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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 35477-6-III

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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MICHAEL CLARKE,

Appellant,

v.

JAY NICHOLS and MARGARET NICHOLS, husband and wife;  
VERONICA NICHOLS, an individual; and VICKI LANE, an individual,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

Proximate cause is an issue typically reserved for the jury. In granting Defendants' Motions for Summary Judgment on the basis of proximate cause, the trial court erroneously applied an overly onerous level of proof required to establish proximate cause in circumstantial cases. The rule in such cases is well settled. To the extent that Plaintiff Clarke has established the existence of material facts from which a reasonable juror could infer proximate cause, summary judgment on the issue is not appropriate. The cases cited and relied upon by Defendants and the trial court are distinguishable and in the present case do not support the rare and extreme measure of deciding what is otherwise a factual issue as a matter of law.

## II. ARGUMENT

### A. A Reasonable Juror Could Infer Proximate Cause from Established Facts.

Defendants conflate a reasonable inference of negligence from established facts with speculation, guess, and conjecture. While it is true that a party may not rely upon speculation, guess, or conjecture to establish the existence of a fact or facts, it is equally true that jurors are allowed to reasonably infer negligence from established facts. *Home Ins. Co. of New York v. Northern Pac. Ry. Co.*, 18 Wn.2d 798, 803, 140 P.2d

507 (1943). Specifically, if established facts would allow a juror to reasonably conclude that there is a greater probability that the event in question, such as a fall from a ladder, happened in such a way as to render a defendant liable for the fall rather than in such a manner as to preclude liability, then such a conclusion is a reasonable inference properly reserved for the jury. *Id.*

In the present case, the record contains multiple facts from which a juror could reasonably infer Defendants' negligence. Established evidence that a juror should be allowed to consider in this matter includes, but is not limited to: the fact that Defendant Jay Nichols set up the ladder from which Clarke fell; the fact that the ladder was not braced or otherwise secured; the fact that the ladder was placed upon bare ground rather than a solid support surface; the fact that the feet of the ladder were not slip resistant; the fact that Nichols cannot state whether the ladder's side rails were straight or even whether it was fully open and locked in place; the fact that Nichols did not warn Clarke as he let go of the ladder and stopped supporting it; the fact that Clarke fell from the ladder almost immediately after Nichols let go and stopped supporting it; and that Clarke had extensive experience working on ladders and does not believe that he would have fallen from a ladder that was steady and secure. CP 32, 94-96, 109-114.

These facts are established. They are not dependent upon speculation, guess, or conjecture for their existence. As in any circumstantial case, Clarke is unfortunately unable to present direct evidence of why and how he fell. However, in alleging that Defendants breached a duty of reasonable care by engaging in an activity and/or failing to remedy a dangerous condition that resulted in Clarke's injury, he is entitled to have a jury determine whether the established facts support the conclusion that there is a "greater probability" that his fall from the ladder "happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable." *Home Ins. Co. of New York*, 18 Wn.2d at 803. In other words, after considering the established facts regarding the manner in which Nichols set up and used the ladder, the timing of Clarke's fall, as well as Clarke's experience using ladders and belief that he would not have fallen from a steady and secure ladder, could a reasonable juror infer from the evidence that there is a greater probability that Clarke fell due to Defendants' unreasonable actions than due to some other reason for which Defendants would not be liable? It is difficult to imagine how such an inference could be characterized as anything but reasonable.

1. Marshall and Little are Distinguishable.

Defendants rely heavily upon *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999), and *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944, *rev. denied*, 158 Wn.2d 1017 (2006). Their reliance is misplaced.

The distinguishing factors of *Marshall* were discussed in Clarke's opening brief and will not be repeated here in detail. Unlike the present case in which Clarke has established multiple facts regarding use of the ladder from which he fell, the plaintiff in *Marshall* was unable to present any evidence regarding her injury. Indeed, there was no evidence that the treadmill she had been using was defective in any manner, or even that she in fact fell from the treadmill. Consequently, there was no established evidence from which an inference of negligence could have been made. Instead, the court determined that the only means by which facts necessary to prove plaintiff's claim could be surmised was through speculation, guess, or conjecture. In contrast, the present case involves established facts from which a reasonable inference of Defendants' liability may be made.

The opinion in *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944, *rev. denied*, 158 Wn.2d 1017 (2006), is distinguishable for similar reasons. Jared Little was injured while installing gutters on a

house for defendant Countrywood Homes. His brother, who was also a coworker, found him on the ground trying to stand up. His ladder was also on the ground. Jared was disoriented and did not know what happened. There were no witnesses. *Id.* at 945-46.

Jared's claim against Countrywood Homes was dismissed on summary judgment due to his inability to prove proximate cause.

Affirming the trial court's decision, the appellate court reasoned that Little failed to present evidence establishing that defendant's breach, if any, was a proximate cause of his injuries. Echoing the well-settled test from *Homes Ins. Co. of New York*, the court observed that, "To meet his burden, Little needed to present proof sufficient to allow a reasonable person to conclude that the harm, more probably than not, happened in such a way that the moving party should be held liable." *Id.* at 947, citing *Gardner v. Seymour*, 27 Wash.2d 802, 808-09, 180 P.2d 564 (1947). Although not required to provide proof to an absolute certainty, the court noted that Little "needed to submit evidence allowing a reasonable person to infer, without speculating, that Countrywood's negligence more probably than not caused the accident." *Id.* at 947, citing *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999).

Like *Marshall*, *Little* stands for the proposition that summary judgment is appropriate when no evidence is submitted from which an

inference of negligence can be made. Unlike Jared Little who presented no evidence regarding his fall or the ladder from which he presumably fell, the present case involves established facts regarding the ladder, the manner in which it was set up, as well as events immediately preceding Clarke's fall. No such evidence was present in *Little*.

The legal significance of these factual distinctions is apparent from two cases decided by Division 1 of the Court of Appeals. Although the opinions are unpublished and therefore not binding authority, they are nonetheless persuasive since they were issued by the same court that decided *Little* and involve factual distinctions similar to the present case. GR 14.1(a).

In *Fulwiler v. Archon Group, LP*, 122313 WACA, No. 69338-7-1 (Court of Appeals of Washington, Division 1, December 23, 2013), the court reversed the summary judgment dismissal by the trial court of a premises liability personal injury action to recover for injuries from a fall on a set of exterior stairs at Bellevue College.

As in the present case, the defendant in *Fulwiler* moved for summary judgment on various theories, including plaintiff's inability to prove proximate cause since she "did not know" how she fell. *Id.* at \*6. Addressing defendant's argument, the appellate court began by noting that proximate cause is generally a question of fact for the jury and not subject

to summary judgment unless “the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.” *Id.* at \*5, quoting *Bernethv v. Walt Failor’s Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982).

The court further recognized that, “Circumstantial evidence is sufficient to establish a prima facie case of negligence, if it affords room for reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not.” *Id.* at \*5, citing *Hernandez v. Western Farmers Ass’n.*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969).

Ultimately reversing the trial court’s order of summary judgment, the court distinguished the decisions in *Little* and *Marshall* by noting that the plaintiffs in those cases “offered no evidence of why the injured party fell (the cause of the injuries)” and that “their claims were dismissed because the plaintiff’s theory of the defendant’s negligence was based on mere speculation.” *Id.* at \*6-7. Conversely, *Fulwiler* presented evidence that she fell because she was unable to distinguish one step from another. *Id.* at \*7. The evidence, therefore, was sufficient to create an issue of fact as to proximate cause. *Id.*

As in *Fulwiler* and distinct from *Little* and *Marshall*, *Clarke* has presented material facts sufficient to create a factual dispute about why he

fell. Jurors would not be required to speculate about evidence that might equally support competing theories. Rather, established evidence would allow a reasonable juror to conclude that the facts more probably than not support Clarke's theory that his fall from the ladder and resulting injuries were caused by Defendants' negligence in setting up and using the ladder without reasonable care.

Division 1 of the Court of Appeals again addressed a similar case in the unpublished opinion *Champion v. Lowe's HIW, Inc.*, 063014 WACA, No. 70933-0-01 (Court of Appeals of Washington, Division 1, June 30, 2014). Champion sued Lowe's for injuries sustained from a fall while shopping in one of its stores. Plaintiff alleged that she tripped and fell on a pallet lifter parked in the merchandise aisle where she was shopping. *Id.* at \*1. Although plaintiff had no memory of the fall, two witnesses testified that she was looking at merchandise on overhead shelves before she fell face-forward onto the pallet lifter. Neither witness saw plaintiff's feet immediately before she fell. *Id.*

As in the present case, defendant Lowe's moved for summary judgment on the issue of liability due to Champion's lack of memory and the absence of any other witness to the fall itself. *Id.* at \*4-5. Lowe's argued that there was insufficient evidence to prove that plaintiff tripped

on the pallet as opposed to tripping on her own feet. *Id.* at \*5. The trial court granted summary judgment.

Reversing the trial court's order granting summary judgment, the court emphasized the circumstantial evidence and reasonable inferences regarding the cause of Champion's fall. *Id.* Despite the fact that Champion could not remember the incident, and despite the absence of witnesses to Champion's fall, the court reasoned that multiple established facts supported a reasonable inference of Lowe's liability. *Id.* Specifically, the court referenced Champion's proximity to the pallet when she fell, the nature and location of her injuries, as well as her diverted attention to the overhead merchandise as she walked, as factors a reasonable juror could rely upon in finding liability. *Id.* Importantly, the court distinguished its decision in *Little*, where plaintiff relied upon speculation as opposed to a reasonable inference of liability based upon established circumstantial evidence. *Id.*

As in the *Champion* decision where sufficient evidence of defendant's liability was presented despite the plaintiff's lack of memory and the absence of witnesses, Clarke's lack of memory and the absence of a direct witness to his fall are certainly not fatal to his claim. Just as the circumstantial evidence in *Champion* regarding the events and circumstances immediately preceding her fall on the pallet lifter was

sufficient prima facie evidence of defendant's liability, so too is the established circumstantial evidence in the present case. For the same reasons it was error to prevent a jury from considering the circumstantial evidence in *Champion*, it is likewise inappropriate to deny Clarke an opportunity to present his evidence-based theory of liability to a jury.

2. The Evidence Does not Support an Equally Plausible Theory.

Defendants assert that it is equally possible that Clarke slipped and fell due to his own negligence than it is that he did so as a proximate result of Defendants' negligence. Defendants' assertion is refuted by the evidence.

It is important to note that Defendants' assertion that Clarke fell of his own accord relies upon speculation, guess, and conjecture. As opposed to substantial evidence establishing that the ladder was neither set up nor used in a safe manner, there is absolutely no evidence that Clarke merely lost his balance independent of Defendants' actions. To the contrary, established facts regarding Clarke's experience with ladders support the opposite conclusion.

Consequently, this is not a case where a juror would have to speculate about facts that would equally support two competing theories. Unlike the decisions in *Marshall* and *Little*, the evidence from which Defendants' liability could be reasonably inferred in the present case has

been established. Moreover, to the extent that a reasonable juror might interpret the established facts differently, any such differing interpretation of the evidence merely illustrates why summary judgment is not appropriate.

**B. Defendants Owed a Duty to Clarke.**

The trial court granted summary judgment based solely on the issue of proximate cause. Indeed, the record illustrates that the evidence clearly presents issues of material fact on the remaining elements of a premises liability injury claim. As title owners of the property on which Clarke was injured, each defendant is liable for his injuries. *Gildon v. Simon Property Group*, 158 Wn.2d 483, 145 P.3d 1196 (2006). Defendant Jay Nichols is further liable as possessor of the property. *Id.*

The four elements of a negligence claim are the same as those of a premises liability claim. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). Premises liability theory merely governs the scope and nature of Defendants' duty owed Clarke. *Id.* The issue and relevant case law were clearly cited in Clarke's opening brief. Brief of Appellant, p. 9.

Defendants Jay and Margaret Nichols assert that the duty owed to Clarke was that of a licensee. However, factual issues remain as to Clarke's legal status at the time of injury. It is beyond dispute that an

individual's legal status, whether it be invitee, licensee, or trespasser, may change depending on the facts. For example, an invitee may become a licensee if the scope of the invitation is exceeded. *Id.* at 140. Although the threshold issue of whether a duty is owed is a question of law, to the extent that a plaintiff's legal status depends upon a factual determination, it is a question of fact. *Id.* at 128; *see also Egede-Nissen v. Crystal Mountain*, 93 Wn.2d 127, 130, 606 P.2d 1214 (1980).

Consequently, although Clarke may have been a licensee at the time he arrived at the Nichols' property, a factual issue remains as to whether he became an invitee by virtue of conferring an economic benefit to Defendants through his work on the shed. *See* WPI 120.05.

In a very similar case, the Washington State Supreme Court addressed the situation of a stepfather who fell from a scaffold while visiting a building site owned by his stepson. *Ward v. Thompson*, 57 Wn.2d 655, 359 P.2d 143 (1961). Analogous to the present case, defendant asked plaintiff to mount a scaffold to assist in a construction task. Shortly after climbing the scaffold, it collapsed causing plaintiff's injuries. *Id.* at 657.

As in the present case, defendants argued that the plaintiff stepfather was merely a social guest of his stepson and therefore a licensee. Rejecting defendant's argument, the court reasoned that a guest

will attain the status of invitee if the visit results in at least an indirect economic benefit to the owner. *Id.*

Concluding that the stepfather's act of mounting the scaffold to assist in the construction of his stepson's house conferred an economic benefit to his stepson, the court explained that whether plaintiff was motivated out of friendship or parental love is irrelevant. *Id.* at 659. The court concluded that defendant "most certainly" received an economic benefit from plaintiff's work on the scaffold. *Id.*

Consequently, even if Clarke was a licensee at the time he arrived at the Willms Road property, the facts clearly support the conclusion that he was an invitee at the moment of injury. Just as the plaintiff in *Ward* climbed a scaffold out of friendship or devotion to assist his stepson in a construction project, Clarke climbed a ladder to assist his best friend in a construction task. Just as the stepson in *Ward* received a sufficient economic benefit, so too did Defendants in the present case.

Considering further that Defendant Jay Nichols' purpose at the property prior to Clarke's arrival included his intention to work on the shed, coupled with the fact that two ladders were erected adjacent to the shed prior to Clarke's arrival, there is clearly a question of fact as to whether the underlying purpose of Clarke's visit was purely social.

Regardless, at the time of his injury, if not sooner, material facts establish that Clarke was an invitee as reasoned by the court in *Ward*.

As an invitee, Clarke was owed a duty “to exercise ordinary care for his safety.” WPI 120.06; *Miniken v. Carr*, 71 Wn.2d 323, 438 P.2d 716 (1967). At a minimum, the issue of Clarke’s legal status, based upon the factual determination of whether his presence conferred an indirect economic benefit to Defendants, is a question of material fact about which reasonable minds may differ.

Although Defendants Jay and Margaret Nichols correctly recite the duty owed a licensee for conditions on the property, they have ignored a second basis for premises liability. Distinct from liability for an owner’s condition of the premises, is liability for activities of the owner or occupier. WPI 120.03; *Potts v. Amis*, 62 Wn.2d 777, 384 P.2d 825 (1963). The duty in this context is the same to licensees and invitees. *Id.* There is no distinction. As opposed to duties arising from conditions on the land, “an owner of premises has a duty to exercise ordinary care in conducting activities so as to avoid injuring any person who is on the premises with permission and of whose presence the owner is, or should be, aware.” WPI 120.03; *Potts*, 62 Wn.2d at 787.

There is no question that as joint owners of the Willms Road property, Defendants owed a duty to Clarke. Contrary to Defendant

Veronica Nichols' assertion, the fact that she was not present at the property at the time of Clarke's fall is immaterial. As stated by the court in *Gildon*, ownership, possession, or control of a property is sufficient to give rise to a duty to exercise reasonable care. *Gildon*, 158 Wn.2d at 496-97. Either a title owner or a possessor may be liable in a premises liability action. *Id.* at 505.

To the extent that Defendants may be liable for conditions on the property, factual issues remain as to whether Clarke was an invitee or licensee. To the extent that setting up the ladder, having Clarke climb the ladder, and Jay Nichols' letting go of the ladder were activities being conducted on the property, Defendants owed Clarke a duty of reasonable care.

### **C. Defendants Breached Their Duty to Clarke.**

If it is determined that Clarke was a licensee and his fall from the ladder involved a condition on the property, Defendants owed a duty to either exercise reasonable care to make the condition safe or warn the licensee of the condition and risk involved. *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975). If it is determined that Clarke was an invitee, Defendants owed a duty "to exercise ordinary care for his safety." WPI 120.06; *Miniken v. Carr*, 71 Wn.2d 323, 438 P.2d 716 (1967).

With respect to the duty owed an invitee, the evidence establishes that Defendants exercised no degree of care in setting up and using the ladder. No safety measures were taken. No precautions were made. No ordinary care was exercised to ensure that the ladder remained safe, steady, and secure.

If Clarke is determined to be a licensee, the same established facts prove that Defendants breached their duty. They failed to exercise reasonable care to make the ladder safe. Alternatively, they failed to warn Clarke of the unsafe condition and risk involved.

Contrary to Defendants' assertions, the ladder as an unsafe condition was not open and obvious. As Clarke testified, he would not have climbed the ladder had he thought it was unsafe or unsteady. Moreover, as long as Jay was holding the ladder, it felt secure. Clarke was not present when the ladder was set up and had no way of knowing that it was unsafe or risky to climb. At a minimum, whether the ladder as a dangerous condition was "open and obvious" is a question of fact over which reasonable minds could differ.

The duty of ordinary care also applies to Defendants' activities on the property, irrespective of Clarke's status as an invitee or licensee. Again, the facts establish that reasonable care was not taken in setting up and using the ladder. In this regard, the courts have expressed the

important public policy implications of holding property owners to a high degree of care for injuries resulting from activities where the risk of harm is great. As noted by the Court in *Ward*:

Where the danger of harm is great, as it is with scaffolds, **ladders**, and the like, public policy requires that the occupier of the premises take the **utmost precaution** to keep such equipment in a safe condition. *Ward*, 57 Wn.2d at 600 (emphasis added).

Reasonable care with respect to ladders therefore requires the “utmost precaution.” A reasonable juror could certainly find from the evidence that Defendants’ failure to exercise any caution fell far short of their duty to Clarke.

Although Defendants Jay and Margaret Nichols attempt to distinguish *Ward*, the case is both applicable and persuasive. As discussed previously, the case illustrates how a plaintiff’s status can transform from a licensee to an invitee. Moreover, the case did not involve a landlord/tenant issue but rather a claim by a stepfather against his stepson. Finally, to the extent that Defendants have argued that use of the ladder was a “dangerous condition” on the property rather than an activity, the court’s statement that owners must take the utmost precaution to ensure the equipment’s safe condition is directly applicable.

#### **D. Res Ipsa Loquitur Applies.**

Although Clarke does not believe it necessary to rely upon *res ipsa loquitur* as evidence of Defendants' negligence, the established facts nonetheless meet the doctrine's requisite three elements. *Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010).

First, Clarke would not have ordinarily fallen from the ladder in the absence of negligence. As explained by the court in *Curtis*, the first element is satisfied if general experience and observation teach that the result would not be expected without negligence. *Id.* at 891. Although the dangers of ladders are known, the danger arises from a lack of ordinary care by their owners. General experience tells us that an individual should not fall from a ladder if reasonable care is exercised, which prior to climbing the ladder set up by Defendants, had been Clarke's experience.

Second, the ladder that caused Clarke's injuries was in the exclusive control of Defendants. *Id.* There is frankly no dispute that Defendant Jay Nichols exclusively owned, maintained, and controlled the ladder.

Third and finally, Clarke did not contribute to the accident or occurrence. *Id.* Despite Defendants' assertions that Clarke might have contributed to his fall, there is absolutely no evidence to support their assertion.

### III. CONCLUSION

Clarke has presented a prima facie case of Defendants' liability for injuries sustained from a fall on their property. As owners and/or possessors of the property, Defendants owed a duty to Clarke of exercising reasonable care not to injure him while engaging in activities on the property. Established evidence would allow a reasonable juror to conclude that Defendants breached their duty by failing to properly set up and use the ladder from which Clarke fell. Similarly, a reasonable juror could infer from the evidence that Defendants' breach was, more probably than not, a proximate cause of Clarke's injuries, which are not in dispute.

The trial court granted summary judgment and dismissed Clarke's claim on the issue of proximate cause. Since proximate cause is typically reserved for the jury, and since Clarke has presented established facts from which a reasonable juror could infer proximate cause without speculation, guess, or conjecture, it is respectfully requested that the Court reverse the trial court's ruling and reinstate Clarke's cause of action.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of May, 2018

MEYER THORP, PLLC

A handwritten signature in black ink, appearing to read "Stephen K. Meyer". The signature is fluid and cursive, with the first name "Stephen" being the most prominent part.

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

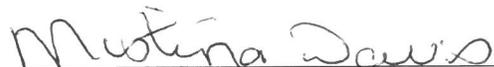
Michael Clarke,	)	
	)	No. 354776
Appellant,	)	
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
Jay Nichols, et ux, et al,	)	
	)	
Respondent.	)	

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