

NO. 35477-6-III



COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

APR 10 2013
COURT OF APPEALS
DIVISION III
SPokane, WA
www.courts.wa.gov

MICHAEL CLARKE,

Appellant,

v.

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

Respondents

RESPONDENT VERONICA
NICHOLS' BRIEF

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I. INTRODUCTION

The trial court properly granted Respondent Veronica Nichols's ("Veronica")¹ summary judgment motion. Appellant Michael Clarke ("Clarke") has produced no legal or factual basis to sue Veronica.

Clarke fell off a ladder and was injured. However, Clarke admitted he did not know why he fell. CP 4. He also admitted Veronica was not present when he fell and did nothing to cause his fall. CP 66. Therefore, Veronica requests this Court affirm the trial court's order granting summary judgment to her.

II. STATEMENT OF THE CASE

Respondents Jay Nichols, Veronica Nichols, and Vicki Lane are siblings who own property in Spokane County, Washington. They each had equal access and right to use the property. CP 96, 97-101.

On May 12, 2013, Jay invited Clarke to meet him at the property. CP 107. Jay asked Clarke to assist him in installing a soffit to a shed. CP 108.

Clarke and Jay needed two ladders to install the soffit. Jay set up one ladder adjacent to a shed on the property for Clarke. CP 94-96. Clarke climbed the ladder, which was steady and secure. CP 95.

¹ As respondents Jay and Margaret Nichols have the same last name as Veronica, for clarity we will refer to the Nichols by their first names.

Jay held the ladder while Clarke climbed it. As Clarke expected, Jay let go of the ladder to walk over to his ladder. Clarke then fell off the ladder. CP 95.

Clarke does not know why he fell. Clarke stated in his declaration that “I have no memory of falling. Given that, I cannot state with any certainty why or how I fell.” CP 95.

While Clarke does not know why he fell, he is sure that Veronica did not cause it. Clarke did not talk with Veronica about installing the soffit or using the ladder. Veronica was not at the property when Clarke fell. CP 66. Veronica did not set up Clarke’s ladder. CP 95.

Most significantly, Clarke admitted in his deposition that he does not believe Veronica caused him to fall.

Q. What do you think that she did that caused the fall?

A. I don’t have an opinion on that.

CP 66.

Veronica requests this Court affirm the dismissal. Clarke has presented no evidence her actions were a proximate cause of Clarke’s fall.

III. LEGAL ARGUMENT

A. CLARKE HAS FAILED TO MEET HIS BURDEN OF PROOF.

Clarke has a heavy burden to prove Veronica was negligent. “The

mere occurrence of an accident and an injury does not necessarily lead to the inference of negligence.” *Marshall v. Pacwest, Inc.*, 94 Wn.App. 372, 377, 972 P.2d 475 (1999).

This court will never presume a party was negligent. “Negligence is never presumed but must be established by a preponderance of the evidence by the one asserting it.” *Gordon v. Deer Park School Dist.*, 71 Wn.2d 119, 122, 426 P.2d 824 (1967) (*citations omitted*).

Clarke has the burden to produce facts proving Veronica proximately caused him to fall. Without such facts, Clarke cannot prove Veronica caused his fall. “We cannot find negligence based upon speculation or conjecture.” *Ruff v. County of King*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995).

Nor has Clarke produced facts to infer that Veronica was negligent. “[The plaintiff] needed to submit evidence allowing a reasonable person to infer, without speculating, that [the defendant’s] negligence more probably than not caused the accident.” *Little v. Countrywood Homes*, 132 Wn.App. 777, 781-82, 133 P.3d 944 (2006).

The trial court granted Veronica’s summary judgment motion that her conduct was not a proximate cause of Clarke’s fall. Veronica requests this Court affirm the dismissal.

**B. CLARK HAS FAILED TO ESTABLISH
PROXIMATE CAUSE.**

In opposing summary judgment, Clarke failed to produce the required facts that Veronica caused him fall.

A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Clarke may not rely on speculation to prove Veronica's actions were a proximate cause of his fall.

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

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

While proximate cause may be an issue of fact for the jury, evidence regarding the cause of the accident cannot be based on speculation or "upon a claim of what might have happened." *Kristjanson*

v. Seattle, 25 Wn.App. 324, 326, 606 P.2d 283 (1980). Clarke simply does not know why he fell. CP 95.

Moreover, Clarke admits that Veronica did not cause him to fall. She did not select the ladder. She did not set up the ladder. Veronica was not even present when he fell. CP 66.

Clarke postulates eleven “facts” from which he claims this Court should infer proximate cause. These eleven facts all relate to the ladder and how it was set up. (Clarke brief, pp. 14-15). These “facts” do not prove Veronica as a proximate cause of the fall because she did not select or set up the ladder. CP 66. Therefore, no inference from these facts establishes that Veronica was a proximate cause of Clarke’s fall.

C. RES IPSA LOQUITUR DOES NOT APPLY.

Courts rarely apply res ipsa loquitur. “The doctrine is to be used sparingly because, in effect, it relieves the plaintiff the necessity of establishing a complete prima facie case against the defendant.” *Kimball v. Otis Elevator Co.*, 89 Wn.App. 169, 177, 947 P.2d 1275 (1997).

The policy behind res ipsa loquitur militates against its application here.

Further, the doctrine of res ipsa loquitur is based in part upon the theory that negligence will be presumed because the defendant either knew of the cause of the accident, or had the best opportunity of ascertaining the cause and, therefore, should be required to produce evidence in explanation.

United Mut. Savings Bank v. Riebli, 55 Wn.2d 816, 821, 350 P.2d 651 (1960).

Res ipsa loquitor does not apply unless Clarke proves the three required conditions. First, the accident does “not ordinarily happen in the absence of someone’s negligence.” Second, Veronica had exclusive control of the instrument that caused Clarke’s injuries. Third, Clarke did not contribute to his fall. *Kimball*, at 177.

Res ipsa loquitor does not apply for three reasons.

First, res ipsa loquitor does not apply because Clarke could have fallen off the ladder without Veronica’s alleged negligence. Res ipsa loquitor does not apply if Clarke could have fallen without Veronica’s negligence. “The doctrine has no applicability when there is evidence that the accident could occur without negligence on the defendant’s part.” *Id.* at 177.

For example, Clarke could have fallen because he lost his balance. Therefore, res ipsa loquitur does not apply.

Second, Veronica did not have exclusive control of the ladder. “Exclusive control does not mean actual physical control, but rather refers to the responsibility for the proper and efficient function of the instrumentality that caused the injury.” *Tinder v. Nordstrom, Inc.*, 84 Wn.App. 787, 795, 929 P.2d 1209 (1997).

Clarke cannot establish Veronica had exclusive control. She was not present when he fell and did not set it up. CP 66.

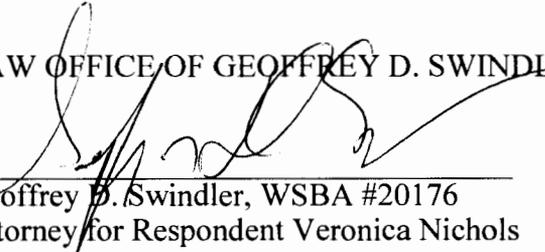
Third, res ipsa loquitur does not apply because Clarke could have caused this accident. Clarke could have lost his balance, missed a step, or improperly shifted his weight. Therefore, res ipsa loquitur does not apply.

IV. CONCLUSION

For the foregoing reasons, Clarke has not established Veronica was a proximate cause of Clarke's fall. Thus, Veronica requests this Court affirm the dismissal.

DATED: April 4, 2018.

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CERTIFICATE OF SERVICE

I do hereby certify that on April 4, 2018, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

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