

COURT OF APPEALS  
DIVISION 2

COBEC - ALL CASES  
STATE OF OREGON  
BY: [Signature]

No. 37994-5-II

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WASHINGTON COURT OF APPEALS, DIVISION 2

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CYNTHIA PHELPS and STEVEN PHELPS,  
Appellants-Plaintiffs

v.

SOUTHWEST WASHINGTON MEDICAL CENTER and  
SOUTHWEST WASHINGTON MANAGEMENT GROUP, INC.,  
Respondents-Defendants

And

FAMILY PHYSICIANS GROUP, PS  
Defendant

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APPELLANTS' BRIEF

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## INTRODUCTION

The plaintiffs in this personal-injury action appeal a summary judgment entered in favor of defendants Southwest Washington Medical Center (“Medical Center”) and Southwest Washington Management Group (“Management Group”).

Plaintiff Cindy Phelps suffered serious injuries when she slipped and fell in a parking lot owned by Medical Center and maintained by Management Group. Cindy and her husband, plaintiff Steven Phelps, brought this action alleging that Cindy fell because of Medical Center’s and Management Group’s negligent failure to clear ice from the parking lot.

Medical Center and Management Group moved for summary judgment on the grounds that there was no evidence that ice, rather than something else, caused Cindy Phelps’s fall. Because of her head injuries, Cindy Phelps does not remember much about the fall. But the plaintiffs responded to the motion with evidence—including weather reports of freezing temperatures and eyewitness accounts of conditions in the parking lot on the day of the accident—from which a trier of fact could find that Cindy Phelps slipped and fell on a sheet of ice that she encountered as she walked from her car to the clinic where she worked.

Although the trial court agreed that the evidence was “consistent” with the plaintiffs’ claims, the court nonetheless granted summary judgment because the plaintiffs had not *also*

presented evidence excluding every other possible cause of the accident.

The plaintiffs were not required to both support their theory and disprove every other possible cause. All the plaintiffs were required to do was present evidence from which a finder of fact could reasonably find in favor of the plaintiffs. Because they did that, summary judgment was improper. The case should be reversed and remanded for trial

### **ASSIGNMENTS OF ERROR**

#### **A. First assignment of error.**

The trial court erred by refusing to consider expert witness Wayne Slagle's testimony that more probably than not, Cindy Phelps slipped and fell on an ice patch near the rear of her car.

#### **B. Second assignment of error.**

The trial court erred by granting summary judgment to Medical Center and Management Group.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

#### **A. Issue raised by the first assignment of error.**

In opposition to the summary-judgment motion, the plaintiffs filed reports and testimony from expert witness Wayne Slagle, a professional engineer experienced in accident reconstruction. Slagle testified that based on his investigation, which included examining the parking lot, reviewing weather

records, and reading witness statements, his opinion was that it was more probable than not that Cindy Phelps slipped and fell on ice that had formed in a low spot in the parking lot near the rear of Cindy Phelps's car. But the trial court refused to consider Slagle's testimony, finding that there was no evidence to support Slagle's opinion that there was ice in the parking lot. Did the trial court err by refusing to consider Slagle's testimony about where and how the accident occurred?

**B. Issue raised by the second assignment of error.**

Medical Center and Management Group moved for summary judgment on the grounds there was no evidence that Cindy Phelps slipped on ice. The plaintiffs responded with evidence from which a jury could reasonably find that Cindy Phelps slipped and fell on a frozen patch of ice near her car. The trial court acknowledged that the plaintiffs had presented evidence supporting their theory, but granted summary judgment because the plaintiffs had not disproved every other possible cause of Cindy Phelps's fall. Did the trial court err by granting summary judgment?

## STATEMENT OF THE CASE

**A. On the morning of November 28, 2005, Vancouver was gripped by cold and icy conditions.**

The morning of November 28, 2005 was cold and overcast in Vancouver.<sup>1</sup> During the night, the temperature had sunk below freezing at around 2 a.m. and it remained below freezing as the morning commute began at 6 a.m.<sup>2</sup>

Mark Magistrale was the executive director of the Family Physicians Group, which has several medical clinics in Vancouver.<sup>3</sup> That morning before he even left home, Magistrale was concerned enough about the weather that he phoned maintenance personnel “to assure that plowing and cleaning and de-icing and that sort of thing was occurring.”<sup>4</sup>

One of the Family Physicians Group’s clinics was located in a medical plaza in the Fisher’s Landing area in southeast Vancouver. Family Physicians Group leased its space from defendant Southwest Washington Medical Center.<sup>5</sup> Property maintenance was performed by defendant Southwest Washington

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<sup>1</sup> CP 148 (Gauker deposition, p. 14, lines 23-25, p. 15, lines 1-10); CP 154 (Gauker deposition, p. 86, lines 1-3).

<sup>2</sup> CP 294 (weather records for Vancouver, Washington on November 28, 2005).

<sup>3</sup> CP 157 (Magistrale deposition, p. 5, lines 16-23).

<sup>4</sup> CP 159 (Magistrale deposition, p. 16, lines 1-6).

<sup>5</sup> CP 157 (Magistrale deposition, p. 7, lines 8-22).

Management Group under the terms of a contract between Medical Center and Management Group.<sup>6</sup>

On the morning of November 28, the weather was sufficiently cold and icy that Management Group elected to apply de-icer on the sidewalks and entry ways at the Fisher's Landing medical plaza.<sup>7</sup> But nothing was done about ice in the parking lot.<sup>8</sup>

**B. Steven Phelps encountered icy streets during his drive to work.**

That morning plaintiff Steven Phelps left for work between 5:45 a.m. and 6 a.m.<sup>9</sup> During his drive from Vancouver to Tigard, Oregon, he encountered ice on the side streets near his Vancouver home as well as in the parking lot at his workplace.<sup>10</sup> Steven Phelps called his wife Cindy to warn her about the slippery road conditions and to suggest that she give herself some extra time to travel to work.<sup>11</sup>

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<sup>6</sup> CP 190 (Hulse deposition, pp. 7-10).

<sup>7</sup> CP 163 (Graves deposition, p. 12, lines 10-18).

<sup>8</sup> CP 165 (Graves deposition, p. 22, lines 9-19).

<sup>9</sup> Supp. CP 396 (S. Phelps deposition, p. 13, lines 13-15).

<sup>10</sup> Supp. CP 396 (S. Phelps deposition, p. 14, lines 5-23).

<sup>11</sup> Supp. CP 396 (S. Phelps deposition, p. 16, lines 13-19); CP 123 (C. Phelps deposition, p. 108, lines 17-25).

**C. Cindy Phelps slipped and fell while walking from her car to the medical clinic where she worked.**

Cindy worked at the Family Physicians Group clinic at Fisher's landing.<sup>12</sup> She left for work at 7 a.m.<sup>13</sup> When her trip was delayed by traffic, she called the clinic and told clinic supervisor Darrin Cook that she would be late.<sup>14</sup> Because of the slick driving conditions, Cook told Cindy to "be careful" and not hurry.<sup>15</sup>

When she arrived at the clinic, Cindy pulled her car into a parking stall in the parking lot.<sup>16</sup> After turning off the engine, she put her car keys in her purse, grabbed her purse and her lunch bag, and got out of her car.<sup>17</sup> Because of where she parked that morning, her route to the clinic required that she walk to the rear of her car, then across the parking lot to the sidewalk, and finally to the clinic.<sup>18</sup>

After closing the car door she took at least one step and then fell to the ground.<sup>19</sup> The next thing she remembers is waking up at home that afternoon with blood on her pillow.<sup>20</sup> She has no

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<sup>12</sup> CP 2, ¶¶ 2, 5; CP 6, ¶¶ 1, 3; CP 148 (Gauker deposition, p. 15, lines 12-14).

<sup>13</sup> CP 127 (C. Phelps deposition, p. 124, lines 15-17).

<sup>14</sup> CP 115-16 (C. Phelps deposition, p. 32, lines 16-25; p. 33, line 1).

<sup>15</sup> CP 116 (C. Phelps deposition, p. 33, lines 1-5); CP 124 (C. Phelps deposition, p. 110, lines 3-11).

<sup>16</sup> CP 117 (C. Phelps deposition, p. 38, line 25, p. 39, lines 1-2).

<sup>17</sup> CP 117 (C. Phelps deposition, p. 39, lines 6-13).

<sup>18</sup> CP 120 (C. Phelps deposition, p. 53, lines 2-15).

<sup>19</sup> CP 128 (C. Phelps deposition, p. 130, lines 1-12); CP 125 (C. Phelps deposition, p. 114, lines 2-7).

<sup>20</sup> CP 118 (C. Phelps deposition, p. 48, lines 3-10).

memory of anything after she began falling and saw the ground coming at her. In particular, she cannot remember where the fall occurred,<sup>21</sup> and she has no recollection of getting medical care after she fell.<sup>22</sup> Furthermore, she is not aware of anyone who saw the fall.<sup>23</sup>

Although Cindy Phelps has no memory of the events, her co-workers testified that she made her way to the clinic, where she was treated for her injuries.<sup>24</sup> She also had a CT scan at a nearby imaging center.<sup>25</sup> While receiving medical treatment, Cindy said that she had slipped.<sup>26</sup>

**D. Clinic supervisor Darrin Cook inspected the parking lot and prepared an incident report.**

After learning of Cindy's accident, clinic employees Janna Moose and Darrin Cook went to the parking lot and found Cindy's car parked in the location shown in the photographs at CP 138-144.<sup>27</sup> As the clinic supervisor, Darrin Cook was second only to the clinic's executive director.<sup>28</sup> Darrin Cook's responsibilities included

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<sup>21</sup> CP 119 (C. Phelps deposition, p. 51, lines 5-10).

<sup>22</sup> CP 118 (C. Phelps deposition, p. 48, lines 11-23).

<sup>23</sup> CP 117 (C. Phelps deposition, p. 38, lines 1-10); CP 44 (plaintiffs' answer to interrogatory no. 10).

<sup>24</sup> CP 96 (record of medical treatment on November 28, 2005); CP 151 (Gauker deposition, pp. 25-28); CP 196 (Moose deposition, pp 8-11).

<sup>25</sup> CP 197 (Moose deposition, pp. 12-14).

<sup>26</sup> CP 196 (Moose deposition, p. 10, lines 8-13).

<sup>27</sup> CP 197-98 (Moose deposition, pp. 15-19).

<sup>28</sup> CP 158 (Magistrale deposition, p. 14, lines 14-20).

preparing an incident report regarding the accident.<sup>29</sup> The incident report is at CP 94. It states that Cynthia Phelps “slipped in parking lot on way into building.” It is signed by Darrin Cook as the “Investigating Person.”

**E. Clinic employee Cheryl Gauker also slipped in the parking lot that morning.**

Cindy Phelps was not the only person who had problems in the parking lot that morning. One of Cindy Phelps’s coworkers, Cheryl Gauker, needed to scrape her car’s windows before she could drive to work.<sup>30</sup> She finally arrived at the parking lot between 7:15 a.m. and 7:30 a.m.<sup>31</sup> When Gauker tried getting out of her car, her feet slipped from beneath her, causing her to tumble back into the driver’s seat.<sup>32</sup> Having fallen once on the slick pavement, Gauker decided to be “extra careful” on her next attempt to get from her car to the clinic.<sup>33</sup> She “sort of scooped along and held onto [her] car” until she reached the sidewalk; then, seeing that the sidewalk appeared to be slick, she “scooted across the sidewalk” and walked on the ground cover to the clinic’s door.<sup>34</sup>

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<sup>29</sup> CP 158 (Magistrale deposition, p. 13, lines 17-25, p. 14, lines 1-5).

<sup>30</sup> CP 148 (Gauker deposition, p. 15, lines 8-10).

<sup>31</sup> CP 147 (Gauker deposition, p. 12, lines 3-9).

<sup>32</sup> CP 148 (Gauker deposition, p. 16, lines 5-15).

<sup>33</sup> CP 149 (Gauker deposition, p. 18, lines 3-9).

<sup>34</sup> CP 149 (Gauker deposition, p. 18, lines 3-13).

**F. Later that day, after the temperature had risen above freezing, a puddle of water was observed near Cindy Phelps's car; it had not rained that day.**

Later November 28, Steven Phelps returned to get Cindy's car.<sup>35</sup> He was accompanied by family friend Debbie Lyons.<sup>36</sup> After finding Cindy's car, Debbie Lyons saw a water puddle approximately 14 inches in diameter near the rear wheel on the car's driver's side.<sup>37</sup> The puddle had formed in a low spot in the parking lot.<sup>38</sup> By then the temperature had risen to 43 degrees.<sup>39</sup> It had not rained between the time Cindy Phelps arrived at work in the morning and when Steven Phelps and Debbie Lyons saw the water puddle that afternoon.<sup>40</sup>

A couple weeks later, Steven Phelps photographed Cindy's car in the stall where he found it on the day of the accident.<sup>41</sup> Those photographs are at CP 137-144. Two of the photos appear on the next two pages in this brief. They show the low spot where Steven Phelps and Debbie Lyons found the water puddle next to Cindy Phelps's car.<sup>42</sup>

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<sup>35</sup> Supp. CP 397 (S. Phelps deposition, p. 20, lines 16-24).

<sup>36</sup> Supp. CP 398 (S. Phelps deposition, p. 21, lines 2-9); CP 224 (witness statement of Deborah Lyons).

<sup>37</sup> CP 224-25 (witness statement of Deborah Lyons).

<sup>38</sup> CP 224 (witness statement of Deborah Lyons).

<sup>39</sup> CP 289 (Pearson Field weather records showing temperature of 43 degrees at 2:53 p.m. on November 28, 2005).

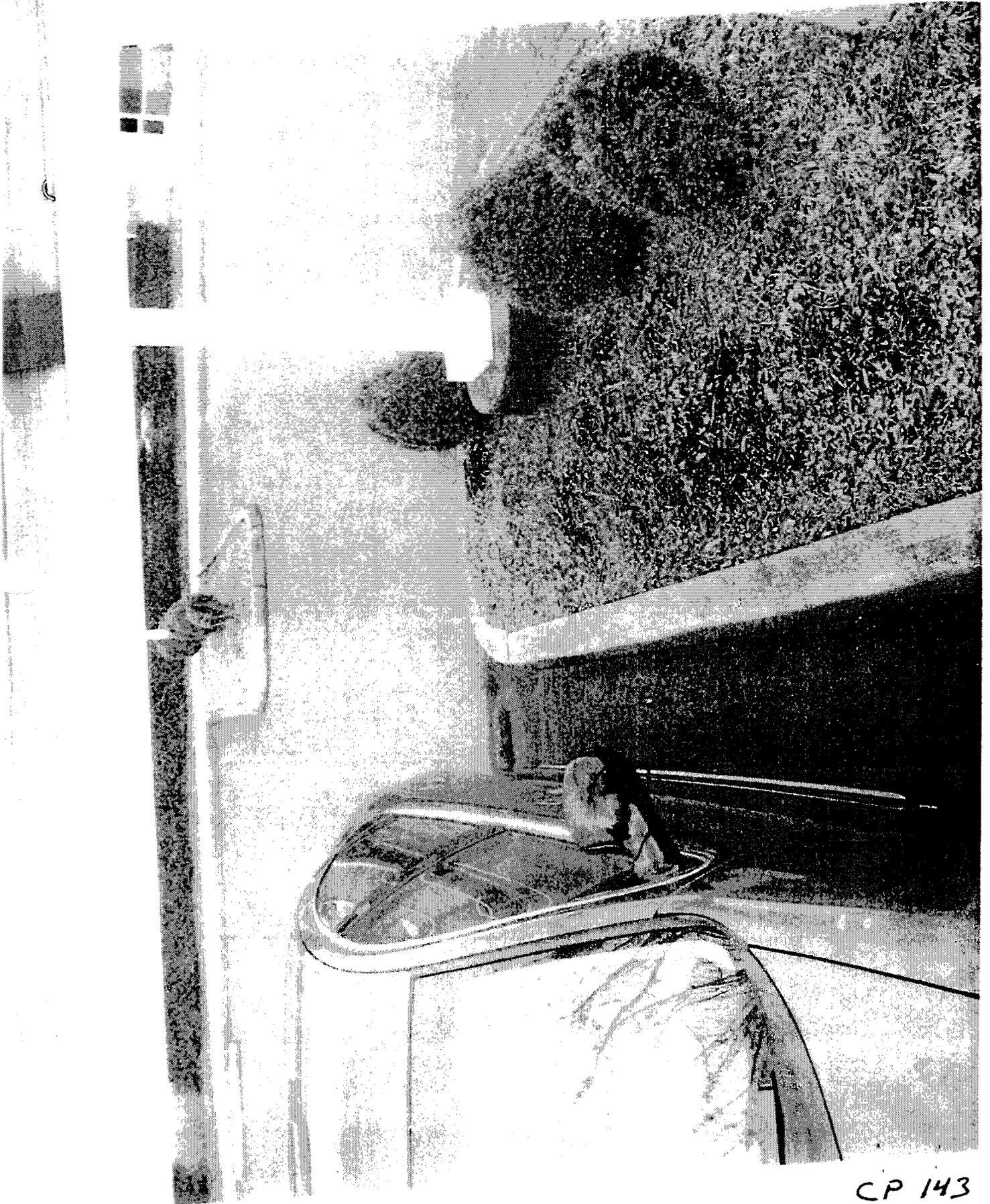
<sup>40</sup> CP 288-89 (weather records for Pearson Field in Vancouver, Washington on November 28, 2005).

<sup>41</sup> Supp. CP 398 (S. Phelps deposition, p. 21, lines 10-25, p. 22, lines 1-15).

<sup>42</sup> CP 225 (witness statement of Debbie Lyons).



CP 142



CP 143

**G. Professional engineer and accident reconstruction expert Wayne Slagle testified that Cindy Phelps slipped on a frozen water puddle near her car.**

During this action the plaintiffs retained expert witness Wayne M. Slagle. Slagle is a registered professional engineer with more than 20 years' experience as an accident reconstructionist.<sup>43</sup> He has consulted on hundreds of cases involving fall-related injuries, and he has testified numerous times in civil actions.<sup>44</sup>

Slagle's investigation included visiting the parking lot.<sup>45</sup> There he found a low spot in the pavement near the rear of the parking stall that Cindy Phelps had used.<sup>46</sup> He also found that the parking lot sloped downward toward the low spot, which would facilitate water puddling in the low spot.<sup>47</sup>

Based on his personal inspection of the parking lot, plus reviewing testimony from witnesses present on the day of the accident, photographs, and weather records, Slagle concluded and testified that in his professional opinion, more likely than not, Cindy Phelps slipped and fell when she stepped on a frozen puddle of water located in a low spot near the rear of where she parked her car.<sup>48</sup>

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<sup>43</sup> CP 205 (declaration of Wayne M. Slagle, P.E.).

<sup>44</sup> CP 206, 216-21 (declaration of Wayne M. Slagle, P.E.).

<sup>45</sup> CP 206 (declaration of Wayne M. Slagle, P.E.).

<sup>46</sup> CP 208 (declaration of Wayne M. Slagle, P.E.).

<sup>47</sup> CP 209 (declaration of Wayne M. Slagle, P.E.).

<sup>48</sup> CP 210-11 (declaration of Wayne M. Slagle, P.E.).

**H. Although the court acknowledged that the evidence was consistent with the plaintiffs' claim that Cindy Phelps slipped and fell on ice in the parking lot, the court ordered summary judgment because the plaintiffs had not excluded every other possible cause of the accident.**

The plaintiffs brought this lawsuit seeking damages for personal injuries allegedly caused by the defendants' negligence.<sup>49</sup> The defendants included Southwest Washington Medical Center, Southwest Washington Management Group, and Family Physicians Group.<sup>50</sup> (The claims against the other named defendants have been dismissed.) The plaintiffs alleged that Southwest Washington Medical Center owned the parking lot where Cindy Phelps fell, and that defendant Southwest Washington Management Group was the Medical Center's agent with respect to maintaining the parking lot.<sup>51</sup> The plaintiffs further alleged that defendants' negligent failure to remove ice from the parking lot caused Cindy Phelps to slip and fall on ice, resulting in severe head injuries.<sup>52</sup>

Medical Center and Management Group moved for summary judgment.<sup>53</sup> Defendant Family Physicians Group did not join in the motion. The moving defendants argued that they were entitled to summary judgment because there was no evidence that their negligence caused the accident. In particular, they argued

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<sup>49</sup> CP 1-4 (plaintiffs' amended complaint).

<sup>50</sup> CP 1 (plaintiffs' amended complaint).

<sup>51</sup> CP 1-2, ¶¶ 1, 3.

<sup>52</sup> CP 3-4, ¶¶ 7-8.

<sup>53</sup> CP 58 (motion for summary judgment).

that there was no evidence that Cynthia Phelps's fall was caused by ice, and consequently a finder of fact could not find that defendants' negligent failure to remove the ice had caused the accident.

The trial judge agreed with that argument and ordered summary judgment against the plaintiffs' claims.<sup>54</sup> The court explained its ruling in a five-page decision that is at CP 330-34. After reviewing the evidence, the court acknowledged that the evidence was *consistent* with the plaintiffs' theory that Cindy Phelps slipped on ice in the parking lot.<sup>55</sup> But the court also said "the evidence is likewise not inconsistent with other possibilities which Plaintiffs cannot exclude."<sup>56</sup> Based on that reasoning, the court ordered summary judgment. Thus, the court seemed to concede that a finder of fact *could* reasonably infer that Cindy Phelps slipped on ice. But the court nonetheless granted summary judgment because the plaintiffs had not shown that slipping on ice was the *only* possible explanation for the accident.

In its ruling, the court explained that it had refused to consider Wayne Slagle's opinion that Cindy Phelps had slipped on ice in the parking lot:

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<sup>54</sup> CP 330-34 (ruling granting defendants' motion for summary judgment).

<sup>55</sup> CP 333 ("The provable facts are consistent, (that is, not inconsistent) with the ice-slip hypothesis . . .) (emphasis in original).

<sup>56</sup> CP 333.

I have reviewed the report of Wayne M. Slagle, Plaintiff's expert witness, who states that in his opinion, Plaintiff slipped on a puddle of ice near the rear of her car. To get there, he opines that sufficient precipitation occurred to cause water to collect and freeze in a low spot in said location. Having been told that Plaintiff slipped on ice, Mr. Slagle concludes that she probably slipped on the puddle of ice near her vehicle.

Mr. Slagle's opinion in that regard is inadmissible, as it is based on a fact not proven, that Plaintiff slipped on ice. Although ER 703 permits an opinion to be based upon facts or data not admissible in evidence, the facts or data must be of the kind generally relied upon by experts in his field. Nowhere in the record does Mr. Slagle state that experts in the witness's field customarily rely upon unsubstantiated speculation, supposition, or hearsay, unsupported by any evidence in the record.<sup>57</sup>

**I. The plaintiffs appealed the judgment dismissing their claims.**

Relying on CR 54(b), the court entered judgment in favor of defendants Southwest Washington Medical Center and Southwest Washington Management Group.<sup>58</sup> Plaintiffs timely filed a notice of appeal.<sup>59</sup> There is no cross-appeal.

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<sup>57</sup> CP 332.

<sup>58</sup> CP 335 (judgment).

<sup>59</sup> CP 343 (notice of appeal).

### SUMMARY OF ARGUMENT

The plaintiffs raise two assignments of error. First, the plaintiffs challenge the trial court's refusal to consider Wayne Slagle's expert opinion that Cindy Phelps slipped and fell on ice that had formed in a low spot in the pavement near the rear of her car. The court held that there was no evidence supporting Slagle's opinion that Cindy Phelps slipped on ice.

The court's decision was wrong. ER 702 permits admission of qualified expert testimony when scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue. Slagle is a qualified expert: In addition to being a licensed professional engineer, he has more than 20 years' experience performing accident reconstructions.

Slagle testified that, more probably than not, Cindy Phelps slipped and fell on ice that had formed in a low spot in the parking lot near the rear of her car. Contrary to the trial court's decision, Slagle's opinion was not based on speculation, conjecture, or hearsay. Slagle's thorough investigation included (1) visiting and inspecting the parking lot; (2) reviewing Cindy Phelps's medical records; (3) studying photographs of the parking lot showing where Cindy Phelps's car was parked on the day of the accident; (4) analyzing weather reports from the Vancouver area from the day before the accident and the day of the accident; and (5) reading witness accounts of what they observed and experienced on the

day of the accident. That is the type of information that experts routinely rely on in forming opinions in connection with litigation.

Based on that information, Slagle testified that more likely than not, Cindy Phelps slipped and fell on ice located in a low spot in the parking lot near her car. Slagle's opinion was supported by facts, including (1) weather records showing below-freezing temperatures; (2) witness statements identifying a low spot filled with water near the rear of Cindy Phelps's car on the afternoon of the accident; (3) Cheryl Gauker's testimony that the parking lot was slippery on the morning of the accident; and (4) Cindy Phelps's testimony that she fell near her car.

Thus, the trial court erred in ruling that Slagle's opinion that Cindy Phelps slipped on ice was based on speculation and hearsay. Rather than relying on speculation and hearsay, Slagle based his opinion on solid factual evidence of the type that experts in his field (and most other fields) use: witness statements; photographs; weather records; personal observations. Therefore, the court should have considered all of Slagle's testimony.

The plaintiffs' second assignment of error challenges the trial court's order granting summary judgment to Medical Center and Management Group. The trial court's decision is peculiar. The court acknowledged that evidence was consistent with the plaintiffs' claims. Ordinarily, therefore, one would expect the court to deny the summary-judgment motion since the record has

evidence from which a trier of fact could find in favor of the plaintiffs. But here the court imposed an additional burden by requiring the plaintiffs to exclude other possible causes of the accident.

The trial court erred. The plaintiffs were not required to establish that theirs was the only possible explanation for the accident. Instead, all they were required to do was present evidence from which a trier of fact could reasonably find facts consistent with their claim that Cindy Phelps slipped and fell on ice in the parking lot. And the record contains such evidence.

The facts in the record establish that it was freezing on the morning of the accident. Another clinic employee, Cheryl Gauker, slipped in the parking lot when she arrived at work, and had to cling to her car to get across the parking lot. Clinic executive director Mark Magistrale was so concerned about the weather that, before he left home in the morning, he called to be sure maintenance personnel were addressing the ice and snow. Cindy Phelps slipped after taking only a step or two after leaving her car. Witnesses that day saw a water puddle located near the rear of Cindy Phelps's car, directly in the route she would have walked to reach the clinic. Since it did not rain that day between the time of the accident and when the puddle was observed, it is reasonable to infer that the water was there when Cindy Phelps arrived at work. And since the weather records establish that the temperature was

below freezing in the morning, it is further reasonable to infer that the water was frozen when Cindy Phelps stepped on it, causing her to fall.

Since the evidence would permit a finder of fact to reasonably conclude that Cindy Phelps slipped and fell on ice in the parking lot, the trial court erred by ordering summary judgment.

### ARGUMENT

**A. First assignment of error: The trial court erred by excluding expert witness Wayne Slagle's testimony that Cindy Phelps probably slipped on ice in the parking lot.**

**1. Standard of review: The admission or exclusion of expert testimony is reviewed for abuse of discretion.**

The first assignment of error challenges the trial court's exclusion of expert witness Wayne Slagle's testimony that Cindy Phelps probably slipped on a puddle of frozen water in the parking lot. A trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion.<sup>60</sup>

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<sup>60</sup> *State v. Phillips*, 123 Wn. App. 761, 765, 98 P.3d 838 (2004), *rev. den.*, 154 Wn.2d 1014 (2005).

2. **Relying on facts and data of the type customarily relied on by experts in his field, Wayne Slagle concluded that it was more probable than not that Cindy Phelps slipped and fell on ice that had formed in a low spot in the parking lot near the rear of her car.**

ER 702<sup>61</sup> permits admission of qualified expert testimony when scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue. A witness without personal knowledge who fails to satisfy the requirements of ER 702 is merely speculating.<sup>62</sup> “Such a witness has no relevant admissible evidence and must be excluded.”<sup>63</sup>

Here, the plaintiffs opposed the summary-judgment motion with reports and testimony from Wayne Slagle. The reports are at CP 83-84 and CP 88-89; Slagle’s declaration is at CP 205-21. Slagle is a licensed professional engineer.<sup>64</sup> He has more than 20 years’ experience doing accident reconstruction.<sup>65</sup> He has testified in more than 200 cases, and he has participated in hundreds of cases involving fall-related injuries.<sup>66</sup>

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<sup>61</sup> “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

<sup>62</sup> *Phillips*, 123 Wn. App. at 765.

<sup>63</sup> *Id.*

<sup>64</sup> CP 205 ¶ 2 (Slagle declaration).

<sup>65</sup> CP 205 ¶ 2 (Slagle declaration).

<sup>66</sup> CP 206 ¶¶ 5-6 (Slagle declaration).

Slagle's investigation included examining the parking lot where Cindy Phelps fell;<sup>67</sup> reviewing her medical records;<sup>68</sup> researching weather records for multiple locations in the Vancouver area on November 27, 2005 and November 28, 2005;<sup>69</sup> studying Steven Phelps's photographs of where he found Cindy Phelps's car;<sup>70</sup> and reading the testimony and accounts of witnesses with personal knowledge of relevant facts.<sup>71</sup> Slagle testified that the information he reviewed is the type of information used by experts in his field, consistent with ER 703.<sup>72</sup>

Based on the information learned through his investigation, as evaluated in light of his experience as an accident reconstructionist, Slagle testified that "it is more probable than not that Ms. Phelps fell at the low spot in the lot, immediately behind where her car was parked, which was at that point extremely slippery or icy."<sup>73</sup> Facts supporting that opinion included (1) Debbie Lyons's observation of a water puddle near the rear of Cindy Phelps's car on the afternoon of the accident; (2) weather records showing that the temperature was below freezing during the early morning of the day of the accident; and (3) Slagle's own

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<sup>67</sup> CP 206 ¶ 6 (Slagle declaration).

<sup>68</sup> CP 207 ¶ 12 (Slagle declaration).

<sup>69</sup> CP 207 ¶ 11 (Slagle declaration).

<sup>70</sup> CP 207 ¶ 13 (Slagle declaration).

<sup>71</sup> CP 207 ¶13, Supp. CP 387 (Slagle deposition at p. 53).

<sup>72</sup> CP 208 ¶ 14 (Slagle declaration).

<sup>73</sup> CP 210 ¶ 26 (Slagle declaration).

inspection of the parking lot, which (consistent with Debbie Lyons's observation) found a low spot in the pavement at a location that Cindy Phelps's would have crossed after leaving her car.

Although the trial court admitted most of Slagle's evidence, it refused to consider Slagle's opinion that Cindy Phelps slipped and fell on ice that had developed in a low spot in the pavement near the rear of her car. In rejecting Slagle's testimony, the court said:

Having been told that Plaintiff slipped on ice, Mr. Slagle concludes that she probably slipped on the puddle of ice near her vehicle.

Ms. [sic] Slagle's opinion in that regard is inadmissible, as it is based upon a fact not proven, that Plaintiff slipped on ice. Although ER 703 permits an opinion to be based upon facts or data not admissible in evidence, the facts or data must be of the kind generally relied upon by experts in his field. Nowhere in the record does Mr. Slagle state that experts in the witness's field customarily rely upon unsubstantiated speculation, supposition, or hearsay, unsupported by any evidence in the record.<sup>74</sup>

Apparently, the court did not understand Slagle's testimony. Slagle's opinion was not based on "[h]aving been told that Plaintiff slipped on ice[.]" Instead, Slagle investigated both (1) *why* Cindy Phelps fell and (2) *where* Cindy Phelps fell.

Contrary to the trial court's ruling, Slagle's answer to "why" she fell was not based on "unsubstantiated speculation,

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<sup>74</sup> CP 332.

supposition, or hearsay[.]”<sup>75</sup> Instead, it was based on his examination of the parking lot, weather records, photographs, and eyewitness statements. That evidence—which is precisely the type of evidence that experts (not to mention juries) rely on in such matters—caused Slagle to conclude that there was a frozen puddle of water in the parking lot near where Cindy Phelps parked. Thus, he did not come to that conclusion based on speculation, but instead based on hard evidence—indeed, evidence that is uncontroverted.

Having concluded that there probably was ice in the parking lot on the morning of the accident, he placed the ice near the rear of Cindy Phelps’s car. That opinion, again, was based on facts learned through his investigation, including witness statements describing a puddle of water found near Cindy Phelps’s car on the afternoon of the accident; his own observations of the parking lot, including the low spot that collected water runoff; photographs of the parking lot showing the low spot near Cindy Phelps’s car; and Cindy Phelps’s testimony that she slipped not long after leaving her car.

In summary, Slagle, a qualified accident reconstruction expert, relied on facts discovered during his investigation to form the opinion that more probably than not, Cindy Phelps slipped and

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<sup>75</sup> CP 332.

fell on an icy spot that had formed in a low spot in the pavement near the rear of her car. The trial court erred by holding that Slagle's testimony was not admissible.

**B. Second assignment of error: The trial court erred by granting summary judgment.**

**1. Standard of review: An order granting summary judgment is reviewed de novo, with all facts and inferences viewed in the light most favorable to the nonmoving party.**

Summary judgment is governed by CR 56. "When reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court."<sup>76</sup> The court may affirm an order granting summary judgment only "if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."<sup>77</sup> "A material fact is of such a nature that it affects the outcome of the litigation."<sup>78</sup> "The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party."<sup>79</sup> Summary judgment is appropriate "only if reasonable persons could reach but one conclusion."<sup>80</sup>

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<sup>76</sup> *Retired Public Employees Council of Washington v. Charles*, 148 Wn.2d 602, 612, 62 P.3d 470 (2003).

<sup>77</sup> *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002).

<sup>78</sup> *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

<sup>79</sup> *Jones*, 146 Wn.2d at 300.

<sup>80</sup> *Retired Public Employees Council*, 148 Wn.2d at 613.

**2. The trial court erred because the evidence established a genuine issue of fact whether Cindy Phelps slipped on ice in the parking lot.**

The plaintiffs alleged that the defendants' negligent failure to remove ice from the parking lot caused Cindy Phelps to slip and fall on ice, resulting in serious head injuries. To maintain an action for negligence, a plaintiff must show (a) that the defendant owed a duty of care to the plaintiff; (b) the defendant breached that duty; (c) injury to the plaintiff resulted; and (d) the defendant's breach was the proximate cause of the injury.<sup>81</sup>

This negligence action involves the duties of a possessor of land. "The common law classification of persons entering upon real property determines the scope of the duty of care owed by the owner or occupier of that property."<sup>82</sup> The three common-law classifications are invitee, licensee, and trespasser.<sup>83</sup>

Here, Cindy Phelps was an invitee. Washington has adopted the definition of invitee in RESTATEMENT (SECOND) OF TORTS § 332 (1965).<sup>84</sup> Section 332 says:

- (1) An invitee is either a public invitee or a business visitor.
- (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a

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<sup>81</sup> *Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 776, 632 P.2d 504 (1981).

<sup>82</sup> *Mucsi v. Graoch Associates Limited*, 144 Wn.2d 847, 854-55, 31 P.3d 684 (2001).

<sup>83</sup> *Iwai v. State of Washington*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996).

<sup>84</sup> *McKinnon v. Wash. Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 650, 414 P.2d 773 (1966).

purpose for which the land is held open to the public.

- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land.

Cindy Phelps was injured in a parking lot held open to the public for use by clinic employees and customers. Therefore, she was a public invitee.<sup>85</sup>

“A landowner has an affirmative duty to maintain common areas in a reasonably safe condition.”<sup>86</sup> That duty extends to the removal of snow and ice.<sup>87</sup> Thus, Medical Center and Management Group had duty to exercise reasonable care to maintain the parking lot in a safe condition by removing snow and ice.

In their motion for summary judgment, Medical Center and Management Group argued that whether they breached that duty was irrelevant because there was no evidence that such a breach was the proximate cause of Cindy Phelps’s fall. “A proximate cause is one that in natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred.”<sup>88</sup>

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<sup>85</sup> *Iwai*, 129 Wn.2d at 91 (the parties agreed that plaintiff was an invitee where the plaintiff slipped and fell in a parking lot held open to the public).

<sup>86</sup> *Mucsi*, 144 Wn.2d at 855.

<sup>87</sup> *Id.* at 856.

<sup>88</sup> *Attwood v. Albertson’s Food Centers, Inc.*, 92 Wn. App. 326, 330, 966 P.2d 351 (1998).

Although proof of proximate cause may not rest on conjecture or speculation, a plaintiff is not required to prove proximate cause to an absolute certainty.<sup>89</sup> Instead, it is sufficient to present evidence that allows a jury reasonably to infer causation from the preponderance of the evidence.<sup>90</sup> Because proximate cause is a fact issue, it is “generally not susceptible to summary judgment.”<sup>91</sup>

Summary judgment was improper here because there was evidence from which a jury could reasonably infer that Cindy Phelps slipped and fell on ice in the parking lot. The defendants’ motion emphasized the absence of direct evidence about the accident. It is true that Cindy Phelps’s head injuries have deprived her of the ability to remember anything that happened after she began falling to the ground. And it is also true that neither party has found a witness to the fall. Thus, no party is able to present direct evidence of what caused Cindy Phelps to slip and fall.

But it is not unusual that to have no direct evidence of an event material to a lawsuit. For that reason, the law views circumstantial evidence as equally reliable as direct evidence.<sup>92</sup> As this court said in *Attwood v. Albertson’s Food Centers, Inc.*,<sup>93</sup> “The plaintiff need not establish causation by direct and positive

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<sup>89</sup> *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947).

<sup>90</sup> *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

<sup>91</sup> *Ruff*, 125 Wn.2d at 703.

<sup>92</sup> *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

<sup>93</sup> *Attwood*, 92 Wn. App. At 331.

evidence, but only by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable.”

Therefore, a lack of direct evidence of the accident does not prevent the plaintiffs from proving causation. Instead, the issue is whether there is evidence of any kind from which a trier of fact could reasonably infer that Cindy Phelps slipped and fell on ice. And, as the trial court acknowledged, there is.

The evidence in the record, viewed in the light most favorable to the plaintiffs, would permit a jury to reasonably make these findings:

- Family Physicians Group is located in southeast Vancouver.
- There is a parking lot next to the Family Physicians Group clinic.
- The temperature at the parking lot fell below freezing at approximately 2 a.m. on the morning of November 28, 2005.
- Before even leaving home in the morning, the Family Physician Group’s executive director was making phone calls to ensure that ice and snow abatement actions were being performed.
- The temperature at the parking lot remained below freezing until at least 7:53 a.m.

- On the morning of November 28, 2005, the weather was cold and overcast in Vancouver.
- It was cold enough that Cheryl Gauker was required to scrape ice from her windshield before she could drive her car.
- It was cold enough that Steven Phelps observed ice both on the side streets in Vancouver and in his company parking lot in Tigard, Oregon.
- Road conditions were sufficiently hazardous in Vancouver that both Steven Phelps and Darrin Cook warned Cindy Phelps to drive carefully on her way to work.
- Cheryl Gauker arrived at the parking lot at between 7:15 a.m. and 7:30 a.m. on the morning of November 28, 2005.
- When Cheryl Gauker attempted to get out of her car, her feet slipped from under her, causing her to tumble backwards into her car.
- Conditions in the parking lot were so slippery and hazardous that Cheryl Gauker was unable to walk normally; instead, she clung to her car for support while carefully maneuvering the length of her car, then chose to avoid the slick sidewalk and instead walk on ground cover.

- The temperature at the parking lot remained below freezing until Cindy Phelps arrived at the parking lot.
- Cindy Phelps parked in a stall in the parking lot.
- Where Cindy Phelps parked required her to walk the length of her car, across the parking lot, and then on the sidewalk to the clinic.
- There was a low spot in the pavement near the back of Cindy Phelps's car.
- Cindy Phelps's path to her workplace required her to cross the low spot.
- The low spot had collected water, and that water was frozen at the time Cindy Phelps was walking to work on November 28.
- After getting out of her car, Cindy Phelps took at least one step, but not many more, then fell to the ground.
- Cindy Phelps fell in the area of the frozen puddle of water.
- The temperature at the parking lot increased during November 28, and was approximately 43 degrees at 3 p.m.
- Debbie Lyons and Steven Phelps saw a water puddle approximately 14 inches in diameter located near the rear of Cindy Phelps's car.

- It did not rain at the parking lot between the time Cindy Phelps arrived and when Debbie Lyons saw the water puddle, nor is there any other evidence suggesting that the water in the puddle collected after Cindy Phelps arrived that morning.

These facts and inferences would permit a jury to find that Cindy Phelps slipped on ice in the parking lot. The evidence supports that conclusion because it shows that the temperature was below freezing on the morning of November 28; the parking lot was slippery and icy; there was a frozen puddle directly in Cindy Phelps's path from her car to her workplace; and Cindy Phelps slipped and fell precisely where she would have encountered the frozen puddle.

Furthermore Wayne Slagle, a qualified accident reconstruction expert, examined these facts and testified that in his expert opinion, it was more likely than not that Cindy Phelps slipped and fell on a patch of ice that had formed in a low spot in the pavement near the rear of her car.

Thus, there was abundant evidence creating a genuine issue of fact whether Cindy Phelps slipped and fell on ice in the parking lot.

In the trial court, the defendants argued that this case is similar to *Marshall v. Bally's Pacwest, Inc.*,<sup>94</sup> in which this court affirmed a summary judgment on the grounds that the plaintiff could not raise a genuine issue of fact about the cause of her injuries.

*Marshall* involved claims for personal injuries the plaintiff suffered while exercising on a treadmill at the defendant's fitness club. The only evidence of the accident was: (a) the plaintiff was using the treadmill; (b) the treadmill abruptly stopped in the middle of the program; (c) the plaintiff reprogrammed the treadmill and pushed the start button. The plaintiff then somehow fell from the treadmill and suffered injuries.

The plaintiff sued, alleging that the treadmill malfunctioned by restarting at 6.2 miles per hour rather than its usual 2.5 miles per hour, which caused plaintiff to be thrown from the treadmill. But according to the appellate court, the plaintiff could not present any evidence to support that theory. In particular, in addition to her own lack of memory, the court noted that the plaintiff was unable to present any evidence from any source that the treadmill had malfunctioned. As this court said, "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."<sup>95</sup> Because

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<sup>94</sup> *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999).

<sup>95</sup> *Id.* at 379.

there was no evidence that there was anything wrong with the treadmill, the plaintiff was asking the jury to speculate about what had caused her to fall.

The plaintiffs' claims are different from *Marshall* because here there *is* evidence of what caused Cindy Phelps's fall. As discussed earlier, the evidence supports the conclusion that the parking lot was icy, that there was a frozen puddle in Cindy Phelps's path to work, and that she slipped and fell on that puddle. The plaintiffs are not asking a jury to speculate about whether there was ice in the parking lot; what the temperature was that morning; whether there was a frozen puddle in her path; or where Cindy Phelps fell. Those are all matters supported by evidence.

This evidence caused the trial court to acknowledge that there was evidence from which a trier of fact could conclude that Cindy Phelps slipped on ice in the parking lot. But the court expected the plaintiffs to not merely present evidence *supporting* their allegations, but to also *refute* and *disprove* every other possible cause. That is not a burden the plaintiffs were required to carry to survive summary judgment. Causation need not be proved to a mathematical certainty, nor does the plaintiff have the burden of disproving every alternative possible cause. The plaintiffs were required only to present evidence from which their theory of

causation could be reasonably and naturally inferred.<sup>96</sup> The fact that reasonable minds could differ only means that there is an issue for trial.<sup>97</sup>

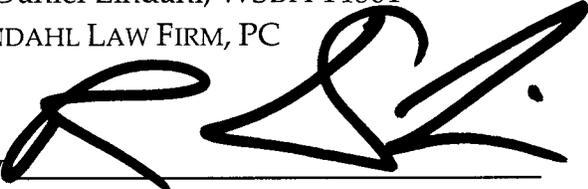
### CONCLUSION

The judgment should be reversed and the case remanded for trial.

Dated: November 26, 2008.

Respectfully submitted,

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<sup>96</sup> *Attwood*, 92 Wn. App. at 331.

<sup>97</sup> *Ruff*, 125 Wn.2d at 703-04 (summary judgment appropriate only when reasonable minds could reach by one conclusion).

**CERTIFICATE OF SERVICE**

I certify that on November 26, 2008, I mailed a copy of the foregoing Appellants' Brief to the persons listed below, at the addresses indicated, postage prepaid.

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