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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 35477-6-III

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

MICHAEL CLARKE,

Appellant,

v.

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

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves the level of proof required to avoid summary judgment on the issue of proximate cause in a circumstantial case of negligence. In granting Respondents' Motions for Summary Judgment on the issue of proximate cause, the trial court erred by exacting a standard of proof that significantly exceeds that required under the law.

Appellant Clarke fell from a ladder while assisting Respondent Jay Nichols on property jointly owned by Respondents. Although Clarke has no recollection of the fall due to his significant injuries, and although Nichols did not witness Clarke's immediate fall from the ladder or impact with the ground below, Appellant has established no less than eleven distinct facts from which a reasonable juror could find that Respondents breached their duty owed to Clarke.

While it is of course true that one cannot rely on speculation or conjecture to establish the existence of fact, it is equally true that reasonable jurors are allowed to infer negligence from established facts. By granting summary judgment on the issue of proximate cause, an issue typically reserved for the jury, the trial court conflated establishing facts through conjecture or speculation, which is clearly not permissible, with a

reasonable inference of negligence based upon proven facts, which falls squarely within the province of the jury.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering its Order dated June 16, 2017, granting Defendants Jay and Margaret Nichols' Motion for Summary Judgment, thereby dismissing, with prejudice, Plaintiff's claims against them. Mr. Clarke presented sufficient evidence from which a reasonable jury could find proximate cause. Genuine issues of material fact remain. Dismissal of Plaintiff's claims was erroneous.
2. The superior court erred in entering its Order dated June 21, 2017, granting Defendant Veronica Nichols' Motion for Summary Judgment, thereby dismissing, with prejudice, Plaintiff's claims against her. Mr. Clarke presented sufficient evidence from which a reasonable jury could find proximate cause. Genuine issues of material fact remain. Dismissal of Plaintiff's claims was erroneous.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a plaintiff, who has alleged defendants' negligence on the theory of premises liability, and who has established the existence of distinct facts regarding defendants' actions and omissions preceding plaintiff's injury, is entitled to present his negligence claim to a jury for their determination of whether the established facts constitute sufficient evidence of proximate cause?
2. If so, whether a reasonable juror could conclude that any of the facts established by Mr. Clarke was a proximate cause of his fall from the ladder?

IV. STATEMENT OF THE CASE

Respondents are siblings who jointly own recreational property in Elk, Washington. CP 92-93; 97-101. Although there is no formal agreement among Respondents, their understanding and practice is that each has equal rights to enter, use, and invite others onto the property. *Id.* Respondent Jay Nichols was informally delegated control and management of the property. *Id.*

The property consists of sixty-four acres. CP 102. The land is primitive and heavily wooded. CP 103. It was described by Respondent Jay Nichols as being “hilly and not very level at all,” with “quite a bit” of underbrush and natural debris on the ground. CP 104. There are three small outbuildings on the property, consisting of a shack, gazebo, and a newly constructed shed. CP 104-05.

Appellant Clarke and Respondent Jay Nichols are best friends. CP 106. On May 12, 2013, Appellant was invited to the property to meet and visit with Jay, who was already there to recreate and work on construction of the shed. CP 107. Prior to Clarke’s arrival at the property, Jay set up two A frame, wood ladders that he owned adjacent to the shed. CP 94-96, 116. Clarke had no role in setting up either ladder. *Id.*

After arriving at the property and visiting for a while, Jay asked Clarke if he would assist in attaching a piece of trim molding to the soffit of the shed. CP 108. Clarke agreed and walked to one of the ladders that was already standing. CP 109.

According to Jay's deposition testimony, the ladder that Clarke used had not been placed upon a level, support surface, but was rather placed directly on fairly level, medium-hard packed dirt. CP 109, 110. The ladder was not braced in any manner to prevent accidental displacement. CP 110. The feet of the ladder were not slip or skid resistant. *Id.* Jay further testified that he did not know how old the ladder was or when it was last used. CP 111. He did not know its duty rating or maximum load. CP 112. Prior to May 12, 2013, Jay had not been trained in safe ladder use. CP 13. Prior to Clarke beginning to climb the ladder on that date, Jay did not inspect the ladder or look to ensure that the side rails were tight. CP 111, 113. He cannot state whether the ladder was fully open with the spreaders locked before being used by Clarke. CP 110.

As Clarke began to climb the ladder, Jay held onto it to steady the ladder. CP 114. With Jay holding the ladder, Clarke noted it to feel steady and secure. CP 94-96. Although Clarke knew that Jay would, at some point, let go of the ladder to begin work from the second ladder, he

expected the ladder to remain steady and secure. *Id.* Jay let go of the ladder without warning or statement to Clarke advising that he was about to do so. CP 94-96. Clarke fell from the ladder, landing on the left side of his head and body. CP 117. Respondents Jay and Margaret Nichols drove Clarke to the hospital, where he was noted to have sustained extensive internal and orthopedic injuries. CP 118-23.

Jay did not see Clarke fall from the ladder. Clarke has no memory of the fall. CP 94-96. He has admitted that he cannot state with certainty what happened, other than that he did not set up the ladder which felt steady and secure while Jay was holding it. *Id.* Prior to May 12, 2013, Clarke had extensive experience working on ladders. *Id.* Having climbed, stood on, worked from, and descended ladders hundreds of times prior to May 12, 2013, he had never fallen from a ladder. *Id.* He does not believe that he would have fallen on that date from a steady and secure ladder. *Id.*

At some unknown date after May 12, 2013, the ladder used by Clarke was stolen from Respondents' property. CP 115. It has not been recovered and is not available. *Id.*

Clarke filed suit against Respondents in Spokane County Superior Court alleging Respondents' negligence pursuant to premises liability theory in causing his fall from the ladder and resulting injuries. CP 1-6.

Discovery was conducted, including the deposition testimony of Respondent Jay Nichols and Appellant Clarke.

Respondents Jay and Margaret Nichols and Respondent Veronica Nichols filed Motions for Summary Judgment. On June 16, 2017, the superior court heard oral argument. VROP. Although Respondents presented various arguments in support of summary judgment, the court granted the motions solely on the issue of proximate cause. VROP 27-28.

As explained in the court's oral ruling, Mr. Clarke "cannot say why or how you fell from the ladder; and that's really what you've got to have in order to prove your case." *Id.* at 27. Regarding the "11 facts" established by Appellant, the court further explained that "There has to be a link between the failure to inspect the ladder and what caused the fall, and there's - - there's nothing. There's nothing here." *Id.* Ultimately, the court concluded that Appellant did not "meet a certain threshold here" based on causation. *Id.* at 28.

Clarke appeals the court's granting of summary judgment on the issue of proximate cause.

V. SUMMARY OF THE ARGUMENT

Appellant's premises liability claim is circumstantial. Due to injuries sustained in the fall, he has no memory of it. There were no other witnesses to the fall itself. However, eleven distinct facts regarding the ladder and how it was set up by Respondent Jay Nichols have been established. The eleven facts are not in dispute.

When considering the undisputed facts, particularly when viewed in a light most favorable to Appellant, the threshold issue of proximate cause has been established. Clarke is not required to prove proximate cause to an absolute certainty. Rather, the question is whether a reasonable juror could infer Respondents' negligence from any of the eleven established facts. Specifically, could a reasonable juror find a greater probability that any of the established facts, alone or in combination, was a proximate cause of Appellant's fall as opposed to the alternative of the fall occurring independent of any alleged negligence? Could a reasonable person conclude that any or all of the eleven acts and omissions were more probably than not "a" proximate cause of Appellant's fall? Could reasonable minds differ regarding the significance to be afforded the established facts in terms of causation? Appellant maintains the answer to each question is unequivocally yes.

VI. STANDARD OF REVIEW

When reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 588-89, 999 P.2d 42 (2000), citing *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 589. In so deciding, the court must consider all facts submitted and all reasonable inferences therefrom in a light most favorable to the nonmoving party. *Id.* The court should grant summary judgment only if reasonable minds could reach but one conclusion. *Id.*

Issues of proximate cause are ordinarily reserved for the jury unless the facts are undisputed and not subject to reasonable differences of opinion or interpretation. *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 142, 727 P.2d 655 (1986). The issue of proximate cause should be removed from the jury and decided as a matter of law only when the facts are undisputed and “the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion...” *Id.*

VII. ARGUMENT

A plaintiff alleging negligence must 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, 128, 875 P.2d 621 (1994), citing *Pedroza v. Bryant*, 101 Wash.2d 226, 228, 677 P.2d 166 (1984). In the present case, summary judgment was granted solely on the fourth element; the issue of proximate cause.

Contrary to the trial court's orders under appeal, Appellant has established the existence of relevant facts from which a reasonable juror could infer proximate cause. Indeed, it would be *unreasonable* to suggest that inferences from the established facts are incapable of reasonable doubt or difference of opinion.

A. Proximate Cause may be Established through Legitimate Inference from Established Facts.

Proximate cause includes two elements: cause in fact and legal causation. *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 142, 727 P.2d 655 (1986). Cause in fact is also referred to as "but for" causation. *Id.* Legal causation involves a determination of whether liability should attach

as a matter of law given the existence of cause in fact. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008). There may be more than one proximate cause of an injury or event. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 709 P.2d 774 (1985); WPI 15.01. At issue in the present appeal is cause in fact or “but for” causation.

In their briefing before the trial court in support of their Motions for Summary Judgment, Respondents correctly stated that a finding of negligence cannot be based upon mere guess, speculation, or conjecture. Unfortunately, Respondents and the trial court erroneously equated a juror’s valid ability to draw a reasonable inference of proximate cause from established facts with guess, speculation, and/or conjecture.

While it is, of course, true that negligence cannot be assumed, it may be established either through direct evidence “or by legitimate inference from established facts.” *Grange v. Finlay*, 58 Wn.2d 528, 531, 364 P.2d 234 (1961). Legitimate inference from established facts does not equate to guess, speculation, and/or conjecture. Moreover, it rests squarely within the province of the jury.

One of the earliest decisions addressing the level of proof required to establish proximate cause in cases of circumstantial evidence was *Home Ins. Co. of New York v. Northern Pac. Ry. Co.*, 18 Wn.2d 798, 140 P.2d

507 (1943). The appellant in the case, Northern Pacific Railway Company, had been found liable for the destruction of wheat due to a fire. There were no witnesses to the fire's origin and no direct evidence as to the cause of the fire. *Id.* at 802. In its defense, appellant argued that the fire was due to acts of negligence by the owner and shipper. Ultimately rejecting appellant's defense, the court recognized the following rule governing circumstantial claims of liability:

The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture. It is also the rule that the one having the affirmative of an issue does not have to make proof to an absolute certainty. It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the thing in question, such as the occurrence of a fire, 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. In applying the circumstantial evidence to prove a fact, the *trier of fact* must recognize the distinction between that which is mere conjecture and what is a reasonable inference. *Id.* at 803 (emphasis added).

Unlike Appellant Clarke in the present appeal, the appellant in *Home Ins. Co.* was unable to establish the existence of "any proven facts" from which a factfinder could reasonably infer negligence by the opposing party. *Id.* at 804. The well-established rule applied by the court clearly distinguishes conjecture and speculation from the legitimate inference of

negligence from established facts. Furthermore, the distinction between conjecture and reasonable inference is for the “trier of fact” to decide. *Id.*

The court addressed the same issue in *Grange v. Finlay*, 58 Wn.2d 528, 364 P.2d 234 (1961). The plaintiff in *Grange* owned a boat moorage facility. The defendant owned a boat that he kept at plaintiff’s facility. Plaintiff’s facility was damaged by a fire on defendant’s boat, the start of which was not witnessed. However, the day before the fire defendant had taken his boat out into the lake where it caught fire. The fire was ultimately extinguished, and the boat was brought back to the moorage facility. At the facility, defendant examined the boat and doused more water on a mattress. He remained with the boat for approximately fifteen minutes, advised plaintiff that there had been a fire on the boat, and then went home. *Id.* at 530.

Approximately 2 a.m. the following morning, plaintiffs awoke to a fire on defendant’s boat that spread to the surrounding facility. Although the jury found defendant liable for the fire, the trial court set aside the verdict on the grounds that “there was no evidence that the fire was the result of negligence of the defendant.” *Id.* at 530-31.

Reversing the trial court’s decision, the court acknowledged that defendant’s negligence cannot be assumed. Instead, “it must be

established by evidence or by legitimate inference from the established facts.” *Id.* at 531. After quoting the rule described in *Home Ins. Co.*, the court reasoned that the jury had been presented with evidence from which it could reasonably infer defendant’s negligence as the cause of the fire. *Id.* at 531 – 32. Other than the established facts, no other explanation as to how the fire could have started was offered. The jury was not asked to conjecture between opposing theories with no basis in fact. *Id.* at 532.

As did the plaintiffs in *Grange*, Clarke has established evidence and facts from which a reasonable juror could find in his favor. The facts regarding Respondent Nichols’ acts and omissions in setting up and having Clarke use the ladder are undisputed. Their existence does not require guess, conjecture, or speculation.

Furthermore, like the defendant in *Grange*, Respondents in the current appeal have not offered any explanation based in fact, other than their acts and omissions, for Clarke’s fall from the ladder. Ironically, although Respondents may assert that Clarke may have fallen due to his own negligence, such an assertion has not been established and is based entirely on the type of guess, conjecture, and speculation to which they erroneously attribute Appellant. In fact, Clarke’s declaration makes clear

that given his experience using ladders, he does not believe he would have fallen from a ladder that was steady and secure.

The current case is no more circumstantial than *Grange*. Just as there was no direct witness to the fire in *Grange*, there was no direct witness to Clarke's fall from the ladder. In each case, however, relevant facts preceding the event in question were established by plaintiffs. Just as the jury in *Grange* was entitled infer defendant's negligence from the established facts, so too is it appropriate in the present case for a jury to determine whether Respondents' negligence has been established by "legitimate inference from the established facts." *Id.* at 531.

B. The Established Facts Support a Reasonable Inference of Respondents' Negligence.

Clarke has established no less than eleven distinct facts from which a reasonable juror could legitimately infer causation and Respondents' negligence. Established material facts which support both a breach and proximate cause include:

1. Respondent did not inspect the ladder before Clarke's use;
2. The ladder was set directly upon "fairly level" soil rather than a level support surface;
3. The ladder was not braced in any manner to prevent accidental displacement;
4. The feet of the ladder were not slip resistant;
5. Respondent did not know the age of the ladder or when it was last used;

6. Respondent did not know the maximum weight capacity of the ladder;
7. Respondent did not inspect the side rails to ensure they were straight;
8. Respondent cannot state whether the ladder was fully open;
9. Respondent cannot state whether Clarke had finished climbing before he let go of the ladder;
10. Respondent did not warn Clarke that he was about to let go of the ladder; and
11. Clarke had extensive experience with ladders and would not likely have fallen but for the ladder being unsteady.

Consequently, Clarke should be allowed to argue to a jury that Respondents' acts and omissions in setting up and using the ladder were "a" proximate cause of his fall from a ladder that was not properly secure, steady, or safe. Again, Respondents have offered no evidence establishing an alternate theory.

The reasonableness and legitimacy of a juror's inference of causation in the present case is further supported by 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 v. Thompson*, 57 Wn.2d 655, 359 P.2d 143 (1961):

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. *Id.* at 660 (emphasis added).

In the present case, it has been established that Respondents took no precaution regarding the safe condition and use of the ladder. A reasonable juror could easily find that the established facts in this matter demonstrate Respondents' failure to take the "utmost precaution," and that this failure was a proximate cause of Clarke's fall. At a minimum, reasonable minds could certainly differ over such an inference.

The relevance of the established facts in the present case is further illustrated by administrative rules and regulations regarding the safe use and maintenance of ladders. Although Respondents were not employers and not subject to the requirements of ladder care and use set forth in WAC 296-876, Ladders, Portable and Fixed, the code is nonetheless indicative of Respondents' failure to exercise the utmost precaution, as well as the adverse safety implications of their established acts and omissions relative to the ladder. For example, portable ladders must be inspected, maintained and stored properly. WAC 296-876-300, WAC 296-876-30005. Ladders must not be used in excess of the maximum intended load or rating capacity. WAC 296-876-40005. Ladders must be secured so as to avoid possible displacement or placed on a level support surface with a secure footing. WAC 296-876-40015. They must be set up at a proper angle and precautions taken to make sure a ladder is not

moved, shifted, or adjusted while anyone is on it. WAC 296-876-40020; 296-876-40040.

Again, Appellant is not arguing that Respondents were subject to workplace safety rules governing the use of ladders. However, to the extent that the rules illustrate precautions necessary to ensure the safe use of ladders, and to the extent Clarke has established that such precautions were not taken by Respondents, the rules merely reflect that it would be reasonable for a juror to infer Respondents' negligence from their established acts and omissions regarding the ladder.

C. *Marshall v. Bally's* is Distinguishable.

Respondents and the trial court relied heavily upon the decision in *Marshall v. Bally's Pacwest Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999). The case is factually distinct from the present appeal.

The plaintiff in *Marshall* sued the owner of a health club for injuries allegedly sustained when she was thrown from a defective treadmill. As in the present case, there were no witnesses to plaintiff's injury; she had no memory of being "thrown" from the treadmill due to a resulting head injury; and the treadmill was not available for inspection prior to trial. *Id.* at 375 - 376. That is where the similarity to the present appeal ends.

Unlike the present appeal, the plaintiff in *Marshall* failed to establish any facts from which a reasonable juror could infer defendant's negligence. *Id.* at 379 – 80. Rejecting plaintiff's claim, the court noted that she provided no evidence that she was in fact thrown from the machine; or even if she was, what caused her to be thrown; or how she was injured. *Id.* In short, plaintiff could only establish relevant facts through guess, conjecture, or speculation.

In contrast, it has been established that Clarke fell from the ladder. That fact is not disputed. Likewise, there is no dispute that Clarke sustained injuries as a direct result of the fall from the ladder. Furthermore, Clarke has established multiple, distinct material facts, any one of which a reasonable juror could find was "a" proximate cause of his fall.

Marshall cannot be read, therefore, as requiring proximate cause to be established with absolute certainty or direct evidence. Nor can it be read as abrogating a juror's valid ability and authority to reasonably infer proximate cause from established facts as recognized by the courts in *Home Ins. Co.* and *Grange*.

Finally, although not commenting directly upon the *Marshall* court's discussion of proximate cause, this court has recently disagreed

with *Marshall's* apparent approval of a rebuttable presumption instruction as a remedy for spoliation. *Cook v. Tarbert Logging*, 190 Wn. App. 448, n.7, 360 P.3d 855 (2015).

D. The Elements of *Res Ipsa Loquitur* are Satisfied.

Although Appellant maintains that sufficient proof of proximate cause exists so as to render the doctrine of *res ipsa loquitur* unnecessary, should this court conclude otherwise, the doctrine's inference of negligence should be available to Appellant under the established facts.

A plaintiff seeking to rely upon the doctrine must first establish three elements. *Curtis v. Lein*, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010). First, that the event that caused plaintiff's injury would not ordinarily happen in the absence of negligence. Second, that the instrument that caused the injury was in the exclusive control of defendant. Third, that plaintiff did not contribute to the accident or occurrence. *Id.*

Although the trial court concluded that *res ipsa loquitur* did not apply in the present case, no rationale was given. Given the established facts of this case, particularly when viewed in a light most favorable to Appellant, the three elements have been met.

Initially, general experience and observation tells us that if ladders are set up and used with reasonable care, an individual should not fall from a ladder absent negligence. *Id.* Secondly, there is no dispute that the ladder was owned and controlled by Respondent Jay Nichols. Thirdly, there is no evidence establishing, or even suggesting, that Clarke contributed to his fall. Respondents may not rely upon guess, conjecture, or speculation to establish facts from which Clarke's negligence might be inferred.

Consequently, should it be necessary, the doctrine of *res ipsa loquitur* should be made available to Appellant to establish a prima facie case of negligence. *Id.* at 894.

VIII. CONCLUSION

Issues of proximate cause are generally reserved for the jury. Summary judgment on the issue is appropriate only if the established facts are incapable of producing a reasonable inference of causation. Appellant does not rely on guess, conjecture, or speculation to establish material facts. Indeed, a juror's ability and authority to draw reasonable conclusions regarding liability from established material facts constitutes an allowable inference rather than guess, conjecture, or speculation. In the present case, Clarke has established material facts from which a juror

could reasonably infer causation and ultimately Respondents' liability. For the purpose of defeating summary judgment, such an inference is rendered that much more reasonable when the facts and inference are viewed most favorably for Appellant. At a minimum, reasonable minds could differ.

It is therefore respectfully requested that the trial court's orders granting Respondents' Motions for Summary Judgment, dated June 16, 2017, and June 21, 2017, be reversed.

RESPECTFULLY SUBMITTED this 1st day of February, 2018

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DIVISION III

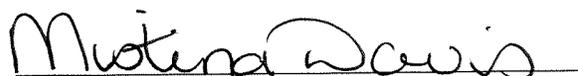
Michael Clarke,)	
)	No. 354776
Appellant,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
Jay Nichols, et ux, et al,)	
)	
Respondent.)	

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