

FILED  
Court of Appeals  
Division III  
State of Washington  
6/28/2019 2:50 PM

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
Division III**

**Court of Appeals No. 362761**

---

**JAMES F. BEHLA,**

**Plaintiff/Appellant,**

**v.**

**R.J. JUNG, LLC, a Washington Limited Liability Company;  
JENNIFER JUNG and JOHN DOE JUNG, and the marital  
community thereof,**

**Defendants/Respondents.**

---

**AMENDED REPLY BRIEF**

---

**JULIE C. WATTS/WSBA #43729  
Attorney for Plaintiff/Appellant  
The Law Office of Julie C. Watts, PLLC  
505 W. Riverside Ave., Suite 210  
Spokane, WA 99201  
(509) 207-7615**

## TABLE OF CONTENTS

<b>I. ARGUMENT</b>	<b>1</b>
<b>A. The trial court erred when it dismissed Mr. Behla’s negligence claim.</b>	
1. <i>The trial court’s finding that Mr. Behla “did not recall what caused him to fall,” is unsupported by substantial evidence in the record.</i>	
2. <i>The trial court’s finding that Mr. Behla did not “recall[] his foot ever touching the cord” is unsupported by substantial evidence in the record.</i>	
3. <i>The trial court erred when it failed to view all facts and reasonable inferences in favor of the nonmoving party.</i>	
4. <i>The trial court erred when it failed to properly apply Washington law to the facts of this case.</i>	
<b>II. CONCLUSION</b>	<b>8</b>

**TABLE OF AUTHORITIES**

Gardner v. Seymour, 27 Wn.2d 802, 180 P.2d 564 (1947).....3, 4

Little v. Countrywood Homes, Inc., 132 Wn.App. 777, 780, 133 P.3d 944 (2006).....4

Marshall v. Bally's Pacwest, Inc., 94 Wn.App. 372, 972 P.2d 475 (1999).....3

Mehlert v. Baseball of Seattle, Inc., 1 Wn.App.2d 115, 119, 404 P.3d 97 (2017).....4

**RULES**

RAP 10.3(b)..... 1, 2

## I. ARGUMENT

### A. The trial court erred when it dismissed Mr. Behla's negligence claim.

1. *The trial court's finding that Mr. Behla "did not recall what caused him to fall," is unsupported by substantial evidence in the record.*

On appeal, Mr. Behla asserts that he *never* testified that he did not recall what caused him to fall; to the contrary, he repeatedly testified to his recollection that the fall was caused by tripping on the extension cord. (CP 27, 52, 53, 55, 56.)

Respondents do not respond to this issue directly (in violation of RAP 10.3(b)), and they do not meaningfully dispute this assertion on appeal.

2. *The trial court's finding that Mr. Behla did not "recall[] his foot ever touching the cord" is unsupported by substantial evidence in the record.*

Mr. Behla never testified that he did not recall his foot ever touching the cord. To the contrary, Mr. Behla clarified that his foot had not been "tangled in the cord" as suggested by Ms. Jung's counsel, but rather, Mr. Behla testified that he thought his foot "caught on it." (CP 27.)

Respondents do not respond to this issue directly (in violation of RAP 10.3(b)), and they do not meaningfully dispute this assertion on appeal.

3. *The trial court erred when it failed to view all facts and reasonable inferences in favor of the nonmoving party.*

Respondents agree that a trial court is required to view facts and make all reasonable inferences in the light most favorable to the non-moving party. *Respondents' Brief*, pg. 11. Respondents do not respond to this issue directly

(in violation of RAP 10.3(b)), and they do not meaningfully dispute this assertion on appeal.

4. *The trial court erred when it failed to properly apply Washington law to the facts of this case.*

The job of a jury is to evaluate evidence and determine the facts of a case based on a preponderance of the evidence; this standard means that a jury is tasked with reviewing the evidence and determining, on a more likely than not basis, what took place. More than one theory can be presented to the jury for consideration (in fact, it is hard to imagine how a trial would proceed without the parties presenting different theories), and it is the job of the jury to weigh the evidence, to consider the theories presented, and to determine what, more likely than not, occurred. Therefore, it is not a problem that a jury is presented with two competing theories to explain evidence available in the record. That is the normal state of affairs.

A problem occurs when two competing theories equally explain all the available evidence, and there is no additional evidence in the record to show that one theory is more likely than the other. Where two theories equally explain all the available evidence, it follows that neither can be supported by a preponderance of the evidence, which is the applicable standard. Washington law states that such a case ought not to be presented to a jury because the only way a decision could be made in such circumstances would be by assuming

facts not in evidence.<sup>1</sup> *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947). It is an important distinguishing factor to note that the cases where this problem arises are primarily situations where a trial cannot provide any additional information that would permit a jury to appropriately weigh the evidence or to assess the credibility of the plaintiff, such as in circumstances where the plaintiff is deceased (*Gardener v. Seymour*) or has extensive amnesia and has no information to provide (*Marshall v. Bally's*<sup>2</sup>).

**A situation where two competing theories equally explain all the available evidence (unusual and problematic) is distinguishable from a situation where the available evidence would permit a jury to select one of many potentially theories (common and normal).** The former prevents a determination based on the preponderance of the evidence, and the latter simply requires a jury to weigh the evidence and consider the credibility of the witnesses in order to arrive at a conclusion.

---

<sup>1</sup> While it is Respondents that cry speculation, ironically, it was Respondents, not Mr. Behla, who invited the trial court into error by speculating beyond the evidence in the record. At summary judgment, Respondents asserted that *perhaps* Mr. Behla had tripped on pine cones – but there was no evidence in the record about pine cones (which Respondents appear to silently acknowledge by declining to renew their previous pine cone arguments on appeal). To suggest that Mr. Behla tripped on *something else* when there is no information about that *something else* in the record is speculation. It does not matter whether the possible alternative theory is based on pine cones or mushrooms or logs or bears, when the record contains no evidence related to pine cones, mushrooms, logs, or bears, such conjecture is substantively no different than speculating that he tripped on aliens or that a unicorn materialized out of thin air, knocked him over, and then disappeared without so much as leaving a hoofprint behind. Based on Respondents' interpretation of the law, if Mr. Behla cannot actively *disprove* the competing 'teleporting unicorn' theory, his case must be dismissed; but not only is it a well-established rule of logic that proving a negative is impossible, but such an interpretation is a misapprehension of Washington law.

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

In this case, however, the theories presented by the parties do not equally explain all the evidence, because there is substantial information available to permit a jury to determine that Mr. Behla's explanation is more likely based on a preponderance of the evidence standard. Further, Mr. Behla is available for trial and may provide a wealth of information to assist the jury with evaluating the evidence.

To survive summary judgment, a plaintiff is required to demonstrate that he has provided information sufficient that a jury *could* find in his favor on a preponderance of the evidence: "The inquiry is whether a reasonable person could conclude that there is a greater probability that the conduct in question was the proximate cause of the plaintiff's injury than there is that it was not." Mehlert v. Baseball of Seattle, Inc., 1 Wn.App.2d 115, 118-119, 404 P.3d 97 (2017)(emphasis added)(internal citations omitted). Mr. Behla is not required to prove things to a certainty. Little v. Countrywood Homes, Inc., 132 Wn.App. 777, 781, 133 P.3d 944 (2006)(the party who has the burden of production need not provide proof to an absolute certainty). Nor is he required to *disprove* alternative theories to a certainty; rather, he is required to demonstrate that he has provided evidence from which the jury could determine that his theory was *more likely* to be true than alternative theories. Gardner, 27 Wn.2d at 810 (a legitimate inference can be drawn that an accident happened a certain way by showing evidence that it likely happened that way and likely did not happen any other way).

Here, Mr. Behla's assertion is that he tripped on a new extension cord that had been placed in the walkway *exactly* where he fell. It is undisputed that the extension cord was located exactly where he fell. It is undisputed that the extension cord had never been there before. It is undisputed that Mr. Behla had never, in ten years, fallen in that area before.

Respondents have proposed multiple alternative theories, *all* of which are countered by evidence provided by Mr. Behla that a jury could rely upon to determine each alternative theory is far less likely than Mr. Behla's assertion that he tripped over the new extension cord.

'Mr. Behla tripped on a pine cone or a stick.' There is no evidence in the record that there were any pine cones or sticks on the pathway. The jury could not conclude that this theory was more likely than Mr. Behla's allegation without assuming facts not in the record (as doing so would require pure speculation).

'Mr. Behla tripped on gravel.' Mr. Behla provided evidence showing that the gravel was made up of crushed rock, and it was spread by hand. (CP 50.) Mr. Behla had laid the crushed rock and hand-spread it himself and was very familiar with it. (CP 50.) He had walked over it many times in the dark in the past and had never tripped or fallen.

In light of that evidence, it is up to the jury to decide whether it is more likely that Mr. Behla tripped over the new extension cord or whether it is more

likely he tripped on the crushed rock that he had spread himself in a location where he had never tripped in the past.

'Mr. Behla tripped/slipped on snow.' Mr. Behla testified that there was a "light skiff" of fresh snow that was an "inch, maybe" over the crushed rock. (CP 23-24.) Common sense would confirm that crushed rock does not generally become slippery as a result of a light dusting of fresh snow, and Mr. Behla was wearing Nike sneakers. (CP 49.) (It is also somewhat unusual (though not impossible) for someone to *slip* and pitch forward with force; *slipping* tends to cause people to fall backwards or sideways; it is *tripping* that generally causes people to pitch forward with force.)

Mr. Behla had previously walked on that crushed gravel for years in all conditions, and there was no evidence that he had ever previously fallen in the snow. Further, Mr. Behla had extensive experience maintaining his coordination on snowy ground; he had spent years as a snowboarding/ski instructor and doing avalanche control and ski patrol. (CP 46-48.)

In light of that evidence, it is up to a jury to decide whether it is more likely that Mr. Behla tripped on the new extension cord or whether it is more likely that he uncharacteristically slipped while wearing sneakers on a light dusting of snow over crushed rock and subsequently pitched forward with force.

'Mr. Behla tripped on his own feet.' There is no evidence in the record that Mr. Behla has a history of tripping on his own feet or that he had ever previously tripped on his own feet in that area while working there in the dark,

as it was his usual practice to do. (CP 49, 54.) Further, Mr. Behla is very athletic, and he regularly and successfully engaged in activities where his life and livelihood depended on being surefooted. Mr. Behla had run a rafting guide service for over 40 years, in addition to his experience as a snowboarding/ski instructor in Aspen and doing ski patrol and avalanche control. *Id.*

In light of that evidence, it is up to a jury to decide whether it is more likely that Mr. Behla tripped on the new extension cord or whether it more likely that he uncharacteristically tripped over his own feet.

'Mr. Behla tripped on the lip of the concrete slab.' Respondents allege this for the first time on appeal. There is no evidence in the record to support the conclusion that Mr. Behla tripped in the area where the lip of the concrete slab was. Mr. Behla was directly asked this question in his deposition:

Q: Were both of your feet on the concrete slab?

A: Not when I fell. It would have been on the gravel surface that's adjacent, that's next to it.

(CP 32.)

Mr. Behla testified that his foot caught on the extension cord and he "pitched forward." (CP 27.) He testified that his "butt and back hit the concrete slab," and he came to rest with his right hip on the concrete slab. (CP 27, 55.) It appears from the record that the physics of Respondents' new theory are impossible because Mr. Behla would have had to trip over the lip of the

concrete slab with his foot and pitch *forward*, but then somehow simultaneously throw his whole body *backward* so that his legs were off of the concrete slab (behind where his feet were when he would have tripped) and only his right hip was on the slab.

There is no evidence in the record to support this alternative theory.

## II. CONCLUSION

Mr. Behla has presented sufficient evidence to demonstrate that a jury could find that a preponderance of the evidence indicates that it is more likely than not that Mr. Behla tripped over the new extension cord that appeared for the first time exactly where he fell, rather than that (1) he spontaneously tripped on his own feet, (2) he slipped in his Nikes on the light dusting of snow on gravel and somehow forcefully pitched forward, (3) he inexplicably tripped on the gravel itself for the first time, or (4) he tripped on the lip of the concrete slab that was located in a place other than where Mr. Behla actually fell.

That is all Mr. Behla was required to do in order to survive summary judgment. He has met his burden.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of June, 2019,

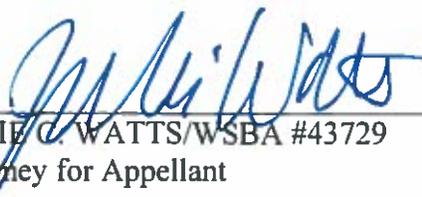
  
\_\_\_\_\_  
JULIE C. WATTS/WSBA #43729  
Attorney for Appellant

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on June 28, 2019, arrangements for delivery of a true and correct copy of the foregoing to the following individuals were made in the manner indicated:

Counsel for the Defendants/Respondents      ✓ Via U.S. Mail  
Elizabeth E. Lampson  
Cari D. Waters      ✓ Via email  
Davis Rothwell Earle & Xochihua P.C.  
200 SW Market Street, Suite 1800  
Portland, Oregon 97201  
(503) 222-4422  
elampson@davisrothwell.com

Jeffrey T. Sperline      ✓ Via U.S. Mail  
Sperline Raekes, PLLC  
601 N. Young Street, Suite A  
Kennewick, WA 99336      ✓ Via email  
(509) 783-6633  
jeff@srlaw.net  
[amanda@srlaw.net](mailto:amanda@srlaw.net)

  
\_\_\_\_\_  
JULIE C. WATTS/WSBA #43729  
Attorney for Appellant

**THE LAW OFFICE OF JULIE C. WATTS, PLLC**

**June 28, 2019 - 2:49 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36276-1  
**Appellate Court Case Title:** James F. Behla v. R.J. Jung, LLC, et al  
**Superior Court Case Number:** 15-2-00159-6

**The following documents have been uploaded:**

- 362761\_Briefs\_20190628144751D3280121\_8478.pdf  
This File Contains:  
Briefs - Appellants Reply - Modifier: Amended  
*The Original File Name was BEHLA v JUNG 362761 Amended Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- amanda@srlaw.net
- cwaters@davisrothwell.com
- docketing@davisrothwell.com
- elampson@davisrothwell.com
- jeff@srlaw.net
- jhenderson@davisrothwell.com

**Comments:**

---

Sender Name: Elena Manley - Email: elena@watts-at-law.com

**Filing on Behalf of:** Julie Christine Watts - Email: julie@watts-at-law.com (Alternate Email: )

Address:  
505 W. Riverside Ave.,  
Suite 210  
Spokane, WA, 99201  
Phone: (509) 207-7615

**Note: The Filing Id is 20190628144751D3280121**