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APR 03 2018

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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BRIEF OF RESPONDENTS

JAY NICHOLS AND MARGARET NICHOLS

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**I. COUNTERSTATEMENT OF THE ISSUE**

Whether the trial court properly granted summary judgment dismissal of the claim of Appellant Michael Clarke against Respondents Jay Nichols and Margaret Nichols, husband and wife, where Clarke fell from a ladder while on the Nichols' property, but does not know, and cannot present admissible evidence regarding, why or how he fell, and accordingly, Clarke cannot prove that any action or inaction by Respondents Nichols was a proximate cause of his fall and injuries?

**II. STATEMENT OF THE CASE**

Michael Clarke and Jay Nichols have been close friends for approximately 60 years. (CP 22, 38-39) On May 12, 2013, Clarke met Jay Nichols on recreational property that Nichols and his sisters own off Willms Road in Spokane County, Washington. This property is primarily native woods, but does contain two small shacks and an outhouse. Clarke and Nichols

planned to start a campfire and socialize. Clarke had been to the property at least 10 times before May 12, 2013. (CP 23-24)

After starting a campfire and talking for some time, Clarke and Jay Nichols attempted to install a piece of soffit trim onto one of the shacks. (CP 25) The soffit trim was approximately six feet long, less than two inches wide, and less than two inches thick. (CP 25-26) It weighed less than a pound. (CP 26) The plan was for Clarke and Nichols each to ascend separate ladders placed approximately six feet apart, with Clarke holding up one end of the trim and Nichols the other end. (CP 27-28) Nichols would then use a nail or screw gun to attach the trim above his head, and work his way with the nail/screw gun toward the end being held up by Clarke, until the trim was fully attached. *Id.*

Clarke and Jay Nichols were talking in close proximity as Clarke ascended his ladder. (CP 29) Nichols had his hands on Clarke's ladder while they were talking, but Clarke did not ask Nichols to hold onto the ladder, nor did Clarke believe he needed

someone to steady the ladder. *Id.* Clarke fully expected that Nichols would leave Clarke's side so Nichols could ascend the second ladder. (CP 29-30) When Jay Nichols removed his hands from the ladder, the ladder felt okay, not unstable. (CP 29) As planned, Nichols then walked toward the second ladder. (CP 30-31) At some point while Nichols was preparing to ascend, or was ascending, the second ladder, Clarke fell off the first ladder, likely from the third rung, and onto his side. (CP 30, 33, 41)

Clarke does not know why he fell off the ladder. (CP 30-31) He does not believe that Jay Nichols did anything to cause his fall. (CP 30, 34) He does not know if the ladder broke, and there is no evidence that the ladder was broken or defective. (CP 32) Clarke does not recall the ladder moving or wiggling. (CP 29-31) All Clarke remembers is that one moment his ladder was solid, and the next moment he was "upside down in the air." (CP 30-31) The only potential witness, Jay Nichols, had his back turned and did not see Clarke fall. (CP 41)

Clarke brought what was styled as a premises liability suit against Jay and Margaret Nichols (as well as Jay's sisters), seeking compensation for injuries allegedly sustained when he fell off the ladder. (CP 1-6) The Nichols moved for summary judgment, on the primary basis that Clarke could not prove the essential element of proximate cause. (CP 42-51, 186-196, 219-220) On June 16, 2017, the trial court granted the Nichols' motion for summary judgment of dismissal and entered an associated order. (CP 202-204) On July 14, 2017, Clarke filed a Notice of Appeal. (CP 210-215)

### **III. ARGUMENT**

#### **A. Standard of Review**

An appellate court reviews *de novo* a trial court's ruling granting (or denying) a motion for summary judgment, performing the same inquiry as the trial court. *E.g., Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). "The purpose of a summary judgment is to avoid a useless trial

when there is no genuine issue of any material fact.” *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). On a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (en banc) (internal citations omitted). The facts are viewed in a light most favorable to the non-moving party. *Id.* at 226. “[A] nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.” *Seven Gables Corp.*, 106 Wn.2d at 13.

B. Nichols Did Not Breach a Duty Owed to Clarke

In the Brief of Appellant, Clarke describes his claim as one of “premises liability;” however, Clarke did not brief premises liability principles or the application of those principles to the facts of this case. Instead, he briefed a claim based on principles of simple negligence, with an unclear description of the duty(ies) allegedly owed to Clarke. Of note, a condition of, or on, the premises really is not a factor in Clarke’s claim.

Because premises liability principles were not briefed, this Court should not consider them. In case the Court decides otherwise, however, Nichols will set forth herein the general principles that apply, and the outcome of the application to this case. At the time of the incident, Clarke was a licensee. A licensee is “a person who is privileged to enter or remain on land only by virtue of the possessor’s consent.” *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). “A licensee includes a social guest, that is, a person who has been invited but does not

meet the legal definition of invitee.” *Id.* For example, a party guest is a licensee, not an invitee. *Id.* at 668. Here, Clarke was a social guest of Jay Nichols, his long-time friend.

The Washington State Supreme Court has adopted the Restatement (Second) of Torts, §342, which sets forth the duty a landowner owes to licensees:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and risk involved.

*Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975).

Thus, under the Restatement, Jay Nichols’ duty to Clarke was

limited to warning Clarke about unsafe conditions of which Jay Nichols was aware, but which Clarke did not know or have reason to know existed. Jay Nichols owed his licensee, Clarke, a limited duty to warn him of hidden dangerous conditions, but the dangers associated with climbing a ladder are open and obvious. Also open and obvious were the surface on which the ladder was placed, the setup of the ladder, and the like. Thus, even if Jay Nichols' duty was determined by Clarke's status as a licensee, Nichols did not breach that duty. There were no hidden dangers of which to warn Clarke.<sup>1</sup>

Turning now to a general negligence claim, Clarke must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. If any

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<sup>1</sup> Clarke's reference to a case reportedly requiring landowners to take the "utmost precaution" with ladders is not applicable here. *Ward v. Thompson*, 57 Wn.2d 655, 359 P.2d 143 (1961). The plaintiff in *Ward* was an invitee, whereas Clarke was a licensee. Clarke was not owed the same duty as Ward. Moreover, the *Ward* court stated only that landlords are required to "take the utmost precaution to keep such equipment in a safe condition," *id.* 660, and not, as Clarke's brief states, "exercise the utmost precaution while using the ladder." The *Ward* decision, in which the plaintiff's injuries were undisputedly caused by a scaffolding collapse, set forth a landlord's duty with respect to defective equipment only. Again, there is no evidence that the ladder used by Clarke was defective.

of these elements cannot be established as a matter of law, summary judgment for the defendant is proper. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 553, 192 P.3d 886 (2008). Clarke does not set forth in his brief the specific duty(ies) he contends the Nichols owed him, and breached. Clarke sets forth numerous Washington Administrative Code provisions applying to ladder use in an employment context, but he concedes none of those standards applies to the Nichols. Presumably, Clarke intended to assert that Jay Nichols had a duty to erect the ladder in a reasonably safe manner. Of course, Clarke also had a duty to evaluate the surrounding area and ladder before climbing it, to look out for his own safety. Regardless, and importantly, Clarke has not offered evidence that Jay Nichols did not use reasonable care in setting up the ladder. In fact, Clarke does not believe Nichols caused his fall, nor does Clarke claim that he expected Nichols to steady his ladder. Indeed, both Nichols and Clarke testified under oath the ladder was stable. Clarke fully expected that Nichols would not hold his ladder, but instead would leave

the proximity of Clarke's ladder to climb a separate ladder located approximately six feet away. Clarke may have simply lost his balance. There is no evidence Nicholas breached a duty owed to Clarke.

Clarke points to "11 distinct facts" that he claims can establish duty, breach and causation, all at once, through some sort of "inferences." Clarke's arguments interchangeably move among these concepts, attempting to use inferences of negligence to establish causation. These alleged "facts" include that Jay Nichols did not "inspect" the ladder before Clarke's use, did not set the ladder on a level support surface, did not brace the ladder to prevent accidental displacement, did not know the age or weight limit of the ladder, and the like. These "facts" are irrelevant, however. Even if Jay Nichols was legally obligated to perform all of those acts, and even if he failed to do so, there is absolutely no evidence that any such failure proximately caused Clarke to fall off the ladder. There is no evidence the ladder broke, was defective, or slipped. There is no evidence the

ladder was dilapidated due to age, or that Clarke was too heavy to use the ladder. There is no evidence that Clarke fell because the ladder tipped or moved, as opposed to the ladder moved because Clarke lost his balance and fell. There are no evidence of a defect in the ladder or a deficiency in how it was set up. Thus, the age, condition, weight capacity, placement and physical characteristics of the ladder, and whether Jay Nichols “inspected” the ladder, are all irrelevant, as there is no causal link to Clarke’s fall, beyond pure speculation.

A party cannot rely on speculation or argumentative assertions that there are disputed issues of material fact to defeat a motion for summary judgment. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). To avoid summary judgment, the evidence must be sufficient “for a reasonable jury to return a verdict for the nonmoving party.” *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). The mere occurrence of an accident and an injury is not sufficient to find a defendant negligent. *Marshall v.*

*Bally's PacWest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Clarke's theory of the case is based on pure speculation that Nichols must have done something to cause his fall, but there is no evidence that Nichols did anything (1) that Clarke did not expect him to do, or (2) that contributed in any way to Clarke falling off the ladder. People fall off ladders all the time without the fall being caused by another person. There is simply no evidence that the Nichols breached any duty of care to Clarke.

C. Clarke Cannot Meet Burden of Proving Proximate Cause.

The mere occurrence of an accident and an injury is not sufficient to find a defendant negligent. *Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). In *Marshall*, the plaintiff sued her gym for negligence after she fell off a treadmill. *Id.* at 378. During her deposition, the plaintiff demonstrated "her total lack of memory regarding the accident." *Id.* at 379. Due to her lack of memory, the plaintiff "simply offer[ed] a theory as to how she sustained her injuries," but did

not provide any “evidence that she was thrown from the machine, what caused her to be thrown from the machine, or how she was injured.” *Id.* at 379-80. In upholding the trial court’s summary judgment dismissal of her claims, the court held, “[g]iven this failure to produce evidence explaining how the accident occurred, proximate cause cannot be established.” *Id.*

Just like the plaintiff in *Marshall*, all we know is that Clarke fell. There is no evidence why or how he fell. There are no eye witnesses to Clarke’s fall, and Clarke has no memory of what caused his fall. Clarke cannot meet his burden to produce evidence explaining how and why the accident occurred; accordingly, as in *Marshall*, proximate cause cannot be established.

In *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944, *rev. denied*, 158 Wn.2d 1017 (2006), Division I of the Court of Appeals addressed the correctness of an order granting summary judgment on the issue of proximate cause in

similar circumstances. In *Little*, Jared Little apparently fell from a ladder while installing gutters on a house for defendant Countrywood. There were no witnesses to the fall; however, Jared Little's brother, Kenny Little, found Jared on the ground, trying to stand. Jared's ladder was on the ground. Jared seemed disoriented and he did not know what had occurred. He injured his brain, knee and pelvis. *Id.* at 778. Little brought suit against Countrywood, and the trial court granted summary judgment of dismissal, in part because Little could not establish the necessary element of proximate cause. *Id.* at 779.

The *Little* court noted that a plaintiff must prove that the harm he suffered would not have occurred but for some act or omission of the defendant. Cause in fact typically is a question for the jury, but it becomes a question of law for the court if the facts, and inferences from the facts, are not subject to reasonable doubt or difference of opinion. Legal causation is a question of law. *Id.* at 779-80. Little contended the defendant breached its duty to provide a safe, secured ladder. Even if Little was correct

in that respect, he had to present evidence allowing a reasonable person to infer, without speculating, that the defendant's negligence more likely than not caused the accident. *Id.* at 782-82. In concluding that summary judgment was appropriately granted in favor of the defendant, the court stated as follows:

Little contends he established more probably than not that Countrywood's negligence was "a 'substantial contributing cause'" of his accident and resulting injuries. We disagree. One may speculate that the ladder was not properly secured at the top, or that the ground was unstable. But even assuming that those conditions constituted breaches of a duty that Countrywood owed Little, he did not provide evidence showing more probably than not that one of those breaches caused his injuries. No one, including Little, knows how he was injured.

*Id.* at 782. Citing favorably to *Marshall, supra*, the court stated, "The appellate court clearly held that summary judgment was proper because Marshall could not establish proximate cause. Likewise, Little failed to present evidence to establish proximate cause." *Id.* at 783. The court concluded, "[w]ithout evidence to explain how his accident occurred, Little could not establish

proximate cause and could not withstand summary judgment.”  
*Id.* at 784. Similarly, Clarke cannot establish the required element of proximate cause because he does not know how or why he fell. He, and the rest of us, can speculate only.

D. The Legal Doctrine of Res Ipsa Loquitur is Not Applicable

The doctrine of res ipsa loquitur is “ordinarily sparingly applied, in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.”  
*Curtis v. Lein*, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010). To rely on res ipsa loquitur’s inference of negligence, a plaintiff must prove:

(1) The accident or occurrence that caused the plaintiff’s injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff’s injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence.

*Id.* at 891. *Curtis*, cited by Clarke, is not applicable to the facts of this claim. In *Curtis*, it was undisputed that the plaintiff's injuries were caused when she walked out onto the landowner's dock for the first time and it collapsed beneath her. *Id.* at 888. A dock does not ordinarily collapse in the absence of negligence, the dock was in the exclusive control of the landowner, and the plaintiff did nothing to contribute to its collapse. *Id.* at 895.

Here, Clarke fell off a ladder, which is a not uncommon occurrence and does not require that anyone other than Clarke be negligent. There is no evidence the ladder was defective, set up incorrectly, or was unsafe, and there is no need for those conditions to exist to explain Clarke's fall. Moreover, Clarke, not Jay Nichols, was in exclusive control of the ladder when Clarke fell, and Clarke very likely contributed to his own fall.

Additionally, there is no evidence that the ladder "caused" the injury, in the way the dock collapse caused the plaintiff's injury in *Curtis*. There is no evidence of any "instrumentality or

agency” that was in the Nichols’ exclusive control that caused the accident. This is not a situation where, for example, a dentist, in exclusive control of his drill, drills on the wrong side of a patient’s mouth, *Pacheco v. Ames*, 149 Wn.2d 431, 69 P.3d 324 (2003), or a scalpel was left in a patient after a surgery, *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (2009), cases in which the doctrine was found to apply. Clarke simply fell off a ladder.

#### IV. CONCLUSION

For the reasons set forth above, this Court should affirm the ruling of the trial court, dismissing with prejudice Clarke’s claim against Jay and Margaret Nichols.

RESPECTFULLY SUBMITTED this 2nd day of April, 2018.

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\_\_\_\_\_  
LAUREN COLLINS

SUBSCRIBED AND SWORN to before me this 2nd day of April, 2018.

  
\_\_\_\_\_  
NOTARY PUBLIC, in and for the State of  
Washington, residing at: Spokane  
My Commission Expires: 4-1-2020

