient myself in order to figure out what was going on, what had been going on.'

Arntz v. City of Seattle, 77504-9-I, 2019 WL 931841, at *1 (Wash. Ct. App. Feb. 25, 2019). The trial court granted summary judgment and Division 1 affirmed. It held that to survive summary judgment, plaintiff was required to establish "'specific and material facts' tending to show that it is more probable than not that the defective manhole caused her fall.

When there could be more than one cause of an injury, the testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on. *Because Arntz cannot establish that her foot contacted the manhole cover prior to falling, she cannot show the recessed manhole cover more probably than not caused her to trip and fall*." *Arntz v. City of Seattle*, 77504-9-I, 2019 WL 931841, at *5 (Wash. Ct. App. Feb. 25, 2019) (some emphasis added; internal citations omitted). The *Arntz* case is indistinguishable from this case, but reaches the opposite conclusion or holding that the Court of Appeals reached here.

RAP 13.4 governs this Court's discretionary review, including petitions for review. Subsection (b) of the rule sets forth the considerations governing acceptance of review. This petition satisfies those considerations. First, the decision here conflicts with decades of case law from this Court, including *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947), as well as other cases from before and after *Gardner*. The Court of Appeals is not free to disregard Supreme Court precedent, even if it disagrees with that precedent or criticizes it, as the Court of Appeals has done here. The Court of Appeals acknowledged this recently: "This appellate court remains bound by a decision of the Washington Supreme Court. We must follow Supreme Court precedence, regardless of any personal disagreement with its premise or correctness." *Sluman v.*

State, 418 P.3d 125, 147 (Div. 3. 2018), *review denied*, 192 Wn.2d 1005, 430 P.3d 254 (2018).

Next, the decision here conflicts with decisions from other divisions of the Court of Appeals. While the *Arntz* opinion, discussed above, is unpublished, it relies on published decisions in reaching its conclusion. Indeed, it relies on the same precedent from the Washington Court of Appeals that defendants relied on in this case. Moreover, there is a legion of cases in the Court of Appeals holding that speculation as to causation cannot overcome summary judgment. *See, e.g., HBH v. State*, 197 Wn. App. 77, 93, 387 P.3d 1093, 1102 (2016), *as amended on denial of reconsideration* (Apr. 18, 2017), *aff'd sub nom. H.B.H. v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018) ("Mere speculation or argumentative assertions of possible counterfactual events is insufficient to prove that but for the defendant's breach of duty the plaintiff would not have been injured."); *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835, 837 (2001) (same); *Hoover v. Warner*, 189 Wn. App. 509, 522, 358 P.3d 1174, 1181 (2015) (same, relying on *Sanchez v. Haddix*, 95 Wash.2d 593, 599, 627 P.2d 1312 (1981)).

The decision from the Court of Appeals here conflicts with decades of precedent from both this Court and the Court of Appeals, and announces that Washington trial courts *must* now abdicate their

gatekeeping function with regard to determining whether a theory of causation is too speculative to send to a jury. The Court of Appeals announced in its decision that it is juries and juries alone who should decide whether a theory of causation is too speculative. It offered no rationale for this holding other than to lament that it has no special training in physics or psychology. But this has always been the case. Courts have never had that specialized training, but have always carried their duty to remove cases from consideration by a jury where the theory of causation was speculative.

Under the Court of Appeals' proposed rule—sending speculative causation to the jury—the courts will lose an important gatekeeping function. And the rationale by the Court of Appeals—that it has received no specialized training in physics, so it should not be the one to perform the gatekeeping function—has implications that reach far beyond this case. For instance, how is a court to decide a *Frey* motion where one party argues that the other party's expert relies on speculation to prove causation? After all, if, as the Court of Appeals stated in its decision, it has no specialized training in the subject matter, how can it make decisions in any area outside of "wordsmithing and sophistry?" The answer is simple: Washington courts have been deciding this issue and many others outside the realm of wordsmithing and sophistry since their inception.

Washington courts are called on all the time to determine whether a party's evidence or theory is too speculative to send to a jury. This is why there is a court-created summary judgment rule right on point. In the context of summary judgment, "a nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Martin v. Gonzaga Univ*., 191 Wn.2d 712, 722, 425 P.3d 837 (2018) (citing *Seven Gables Corp. v. Mgm/Ua Entm't Co*., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). *See also Specialty Asphalt & Constr., LLC v. Lincoln Cty.,* 191 Wn.2d 182, 191, 421 P.3d 925 (2018) (nonmoving party may not rely on speculation).

This rule was considered well-established 50 years ago:

> Causation which is based upon circumstantial evidence is subject to the *well-established rule* that the determination may not rest upon speculation or conjecture; and that there is nothing more substantial to proceed upon than two or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.

Schneider v. Rowell's Inc., 5 Wn.App. 165, 167-68, 487 P.2d 253 (1971) (emphasis added).

> The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. A verdict cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed upon than two or more equally reasonable inferences from a set of facts, and under only one of the inferences would the defendant be liable, a jury will not be allowed to resort to conjecture to determine the facts.

Schmidt v. Pioneer United Dairies, 60 Wn.2d 271, 276, 373 P.2d 764 (1962).

"Opinion testimony as to causation is insufficient to support a judgment if it is expressed in terms of speculation or surmise, *or if it is patently based upon speculation or surmise*." *Halder v. Dep't of Labor & Indus*., 44 Wn.2d 537, 543, 268 P.2d 1020 (1954) (emphasis added)[1]. "The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another." *Jankelson v. Sisters of Charity of House of Providence in Territory of Wash*., 17 Wn.2d 631, 643, 136 P.2d 720 (1943) (quoting *Frescoln v. Puget Sound Traction, Light & Power Co*., 90 Wash. 59, 63,

[1] In other words, a party cannot escape this rule by forcefully asserting conjecture as fact.

155 P. 395 (1916)). "Causation is speculative when, after consideration of the facts, 'there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover.'" *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999) (quoting *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947)).

Here, the Court of Appeals seeks to erase all of this case law by ruling that causation should go to the jury, even where it is speculative. Petitioners disagree with the Court of Appeals, but at the very least, such a pronouncement should come from this Court or the legislature. This Court should therefore accept review and weigh in on the matter.

VI. CONCLUSION

The decision from the Court of Appeals here conflicts with well over 100 years of precedent from this Court and the Court of Appeals. The issues presented involve important matters relating to the division of

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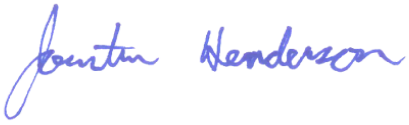
duties between courts and juries. This Court should therefore accept review. If the Court accepts review, petitioners intend to submit a brief on the merits.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, P.C.



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December 3, 2019

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CASE # 362761
James F. Behla v. R.J. Jung, LLC, et al
KLICKITAT COUNTY SUPERIOR COURT No. 152001596

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (may also be filed electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: **E-mail** Honorable Randall C. Krog

FILED
DECEMBER 3, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

JAMES F. BEHLA, Appellant, v. R.J. JUNG, LLC, a Washington Limited Liability Company; JENNIFER JUNG and JOHN DOE JUNG, and the marital community thereof, Respondents.	)	No. 36276-1-III PUBLISHED OPINION

FEARING, J. —

> *We have frequently said that, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.* Gardner v. Seymour, *27 Wn.2d 802, 809, 180 P.2d 564 (1947).*

This appeal asks whether a claimant presents a question of fact as to causation of injuries in order to defeat the defendant's summary judgment motion. The claimant lost awareness from a fall and found, when he regained consciousness, a coiled cable near him. He asserts that the cable caused his fall. Because of these facts and other attended

facts, we answer the question in the affirmative. We reverse the summary judgment dismissal granted the claimant's landowner in a premises liability suit based on the stretching of the cable across a parking lot.

FACTS

This appeal arises from injuries sustained by James Behla on the evening of March 2, 2014, when he fell on property owned by R.J. Jung LLC (R.J. Jung). Behla sues R.J. Jung and its owner, Jennifer Jung, in negligence. We refer to the defendants collectively as R.J. Jung. The dispute between the parties on appeal concerns the cause of the fall.

Since the early 2000s, James Behla has operated a rafting guide service on the White Salmon River. Beginning in the early 2000s, Behla frequently shopped at White Salmon's BZ Corner Grocery Store, then owned by the Gross family. The Gross family kept a shed on the edge of the parking lot, which shed the family offered to permit Behla to use if he repaired it. Behla repaired the shed, installed lighting in and outside of the building, and laid gravel for a parking lot on both sides of the shed. Thereafter he used the shed to store rafting equipment for his business. Behla parked a bus near the shed. Presumably he employed the bus to ferry customers along the river.

In approximately 2003, R.J. Jung, owned by Jennifer Jung and her now deceased husband, purchased BZ Corner Grocery Store. R.J. Jung thereafter rented the shed to

James Behla for $1,000 annually. In 2013, Behla, at the direction of R.J. Jung, moved his bus so that Jung could place a recreational vehicle in the lot. R.J. Jung desired employees to use the RV. Behla moved the bus nearer to his storage shed.

On March 2, 2014, at 10:00 p.m., James Behla went to his shed on R.J. Jung's property to perform inventory and move rafting equipment. One inch of snow blanketed the ground. The only light shone from gas pumps 150 feet away from the shed. Behla ambled to the shed to activate an exterior light switch on the outside of the building. Behla flipped the light switch, but no lights appeared. He then sauntered toward the bus to check its locks. After checking the locks, Behla returned to the shed. According to Behla:

> And—and I turned and walked back to the walk-through door of the building. Next thing I knew, I was lying on the ground with a stabbing, like a knife in the back, of my lower spine, my head banged up, my shoulder aching and blood coming out wherever.

Clerk's Papers (CP) at 52.

James Behla regained consciousness on a concrete slab in front of the shed door. Behla's right hip struck the slab. His body lay in a skiff of snow on the gravel.

After realizing that he fell and sustained injuries, James Behla scanned the area to determine the cause of his fall. He saw a black cable the diameter of his thumb. This cable ran 125 feet and sent power between the shed's breaker box and the recreational

vehicle parked on the R.J. Jung property. Behla did not see the cable before falling, but, when examining it after, saw that part of the cable curled and rose above the ground. After viewing the cable, Behla concluded: "my foot caught it, and it pitched me forward, and my head hit first and then my left hand and arm and then my butt and back hit the concrete slab, and I was laying on my right side." CP at 27. Behla testified in his deposition:

> I am not certain, 'cause I never saw it [the cable] until I woke up on the ground and went back and looked to see what I had tripped over. . . .

CP at 53. The coiled cable rose high enough for his foot to catch thereon. Behla did not directly testify that the cable lay in the pathway that he tread to the shed, but we draw reasonable inferences from other testimony and from photographs to reach this factual conclusion for purposes of R.J. Jung's summary judgment motion.

PROCEDURE

James Behla sued R.J. Jung and Jennifer Jung for failure to exercise reasonable care in maintaining the rented premises. R.J. Jung filed a motion for summary judgment dismissal and argued that Behla cannot prove proximate causation because his theory of liability relies on conjecture. R.J. Jung did not argue the impossibility of Behla's tripping on the cable, but contended that other causes were as likely the cause of the fall. The trial court granted R.J. Jung's summary judgment motion.

LAW AND ANALYSIS

The principal question on appeal is whether James Behla presents an issue of fact, in order to defeat R.J. Jung's summary judgment motion, as to whether the cable stretched across R.J. Jung's parking lot caused Behla's trip and fall. We rule that Behla presents a genuine question of fact.

James Behla sues R.J. Jung in negligence. A negligence claim requires the plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). Proximate cause consists of two elements: cause in fact and legal causation. *Albertson v. State*, 191 Wn. App. 284, 296, 361 P.3d 808 (2015). In support of its summary judgment motion, R.J. Jung relies only on a lack of cause in fact. Even if the complainant establishes negligence, the defendant may not be held liable unless its negligence caused the accident. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 378, 972 P.2d 475 (1999).

Cause in fact, or "but for" causation, refers to the physical connection between an act and an injury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). The

plaintiff must establish that the harm suffered would not have occurred but for an act or omission of the defendant. *Joyce v. Department of Corrections*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005).

A ubiquitous term found in the case law of causation is the word "speculation." Many decisions rest on this word. R.J. Jung argues that James Behla speculates when contending that the black cord caused his fall and injuries.

Evidence establishing proximate cause must rise above "speculation, conjecture, or mere possibility." *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). "Speculation" and "conjecture," in this context, mean the same thing. *Frescoln v. Puget Sound Traction, Light & Power Co.*, 90 Wash. 59, 63, 155 P. 395 (1916). The plaintiff cannot rest a claim for liability on a "speculative theory." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, (1999). The plaintiff must supply proof for a reasonable person to, "without speculation," infer that the act of the other party more probably than not caused the injury. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 781, 133 P.3d 944 (2006). Cause in fact does not exist if the connection between the act and the later injury is "indirect and speculative." *Estate of Borden ex rel. Anderson v. State, Department of Corrections*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004).

Labeling causation as speculative plays a unique role in summary judgment jurisprudence. If one takes many statements of the law literally, a court must withdraw consideration of a tort suit from a jury and grant summary judgment or a directed verdict to the defendant, if the plaintiff bases his assertion of causation on speculation, or at least if the facts present at least two speculative causes. Under these statements of the law, identifying speculation becomes the prerogative of the judge, not the jury.

The rule, on which R.J. Jung principally relies and which we anatomize, declares: when "two or more conjectural theories" exist, "under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred." *Gardner v. Seymour*, 27 Wn.2d 802, 809 (1947). We label this rule "the stated rule." Courts often quote and apply this stated rule. *Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 276, 373 P.2d 764 (1962); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379 (1999); *Schneider v. Rowell's, Inc.*, 5 Wn. App. 165, 168, 487 P.2d 253 (1971). Note that the rule precludes a jury from speculating. Under such a rule the trial court plays the function of a gatekeeper and evaluates evidence to determine if the plaintiff's proffered cause relies on speculation, and, if so, whether other possible conjectural theories exist. If the court so finds, the court must remove the suit from the consideration of the jury.

We criticize the stated rule. The rule only applies if at least two speculative causes subsist, suggesting that, if only one conjectural theory exists, the jury can decide causation. The rule begs the question of what action the trial court takes if the plaintiff's identified cause is speculative, but neither the defendant nor the court can conjure any other potential cause of the injuries. In this appeal, however, R.J. Jung advances other conjectural causes.

The stated rule may assume that two causes of an event are just as likely to be the true cause. We question whether causes of human events can be precisely weighed such that one possible cause is just as likely to be the cause of a plaintiff's injuries as another possible cause.

The stated rule suffers from a more fundamental flaw. The rule assigns to the trial court and eventually an appeals court the task of discerning whether a plaintiff's offered cause depends on speculation. But we question whether the trial court or an appellate court is always a better decision maker than twelve representatives of the community when surmising if an alleged cause suffers from speculation. Judges receive no special training and have no peculiar insight into cause and effect in the physical world. We specialize in wordsmithing and sophistry, not applied physics and applied psychology.

If the trial court applies the stated rule and a plaintiff survives a summary judgment or directed verdict motion, the court must have determined that the plaintiff's proffered cause does not rely on speculation. Nevertheless, even if a plaintiff defeats a summary judgment motion by presenting a factual question on causation, the defense still argues to the jury that the plaintiff bases his or her claim on speculation. Based on the stated rule, defense counsel should be precluded from telling the jury that plaintiff's claim relies on speculation if the case proceeds beyond the summary judgment stage.

Other rules of causation affirm and expand the stated rule probably even to cases when the defense does not identify other possible causes. The claimant cannot show that an accident happened in a certain way by simply showing that it might have happened in that way and without further showing that it could not reasonably have happened in any other way. *Gardner v. Seymour*, 27 Wn.2d 802, 810 (1947); *Whitehouse v. Bryant Lumber & Shingle Co.*, 50 Wn. 563, 565-56, 97 P. 751 (1908). When more than one possible cause of an injury exists, plaintiff's evidence, whether direct or circumstantial, must reasonably exclude every hypothesis other than plaintiff's offered cause. *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). The facts relied on to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them.

Schmidt v. Pioneer United Dairies, 60 Wn.2d 271, 276, 373 P.2d 764 (1962). In the context of a summary judgment motion or a motion for directed verdict, the trial court must view conflicting evidence in the light most favorable to the nonmovant party and determine "whether the proffered result is the only reasonable conclusion." *Estate of Borden ex rel. Anderson v. State, Department of Corrections*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004).

We also question these additional rules. The jury usually determines what conclusions are reasonable. The better rule would be that the reviewing court determines if plaintiff's proffered cause is a reasonable conclusion rather than the only reasonable conclusion or the most reasonable conclusion.

Speculation is a specious word. One person's proof may be another person's speculation. What constitutes speculation may enter a shadow zone where some triers of fact may determine plaintiff's tendered cause to be speculative, while other reasonable people would determine causation to be proven. Whereas, the trial court should not allow a jury to decide a personal injury claim if the jury must undoubtedly speculate as to whether any breach of duty caused the plaintiff's injuries, reasonable persons may disagree as to whether causation is speculative in discrete circumstances. Thus, when addressing purported "speculative" claims, the trial court should give the benefit of the

doubt as to causation to the plaintiff and only dismiss a claim to the extent the court can decide that all reasonable people would conclude causation to be speculative.

We now review Washington decisions, starting with decisions forwarded by R.J. Jung. Jung relies on three Washington cases to argue that the facts asserted by James Behla are insufficient to demonstrate proximate cause and overcome a summary judgment motion. *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947); *Little v. Countrywood Homes*, 132 Wn. App. 777, 133 P.3d 944 (2006); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999). All of these cases espouse the stated rule of causation.

In *Gardner v. Seymour*, Jean Gardner, a manager of a second floor store, exited the store to a hallway in the store's building to retrieve stock replacements. Six minutes after leaving the store, Gardner was found critically injured at the bottom of a freight elevator shaft. No witness observed Gardner fall into the shaft. Gardner subsequently died from his injuries. On appeal, the Washington Supreme Court reversed a jury verdict in favor of Gardner's widow, with the court holding that Gardner failed to prove, as a matter of law, that the alleged negligence of the store owner caused the death.

In *Gardner v. Seymour*, the Washington Supreme Court reasoned that at least two equally reasonable inferences explained Jean Gardner's plummet to his death. The facts

showed that a cord operated the freight elevator platform. If safely operated, the doors to the elevator functioned as safeguards and latched at each floor unless the platform rested at that specific floor. These safeguards, however, could be overcome if another worker wanted to avoid a walk to a higher or lower floor where the freight elevator rested. In that situation, the worker could pry the elevator doors open at the lower floor and manipulate the cord to bring the platform to the desired floor. The maneuvering could result in one later seeking to use the elevator to mistakenly walk into the shaft with no platform and fall to his or her death. The state high court deduced that either Jean Gardner opened the doors to summon the platform from another floor and in doing so caused his own death, or his death resulted from another worker leaving the shaft doors open with no platform present. Under the first scenario, Gardner was responsible for his death. Under the second hypothesis, the building owner was liable for the death. No evidence showed one cause more likely than the other.

The *Gardner* court distinguished between conjecture and reasonable inference based on circumstantial evidence. The court wrote:

> no legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, and without further showing that it could not reasonably have happened in any other way.

Gardner v. Seymour, 27 Wn.2d at 810 (quoting *Whitehouse v. Bryant Lumber & Shingle Co.*, 50 Wash. 563, 565-66, 97 P. 751 (1908)). This passage suggests, contrary to the general rule, that the plaintiff must not only establish that his or her identified cause is more likely the true source of injury, but the plaintiff must also rule out all possible, but reasonable, causes. This burden may often be impossible to fulfill.

In *Little v. Countrywood Homes*, 132 Wn. App. 777 (2006), Jared Little's brother and coworker found Little, a gutter installer, lying on the ground next to a home being built. A ladder laid on the ground next to Little. Little was disoriented from injuries he sustained moments before. Little did not know how he fell and presented no testimony that he even climbed the ladder. No witness saw Little climb the ladder or fall.

Jared Little sued the general contractor, Countrywood Homes, alleging that Countrywood's negligence caused his injuries. Little claimed that Countrywood failed to require ladders to be secured per regulations or failed to provide stable ground on which to set the ladder. The trial court dismissed Little's suit on summary judgment, and this court affirmed. This court explained that one could speculate that the ladder was not properly secured or that the ground beneath it was unstable, but Little presented no evidence that one of these conditions more probably than not caused his injuries.

In *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372 (1999), Kim Marshall was injured on a treadmill at Bally's Pacwest. In her complaint, Marshall alleged she was exercising on the treadmill when it stopped abruptly in the middle of her program. Marshall reprogrammed the treadmill and pushed the "start" button. According to Marshall, the treadmill restarted at 6.2 miles per hour rather than its usual 2.5 miles per hour. Marshall alleged that, because of the sudden and unexpected start, she was violently thrown from the treadmill, causing severe injuries when her head struck a plexiglass wall behind the machine. Nevertheless, during her deposition, Marshall testified that (1) she did not recall how abruptly the treadmill reached full speed, (2) she did not recall being "thrown" from the treadmill, and (3) she did not recall hitting the glass behind the wall. Rather, Marshall last remembered, before her fall, resetting the machine after it stopped. The trial court summarily dismissed Marshall's suit for lack of evidence establishing cause in fact.

On appeal, in *Marshall v. Bally's Pacwest*, Kim Marshall conceded that she did not recall the specifics of how fast the machine restarted. The Court of Appeals affirmed the summary judgment dismissal. Without any memory of the accident, Marshall offered only a theory as to how she sustained her injuries. Marshall provided no evidence that

she was thrown from the machine, what caused her to be thrown from the machine, or how she was injured.

We compare R.J. Jung's three favorite cases with other Washington decisions. In *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 78 P.3d 177 (2003), family members of Enid Conrad, age 91, sued her nursing care facility as a result of a broken femur. Because of an earlier debilitating stroke, Conrad could not explain how she broke her femur. The family claimed moving of Conrad by facility staff caused the bone break. In response, the care facility postulated numerous potential causes, including her osteoporosis and Conrad's husband moving her. The care facility then relied on the stated rule that, if more than one event could have caused the injury and each event is as plausible as the other events, the jury must impermissibly rely on speculation such that the defendant is entitled to a directed verdict. This court affirmed a verdict in favor of the Conrad family on appeal because the family presented believable evidence to refute each of the care facility's proffered causes. The husband agreed that he had recently wheeled Conrad in her wheelchair, but he averred he did nothing to cause the broken femur. An orthopedist testified that osteoporosis did not cause the break.

In *Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 15 P.3d 188 (2000), Matt Esparza suffered severe injuries when he stood on a manlift and the manlift tipped.

Esparza argued that the malfunctioning of circuit cards caused the tipping and that, had Skyreach Equipment, the company that rented the lift to his employer, timely and reasonably inspected the mechanism, the company could have prevented the malfunction. Skyreach Equipment claimed the existence of other possible causes. This court affirmed a verdict in favor of Esparza. This court reviewed expert testimony and concluded that a rational juror "could have" concluded that the failure to inspect was the "likely" cause of the tipping. 103 Wn. App. at 928.

We observe that the court, in *Esparza v. Skyreach Equipment, Inc.*, employed the phrase "could have" and the word "likely" in the same sentence. The terms diverge since "could have" means possibly and "likely" means "probably." Nevertheless, we extract from the sentence the notion that, assuming there is more than one possible cause of plaintiff's injury, the jury should determine what cause probably caused the injury and whether other causes are speculative. If the court concludes that plaintiff's proffered cause "could have" been the likely cause, the court should allow the jury to decide the likely cause.

Some rules of causation benefit James Behla. Precise knowledge of how an accident occurred is not required to prove cause in fact. *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn. App.2d 115, 118, 404 P.3d 97 (2017); *Klossner v. San Juan County*, 21 Wn.

App. 689, 692, 586 P.2d 899 (1978). The plaintiff need not establish causation by direct and positive evidence. *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn. App. 326, 331, 966 P.2d 351 (1998). The claimant can establish causation by inferences arising from circumstantial evidence. *Klossner v. San Juan County*, 21 Wn. App. at 692; *Raybell v. State*, 6 Wn. App. 795, 801, 496 P.2d 559 (1972). He or she need only show by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable. *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 281 (2003). Plaintiff need not negative every possible cause. *Frescoln v. Puget Sound Traction, Light & Power Co.*, 90 Wash. 59, 65, 155 P. 395 (1916).

R.J. Jung argues that James Behla relies only on speculation because he lacks any direct knowledge that he tripped on the cable. According to R.J Jung, Behla surmises the cable caused his injury only because of his observations when he regained consciousness. According to R.J. Jung, Behla's failure to recall how he fell requires a ruling of insufficient evidence of cause in fact since no one saw him stumble on the black cable. R.J. Jung then advances other possible causes of Behla's tumble. Behla could just as likely have tripped on his own two feet, slipped on ice, stumbled on a natural object such as a rock or a stick, or tumbled on the lip of the concrete slab. According to R.J. Jung, the

stated rule requires summary judgment in its favor because the other possible causes are as likely to be the true cause as is the coiled cable.

James Behla emphasizes many facts in his effort to defeat summary judgment. First, Behla had navigated the terrain around the shed for more than a decade without falling. Second, he regularly traversed the terrain at night without earlier falls. Third, the cord had only recently been extended to the recreational vehicle. Fourth, only an inch of snow rested on the ground. Fifth, the parking lot contained no large rocks on which to stumble. Sixth, he saw no stick or other object that could have caused his stumble. Seventh, the positioning of his body partially on the slab and partially off the slab renders tripping over the slab unlikely. Eighth, Behla saw the cable in the location where he fell. Ninth, he was in good health.

We reject application of *Gardner v. Seymour*'s stated rule under the circumstances of James Behla's fall. We instead rely on at least two other rules of causation. First, if the plaintiff can rationally rule out other potential causes, the jury should decide if plaintiff's proffered cause constitutes the true cause of harm or rests in speculation. Second, if the plaintiff can show that his offered cause could have caused his injury, the jury should decide whether the plaintiff's proffered cause is based on speculation or if defendant's list of possible causes relies on speculation.

When taking the facts in the light most favorable to James Behla, we conclude that a jury should decide causation. A reasonable juror could conclude that the black cable more likely than not caused the fall. Behla presents evidence discounting the snowfall as a cause because of its small depth and because no ice formed. Because of the gravel lot, Behla's footing would be firm. Behla was in good health and physique. No evidence suggests that Behla was clumsy and tripped over his own feet. Behla discounts the possibility that a stone or stick or even some other foreign object caused his fall because he looked and no such object was present. Behla presents evidence dismissing the lip of the shed slab as the cause because of the location of his body on the lip of the concrete slab. After reducing the likelihood of other causes being the true cause, Behla provides testimony that he saw the cable in a coiled position that could have caused someone to trip. He came to his conclusion, at the scene of his tumble, of the cord causing his fall rather than later deducing the cable as a cause in order to sue for his injuries.

Unlike in *Gardner v. Seymour*, James Behla survived the accident. Unlike in *Marshall v. Bally's Pacwest* and *Little v. Countrywood Homes*, the injured party, when gaining awareness, immediately scanned the environment to determine the cause of his fall. In *Marshall v. Pacwest*, plaintiff did not know at what speed the machine started.

We know, assuming James Behla to be believed, that a cord lay in the pathway where he walked.

We note that a person who trips often does not notice what caused the fall or else the person could have prevented the fall. The result proposed by R.J. Jung might preclude an injured party, who suffers temporary amnesia from the fall, from always recovering, when no witness saw the fall, despite the physical conditions discovered by the party immediately on regaining consciousness. The responsible party would avoid liability when its negligence caused severe enough injuries for the claimant to suffer amnesia.

R.J. Jung also relies on some foreign decisions. We discuss two foreign decisions, but then juxtapose each decision with another decision inside its respective state to illustrate how each case revolves around its unique facts.

In *Majetich v. P.T. Ferro Construction Co.*, 389 Ill.App.3d 220, 906 N.E.2d 713 (2009), one of R.J. Jung's cases, a son filed suit against the owner of a strip mall and a construction company for the death of his mother. The construction company was repaving the mall's parking lot. The mother fell near a step caused by the paving project. The trial court dismissed the case on summary judgment since the son could not show whether any action by the defendants caused the death. The appellate court affirmed.

The court reasoned that the mother could have fallen for any one of countless reasons that people fall. The court also mentioned that the elderly mother already suffered from serious medical conditions.

The Illinois Court of Appeals, in *Majetich v. P.T. Ferro Construction Co.*, distinguished the case before it from *Wright v. Stech*, 7 Ill.App.3d 1068, 288 N.E.2d 648 (1972), in which the deceased's survivor sought to recover damages caused by the alleged negligence of the owner of a building in which the decedent worked. The appeals court reversed a directed verdict in favor of the owner. Dessie Wright worked as a domestic in the employ of Christine White, who resided on the third floor of an apartment building. Wright accessed White's apartment by a stairway, which extended from the front door of the building to the front door of the apartment. Garbage and debris covered the steps in the dimly lit stairway. An electric light fixture could have provided illumination, but the fixture lacked a bulb. One day as Wright left White's apartment and descended the stairway, White heard a loud thump. White rushed from her apartment and found Wright sprawled on a stairway landing. Wright died from the injuries. No one could testify to the cause of Wright's fall, but her survivor claimed the debris and poor lighting resulted in Wright's demise. The court of appeals held that a jury could rely on Christine White's testimony that, after seeing Wright sprawled in the stairway, White saw debris in the

stairwell. The court noted that, even if other causes could have reasonably led to Wright's fall, the question of causation remained one for the jury. The court observed that Christine White, like James Behla, was otherwise in good health.

Jennifer Jung also relies on *Pennington v. WJL, Inc.*, 263 Ga. App. 758, 589 S.E.2d 259 (2003). In *Pennington*, the appeals court affirmed summary judgment in favor of the owner of a building because the plaintiff relied only on speculation to establish proximate cause. Thomas Pennington entered a dimly lit warehouse through a door. He then went to open a second door from the inside. On doing so, he felt a "loss of balance" and tried to catch himself. Pennington felt his shoulder being pulled and then saw that his fingers were severed. A coworker arrived to assist him and saw hoses in a pile just inside the door where she found Pennington's fingers. Pennington had no memory of his feet touching the hoses or of seeing them, but he alleged that he must have tripped over them. The court reasoned that Pennington presented no evidence that he actually tripped, only that hoses were present at the scene. Therefore, Pennington's argument was solely based on speculation.

We compare and contrast *Pennington v. WJL, Inc.* with another Georgia decision, *Williams v. EMRO Marketing Co.*, 229 Ga. App. 468, 494 S.E.2d 218 (1997). Nathaniel Williams drove his car to work, when he stopped for gasoline at a store operated by

EMRO. He first paid inside the store and then returned to his car along the same route to pump gas. On his return, he slipped and fell, injuring his knee and other parts of his body. He never saw on what he slipped, and he never saw any ice. His clothes were not wet from ice or water. Another customer, Gregory Perkins, averred that he retrieved a large piece of ice near where Williams slipped. The court of appeals reversed a summary judgment dismissal of Williams' suit. According to the court, a jury could reason from Perkins' testimony that dangerous ice, for which the gas station was responsible, caused Williams' fall.

We have reserved for the end the obligatory summary judgment principles. Summary judgment is proper if the records on file with the trial court show no genuine issue as to any material fact. CR 56(c). The appeals court, like the trial court, construes all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Barber* v. *Bankers Life* & *Casualty Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972). If any genuine issue of material fact exists, the court must order a trial. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

Cause in fact usually presents a question for the trier of fact and is generally not susceptible to summary judgment. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013). In most instances, the question of cause in fact is for the jury. *Daugert v.*

Pappas, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). The plaintiff can survive a motion to dismiss if he presents "some competent evidence of factual causation" that precludes jury speculation. *Estate of Borden ex rel. Anderson v. State, Department of Corrections*, 122 Wn. App. 227, 242, 95 P.3d 764 (2004). The court may decide cause in fact as a matter of law, however, if the facts and inferences from them are plain and not subject to reasonable doubt or difference of opinion. *Daugert v. Pappas*, 104 Wn.2d 254, 257 (1985). Stated another way, causation becomes a question of law for the court only when the causal connection is "so speculative and indirect" that reasonable minds could not differ. *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn. App.2d 115, 119 (2017); *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996). Use of the phrase "so speculative" suggests degrees of speculation such that the jury should often be the decider of speculation.

Summary judgment procedure aims to avoid a useless trial. *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). Trial is not useless but absolutely necessary when issues of fact could lead to liability against the defense. *Preston v. Duncan*, 55 Wn.2d at 681.

We must assume, for purposes of summary judgment, that James Behla's claim of seeing a black cable in the proximity of his fall is as believable as Gregory Perkins'

testimony that he saw a piece of ice near where Nathaniel Williams fell and Christine White's testimony that she saw debris in the stairwell where Dessie Wright tumbled. Based on Behla's testimony, he presented an issue of fact as to the causation of his injuries.

CONCLUSION

We reverse the summary judgment dismissal of James Behla's personal injury suit. We remand for further proceedings.

Fearing, J.

WE CONCUR:

Siddoway, J.

Pennell, A.C.J.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 2nd day of January, 2020, I served a true copy of PETITION FOR REVIEW, contained in a sealed envelope, with postage prepaid, addressed to said attorney at said attorney(s)' last-known address, as set forth below, and deposited the same in the post office at Portland, Oregon, on this day.

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