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

Court of Appeals No. 362761

JAMES F. BEHLA,

Plaintiff/Appellant,

vs.

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

Defendants/Respondents.

OPENING BRIEF

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

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I. SUMMARY OF ARGUMENT

The trial court erred when it dismissed Appellant's claim based on findings that were unsupported by substantial evidence in the record and when it misapplied Washington law to disregard evidence presented by Appellant in support of proximate causation.

II. ASSIGNMENTS OF ERROR

1. *The trial court erred when it denied Mr. Behla's 'Motion to Strike.'* (CP 105.)
2. *The trial court erred when it found that Mr. Behla did not recall what caused him to fall without substantial evidence in the record to support the finding.* (CP 102, Finding (e).)
3. *The trial court erred when it found that Mr. Behla did not recall his foot ever touching the extension cord without substantial evidence in the record to support the finding.* (CP 103, Finding (g).)
4. *The trial court erred in concluding that it was "equally plausible" that the Mr. Behla "tripped over his own two feet" when there is no evidence in the record to suggest Mr. Behla tripped over his own feet and all evidence in the record supports the reasonable inference that Mr. Behla did not trip over his own feet.* (CP 103.)
5. *The trial court erred in concluding that it was "equally plausible" that the plaintiff "slipped on ice or a natural artifact on the ground such as a rock or a stick," when there was no evidence in the record to suggest the presence of ice or a rock or a stick.* (CP 103.)
6. *The trial court erred when it failed to consider all the relevant evidence.*
7. *The trial court erred when it failed to consider all facts and reasonable inferences in the light most favorable to the nonmoving party.*
8. *The trial court erred when it failed to properly apply Washington law to the facts.*
9. *The trial court erred when it dismissed Mr. Behla's claim on summary judgment.* (CP 105.)

III. ISSUES PRESENTED

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.*
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.*
3. *The trial court erred when it failed to view all facts and reasonable inferences in favor of the nonmoving party.*
4. *The trial court erred when it failed to properly apply Washington law to the facts of this case.*

IV. STATEMENT OF THE CASE

Mr. Behla is the owner and operator of a rafting guide service that has operated in Washington for over forty years. (CP 46.) Mr. Behla does business as AAAA RiverRider.com, Inc. (hereinafter, "River Riders"). (CP 46.)

In the early 2000s, Mr. Behla was operating on the White Salmon river in Washington. (CP 49). In the town of White Salmon, Washington, there was a small store/gas station that provided groceries, hardware, and other miscellaneous items called the BZ Corner Grocery. (CP 49.) At this time, the store was owned by the Gross family. (CP 49.) Mr. Behla had been a customer of BZ Corner Grocery for years, and during a conversation at the end of one of the rafting seasons, the Gross family mentioned that they intended to burn down a little shed that they had at the corner of their parking lot. (CP 49-50.) Their intention was to remove it, and they talked about donating it to the volunteer fire department as a practice burn. (CP 50.) Mr. Behla then asked

them if he could use the shed to store his rafting equipment. (CP 49-50). The Gross family and Mr. Behla agreed that he could use the shed if he fixed it up entirely at his expense (including cleaning it out, painting it, and patching the roof, etc.). (CP 50.) Mr. Behla installed lighting and brought in crushed rock to make a parking lot on both sides of the shed. (CP 50.) As a result, Mr. Behla's business had a place to store rafting equipment and vehicles, and his customers, who parked there to go rafting, often went into BZ Corner Grocery to buy food and beer and other supplies from the Gross family. (CP 50.)

Several years later, the Jungs took over the store from the Gross family. (CP 50.) Mr. Behla arranged with the Jung family to make an annual payment for the continuing use of the shed. (CP 50.) Every year thereafter through at least 2013, Mr. Behla made the annual payment and continued to use the shed. (CP 50.)

In the late fall or early winter of 2013, Ms. Jung¹ contacted Mr. Behla and asked if he could move his school bus to a different location because she was going to bring an RV to be placed on the lot for employees to live in. (CP 51.) Mr. Behla drove down to White Salmon and moved the bus as requested. (CP 51.) Over the course of the following winter, Ms. Jung called Mr. Behla and told him he needed to move out of the shed. (CP 51.) He responded that he

¹ "Respondents" include R.J. Jung, LLC, Ms. Jung, an individual, and any marital community of which Ms. Jung may be a part; because any actions relevant to the narrative facts make the most grammatical sense when referenced as the actions of an individual, "Respondents" will be referenced as "Ms. Jung" in this brief for the purposes of clarity.

had paid for the entire year through the following summer. (CP 51.) Ms. Jung then asserted that Mr. Behla was responsible to pay the last ten years of power bills. (CP 51.) Mr. Behla believed she was distraught and overwhelmed from the death of her husband who passed away in 2013, and that she was struggling to manage all the aspects of the business in his absence. (CP 51.) Mr. Behla had trouble understanding her because of her strong foreign accent, so he asked if she would please put her position in writing so he could understand her, and that in response she hung up on him. (CP 51.) Mr. Behla and Ms. Jung exchanged several letters about use of the shed and the power bills. (CP 51.)

On March 2, 2014, Mr. Behla went to White Salmon to do some inventory and move some rafting equipment. (CP 48.) Mr. Behla arrived at the shed between 10:00 PM and 11:00 PM. (CP 49.) It was his usual practice to do these tasks late in the evening in order to avoid anyone bothering him or slowing him down. (CP 49, 54.)

After he arrived, Mr. Behla got out of the car, walked about three or four steps to the building and flipped the switch for the exterior lights. (CP 51-52.) The lights did not come on. (CP 52.) Mr. Behla went to check the back of his bus, which was parked nearby to confirm whether it was locked, after which he turned and walked back to the door of the building. (CP 52.) He then tripped over an electrical cable that had been stretched from a breaker box to an RV. (CP 52.)

As a result of his fall, Behla suffered serious injuries to his back, shoulder, and head. (CP 47.)

On August 3, 2015, Mr. Behla filed a complaint in Klickitat County alleging that Ms. Jung had created a dangerous condition that caused his injuries. (CP 2.)

On April 8, 2016, Mr. Behla provided sworn testimony in a deposition:

Q: Okay. *So what caused you to fall?*

A: *It was a – an electrical cable that was laying on the ground that I found there after I fell and banged my head and came to and figured out what was going on and retraced my step. I see there's this cable. It's laying on the ground, had kind of a curl to it, like an uncoiled rope or cable would have. And I walked – I walked from – let me just begin from where I arrived in the car. Got there in the car, got out, walked to the building about three or four steps and flipped the switch for the lights. **The lights didn't come on.** So there was no light. And I looked over to my left, and I saw the back of the school bus. This is the same bus that I had moved four months earlier, approximately four months earlier. Was there, I went over to check the back end of the bus to see if was locked or unlocked. And – and I turned and walked back to the walk-through door of the building. Next thing I knew, I was laying on the ground with a stabbing like a knife in the back, of my lower spine, my head banged up, my shoulder aching, and blood coming out of wherever."*

(CP 27; emphasis added.)

Q: Okay. Were you using flashlight?

A: I did not use a flashlight.

Q: And why not?

A: I had intended to use the lights that were supposed to be on at the – at – at the side of the building.

Q: And how would you turn the lights on at the side of the building? Is there an exterior light switch?

A: There's a – there's a light switch that I wired in that's just – there's a crack in the planks on the side of the building, and there's a gap about five inches long or so, and it – just put your finger in there, and flip the switch back and forth, on and off.

Q: All right. And when you went to flip that switch, what happened?

A: Nothing.

Q: And how come?

MR. SPERLINE: Object to the form. Go – go ahead.

A: Well, I didn't know at the time, but I went back later and found that *the breaker had been turned off in the breaker box*, and there was another breaker had been installed in that breaker box to feed power to the RV. *And that was that cable that was on the ground now laying in front of the door that I tripped over.*

(CP 52; emphasis added.)

Q: Okay. So the cord that you believe you tripped on, is that like an extension cord, or is that Romex or – do you know what Romex is?

A: I do know what Romex is. It was not what I would call Romex. It was like a cable, a black cable about the size of you – diameter of my thumb, your thumb.

Q: So a much larger diameter than a typical extension cord?

A: Definitely larger.

Q: And that went from the breaker box to the RV?

A: It did, yes.

Q: Where did it go?

A: It went from the breaker box, across the – the gravel in front of the shed building that we rented, and on over to the RV. I didn't know it at the time, 'cause I'd never seen it before. And it wasn't marked, it wasn't buried, it wasn't anything. It was just laying on the ground and plugged in the new outlet that had been installed there. And it went over to an RV, and I think it's about 125 feet away, over in the area where my bus had been parked until the previous fall or early winter when I moved it.

(CP 52.)

Q: So how long a distance did this black cable span?

A: Do you mean the entire length of it?

Q: Yeah.

A: I think it goes, I'm pretty sure that it goes from the – from the breaker box to the RV. I'm not certain. They may have put in another outlet further out there that it would run to, or it may have run directly to the RV, but that was maybe 125 feet.

Q: And when it was laying on the ground, was it flush with the ground all the way across, or was it sticking up from the ground in places?

A: I am not certain, 'cause I never saw it until I woke up on the ground and went back and *looked to see what I had tripped over*, but it's – as I said, it's got the kind of twists that's – you know how you coil something up and then you try to lay it out straight, it's still got like the memory of the – of the coiled up position that it's in so it kind of had kind of a long spiral? So some is laying flush and some is, you know, popped up a little bit.

(CP 53; emphasis added.)

Q: Okay. When you look at these photos, the cable seems to be laying flat, flush with the ground. Is that different than you recall it?

A: I recall – well, it was dark when I first encountered it. And, for whatever reason, *some of it was up high enough in the air for my foot to catch on it and pitch me headfirst into the edge of the building.*

(CP 55; emphasis added.)

Q: Okay. And so when you were on the ground after you fell, was your foot still tangled up in this cable?

A: I don't think so. *I think my foot caught it, and it pitched me forward*, and my head hit first and then my left hand and arm and then my butt and back hit the concrete slab, and I was laying on my right side.

(CP 27; emphasis added.)

Q: All right. So the location of the cable when you fell is a fair bit different than what you see in these photos?

A: I would say a couple, three feet. I'm just guessing. I think that it's approximately there. I stepped this way to look at the back of the bus to see whether the lock was on or not, I turned and went that way towards the door, which is here (indicating), "door." *I tripped over the cable here*, and I hit my head, "hit head," there. And then, if you look, here is a concrete slab. The door – they call it the doorstep. It's not a step, it's just a slab. Doorway threshold. Concrete slab here. I landed on my right hip on that concrete slab and was laying in the – in the little skiff of snow and the concrete on my right side. That's what I remember when I came to, if I had blacked out. I don't know. That's where I conked my head, fell there on my right side, came to. This cable I'm certain is not that – it was not that close. Do you have the black and white photos from that night?"

(CP 55; emphasis added.)

Q: You just circled the area where the light switch would be on the side of the building?

A: "Light switch." Tried the lights. Neither one came on. I looked over at the bus, I took a few steps that way to get a better look at the back of the bus, see if the lock was on. Turned and walked back. I believe this cable, I'm – I'm positive this cable was not right up against the base of this. This is a sign-in table. If you see this little thing sticking out here on the side of the building, that is the table that we lay the assumption of risk forms on

where the customers sign in and get checked in on the trip. And that's – that's now where the cable was. It wasn't up against the base like I'm seeing it here and here. It was further out in here. *I turned, and I tripped and hit the thing there and this concrete slab that was my landing pad.*"

(CP 56; emphasis added.)

Nearly two years later, on January 16, 2018, Mr. Behla was deposed again. His testimony was subject to an objection by his attorney indicating that the purpose of the continuation deposition was to discuss any and all treatment and pain complaints since the last deposition, not to re-ask questions about the incident itself, which had already been asked and answered at length in Mr. Behla's first deposition. (CP 33.)

Q. In your last deposition, with the understanding of the objection from your attorney, my understanding is you didn't recall the cord touching your foot in the fall. And has your memory changed on that issue?

MR. SPERLINE: Same objection.

A. It's very fuzzy, the whole thing that – that happened that night. I smashed my head on the corner of the building and landed on a concrete slab. And when I came to, there was – my cell phone was in front of my face and a little bit of snow, and I had blood coming down my face and kind of a gash in my thumb. And I was confused for quite a while, in a lot of pain, and I don't really recall – I don't really recall anything –

Q. Okay.

A. -- really all that – all that clearly. I mean, my bell was rung, as they say. And I don't – *I don't have any, any new – nothing new has come to mind.*

(CP 34; emphasis added.)

On March 20, 2018, Respondents filed a Motion for Summary Judgment based solely on the issue of proximate causation. (CP 12-17.)

On July 24, 2018, the trial court granted summary judgment. (CP 104-105.) In its ruling, the trial court concluded that it was “equally plausible” that the plaintiff “tripped over his own two feet or slipped on ice or a natural artifact on the ground such as a rock or a stick.” (CP 103.) Noting that proximate cause has two elements (cause in fact and legal causation), the trial court made its decision solely based on the element of “cause in fact.” (CP 102-103.) In reaching its conclusion, the trial court solely relied on *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947), concluding that there was nothing more “tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.” (CP 103.) The trial court concluded that any determination of proximate causation would be “pure speculation,” and dismissed Mr. Behla’s claim. (CP 103.)

V. ARGUMENT

SUMMARY JUDGMENT: Summary judgment is reviewed de novo; the appellate court engages in the same inquiry as the trial court. *Little v. Countrywood Homes, Inc.*, 132 Wn.App. 777, 780, 133 P.3d 944 (2006).

“Summary judgment procedure is not a catchpenny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure,

liberally designed for arriving at the truth,” and “[i]ts purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.” Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960)(quoting Whitaker v. Coleman, 115 F.2d 305, 307 (1940)).

Summary judgment is only affirmed when there are no genuine issues of material fact requiring trial, and the moving party is entitled to judgment as a matter of law. Rickman v. Premera Blue Cross, 184 Wn.2d 300, 311, 358 P.3d 1153 (2015); CR 56(c). Evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in the nonmoving party’s favor. Id. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105, 68 U.S.L.W. 4480 (2000), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed. 202, 54 U.S.L.W. 4755 (1986).

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.*

“Substantial evidence is the ‘quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.’” State v. Kaiser,

161 Wn.App. 705, 723-24, 254 P.3d 850 (2011), citing Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

The trial court found that the “[plaintiff] did not recall what caused him to fall.” (CP 102.) The record does not support this finding.

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

The trial court’s finding, which is overly broad, appears to reference Mr. Behla’s testimony that he does not remember any of the physical perceptions he may have had as he was actually falling; rather, he tripped, fell, and being unsure as to what he had tripped over during his fall, he subsequently examined the environment where he had fallen and discovered the extension cord as the object that caused him to trip. This is the nature of how tripping usually takes place; a person who trips generally does not notice the object that causes the trip *prior* to tripping over it; instead, he recognizes *after* falling that he was tripped, and he then discovers the source of the hazard upon examination of the environment.

The trial court’s decision to describe the evidence in this case with such an overly broad finding is what facilitates the subsequent legal error to be discussed below. Such a finding promotes a variety of unexamined conclusions, including the suggestion that Mr. Behla’s detailed recollections of the events and circumstances immediately before and after his fall are

insufficient to constitute a “recollection” of causation unless he is able to recount his physical perceptions as they occurred *during* the fleeting moments of the fall itself. Such a conclusion serves to neatly support Ms. Jung’s legal theory in the underlying proceeding, but it is not well-founded in Washington case law.

Ms. Jung defended against Mr. Behla’s claim in the underlying proceeding by suggesting that because Mr. Behla was unable to describe the actual experience of falling, the jurisprudence discussed in cases where the plaintiff was unable to provide *any* direct or circumstantial evidence to address causation should be applied to dismiss his claim, such as: (1) *Gardner v. Seymour*,² where the plaintiff was deceased, there were no eyewitnesses, and no available circumstantial evidence existed; (2) *Marshall v. Bally’s Pacwest, Inc.*,³ where the plaintiff suffered from a complete loss of memory encompassing a period of two weeks surrounding the accident; (3) *Little v. Countrywood Homes, Inc.*,⁴ where the plaintiff had no memory of the accident whatsoever and could provide no direct or circumstantial evidence; and (4) *Moore v. Hagge*,⁵ where the plaintiff’s inability to provide “evidence establishing the events immediately before the collision” prevented a finding of causation.

² *Gardner v. Seymour*, 27 Wn.2d 802, 280 P.2d 564 (1947).

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

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

⁵ *Moore v. Hagge*, 158 Wn.App. 137, 241 P.3d 787 (2010).

Mr. Behla's circumstances are not analogous to these fact patterns. To the contrary, Mr. Behla remembers all the facts and circumstances surrounding his fall with the exception of his physical perceptions during the actual moment he fell. He can describe in granular detail what he was doing and the conditions of his environment right up until the moment of his fall, and he can describe what occurred after his fall with sufficient detail to present both direct and circumstantial evidence of causation in this case.

Further, the suggestion that Mr. Behla cannot "recall what caused him to fall" unless he is able to describe his physical sensations during the split second when he was actually falling operates contrary to common sense.

To illustrate the point, one might consider a situation where an acquaintance calls out a greeting to a friend. The friend (let's call him John), upon hearing the greeting, may recognize that he is being addressed, but he does not yet see who is speaking and does not recognize the voice. Upon subsequently looking up, John sees his friend, Bob, waving at him. John then reasonably concludes that Bob is the person who just vocally addressed him. In this sense, despite the fact that *at the time* he heard "hello," he did not see Bob or recognize Bob's voice and therefore did not then know that Bob was the person speaking to him, he reasonably concluded based on the information he acquired when he looked up that Bob had been the source of the greeting. In the future, if John retells the incident, he would reasonably describe his recollection of the event by saying that Bob called out to him, and he looked

up to see Bob waving. It would be contrary to common sense for a trial court to make a finding that John could not “recall” who had said hello to him because it took him several moments to determine that information.

There is no evidence in the record to support the broad statement that Mr. Behla “did not recall what caused him to fall,” and there is considerable evidence to the contrary, including multiple explicit statements of such recollection by Mr. Behla in deposition testimony. Therefore, the trial court erred when it found that Mr. Behla did not recall what caused him to fall.

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.

The record in this case does not support a finding that Mr. Behla did not recall his foot ever touching the cord.

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 “my foot caught on it.” (CP 27.)

The confusion appears to have been introduced two years later, in a second deposition, when Ms. Jung’s attorney mischaracterized Mr. Behla’s previous testimony as part of her question, saying, “my understanding is that you didn’t recall the cord touching your foot in the fall,” after which she asked him whether his “memory [had] changed on that issue,” to which Mr. Behla replied that the whole thing was fuzzy but that nothing new had come to mind. (CP

34.) Mr. Behla did not confirm the mischaracterization of his previous testimony; rather, he confirmed that his recollection had not changed from his previous testimony – which was that his foot had not gotten tangled in the cord but rather had caught on it.

In finding that Mr. Behla did not “recall[] his foot ever touching the cord,” the trial court relied on an argumentative statement inaccurately made by Ms. Jung’s attorney in a deposition and not actual testimony by Mr. Behla or other admissible evidence; this is error.

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

The facts and all reasonable inferences from those facts must be considered in the light most favorable to the nonmoving party. *Little*, 132 Wn.App at 779.

The trial court failed to acknowledge all the relevant facts in this case, and it failed to draw all reasonable inferences in favor of the nonmoving party.

Relevant Facts: It is undisputed that Mr. Behla had been navigating the terrain around the White Salmon shed for over a decade without falling down. It is undisputed that Mr. Behla was intimately acquainted with the terrain surrounding the shed because he had designed and created the parking space and remodeled and maintained the shed. It is undisputed that Mr. Behla routinely navigated the terrain around the shed at night. It is undisputed that while there was evidence of a small amount of snow on the gravel, there is no evidence in the record to support the presence of ice. There is no evidence in

the record indicating slippery conditions surrounding the shed for any reason. There is no evidence in the record of the presence of any rock larger than the small rocks forming the gravel of the parking lot itself. There is no evidence in the record of the presence of any stick or natural artifact. It is undisputed that the extension cord was present and stretched across the area where Mr. Behla tripped.

Inferences: In the absence of any evidence to demonstrate the presence of ice, the trial court was required to draw the reasonable inference that Mr. Behla did not slip on ice. Similarly, in the absence of any evidence in the record indicating that conditions were slippery, the trial court was required to draw the reasonable inference that the existence of light snow on gravel was not slippery. In the absence of evidence demonstrating the actual presence of rocks, sticks, or other natural artifacts, the trial court was required to draw the reasonable inference that Mr. Behla did not trip on rocks, sticks, or other natural artifacts.

In the absence of evidence in the record to support the conclusion that Mr. Behla tripped on his own feet and in the presence of evidence confirming that Mr. Behla had never, in ten years of navigating that very terrain, tripped on his own feet, the trial court was required to draw the reasonable inference that Mr. Behla did not trip on his own feet.

Reasonable inferences must be based on evidence not conjecture. *Little*, 132 Wn.App at 781, citing *Gardner*, 27 Wn.2d at 808. The inference on which

the trial court based its ruling (“[i]t is equally plausible that the plaintiff tripped over his own two feet, or slipped on ice or a natural artifact on the ground such as a rock or a stick”) is mere conjecture that completely ignores the evidence in this case, and therefore, it is error. Just as troubling, the trial court also appears to have also construed all inferences in the light most favorable to the *moving* party, which is directly contrary to Washington law.

The trial court erred when it failed to consider all the relevant facts and reasonable inferences and when it failed to view those facts and inferences in the light most favorable to the nonmoving party.

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

“‘Cause in fact’ refers to a physical connection between an act and the injury.” *Little*, 132 Wn.App. at 780, citing *Ang v. Martin*, 154 Wn.2d 477, 482, 114 P.3d 637 (2005). “Causation is usually a jury question.” *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn.App.2d 115, 119, 404 P.3d 97 (2017), citing *Little*, 132 Wn.App. at 780. “It becomes a question of law for the court *only* when the causal connection is so speculative and indirect that reasonable minds could not differ.” *Mehlert*, 1 Wn.App.2d at 118-119 (emphasis added), citing *Moore*, 158 Wn.App. at 148; *Marshall*, 94 Wn.App. at 377.

“There may be more than one proximate cause of an injury.” *Mehlert*, 1 Wn.App.2d at 118, citing *Smith v. Acme Paving Co.*, 16 Wn.App. 389, 396, 558 P.2d 811 (1976). “Direct evidence or precise knowledge of how an

accident occurred is not required; circumstantial evidence is sufficient.” Mehlert, 1 Wn.App.2d at 118, citing Conrad v. Alderwood Manor, 119 Wn.App. 275, 281 78 P.3d 177 (2003); Klossner v. San Juan County, 21 Wn.App. 689, 692, 586 P.2d 899 (1978). The party who has the burden of production need not provide proof to an absolute certainty. Little, 132 Wn.App at 781, citing Gardner, 27 Wn.2d at 808. “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, 1 Wn.App.2d at 118-119, 404 P.3d 97 (emphasis added), citing Hernandez v. W. Farmers Assn, 76 Wn.2d 422, 425-426, 456 P.2d 1020 (1969).

Mr. Behla’s claim is distinguishable from the *Gardner* case in several important ways. In 1947, the Supreme Court of Washington issued the *Gardner* opinion involving a situation where: “As to what actually happened in this case, we have absolutely no evidence.” Gardner, 27 Wn.2d at 805. The plaintiff fell down an elevator shaft and died of his injuries, and, other than the fact that it was conceded the elevator doors could be opened from the outside, there was no other information before the *Gardner* court; the plaintiff was deceased and could not testify as to what had occurred; there were no eyewitnesses, and there was no information as to where the elevator was found after the fall or where the elevator doors were found to be open. Gardner, 27 Wn.2d at 805-807. There was no direct evidence; there was no circumstantial

evidence. *Id.* In the absence of *any* evidence, the *Gardner* court concluded that there was no way to determine whether it was more or less likely that the plaintiff had walked through open elevator doors into the shaft (a situation wherein the defendants would be liable) or whether he had jimmied open closed elevator doors for his own purposes and fallen to his death (a situation wherein the defendants would not be liable). *Gardner*, 27 Wn.2d at 806. It concluded that where there is nothing more tangible to proceed upon than two or more conjectural theories, a jury ought not to be permitted to conjecture how the accident occurred. *Gardner*, 27 Wn.2d at 809. It is this holding that was erroneously applied to dismiss Mr. Behla's claim. (CP 103.)

The present case is significantly different from the facts in *Gardner*. Here, there is significant circumstantial evidence from which a jury could determine that it is far more likely that Mr. Behla's injuries resulted from the placement of the extension cord than by any other explanation. Mr. Behla tripped and fell in an area where he had never tripped before, despite regularly navigating the terrain over the course of a decade, frequently at night, and he subsequently examined the area and discovered a tripping hazard that he had never previously encountered; a jury could reasonably conclude that the unfamiliar tripping hazard, present for the first time in the precise location of his fall is, more likely than not, the cause of Mr. Behla's fall.

Ironically, the alternative competing theories proposed by the Court as "equally plausible" in order to characterize Mr. Behla's claim as conjecture are

themselves all based *solely* on conjecture with no supporting evidence in the record whatsoever; these theories stand in stark contrast to Mr. Behla's assertions, which are supported by ample evidence.

The trial court speculates that it is "equally plausible" that Mr. Behla tripped over a rock or a stick or some other natural artifact rather than the extension cord, but the record is devoid of any evidence confirming the presence of a rock or stick or other natural artifact that might have caused Mr. Behla to trip. Without any evidence in the record to support such a theory, it is mere conjecture, and there is a much greater probability that the extension cord that was actually present caused the injury.

The trial court speculates that it is "equally plausible" that Mr. Behla tripped over his own two feet. There is no evidence in the record to suggest that Mr. Behla tripped in such a manner. In addition to confirming that Mr. Behla made his living for over forty years in an industry that requires him to be fairly athletic rather than clumsy, the record is void of evidence that Mr. Behla had any history of ever falling over his own feet; to the contrary, the record confirms that Mr. Behla successfully navigated the terrain surrounding the shed for over a decade without tripping over his own feet, but on his *first* exposure to the unexpected presence of the extension cord, he tripped and fell at the exact location where the extension cord was present. This information supports the conclusion that it is far more likely that Mr. Behla did not trip over his own feet (as he had never done so before in over ten years of opportunity)

and that he instead tripped over the extension cord (given that his first exposure to the presence of the extension cord corresponds precisely with the time and location of his fall).

Here, unlike *Gardner*, there *is* evidence, both direct and circumstantial, on which the case may proceed. Here, the information is not limited to “two or more conjectural theories.” A determination of proximate cause in this case would not be pure speculation, but rather the proper consideration of the probability the extension cord caused Mr. Behla’s fall in light of the direct and circumstantial evidence contained in the record. Here, reasonable minds could differ as to the strength of the evidence and the probability of causation; therefore, the issue is one for a jury and cannot be decided as a matter of law.

VI. CONCLUSION

The trial court erred when it dismissed Appellant’s claim based on findings that were unsupported by substantial evidence in the record and when it misapplied Washington law to disregard evidence presented by Appellant in support of proximate causation. Appellant respectfully requests that the trial court’s ruling be reversed, and the case be remanded for trial.

RESPECTFULLY SUBMITTED this 21st day of February, 2019,



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on February 26, 2019, arrangements for delivery of a true and correct copy of the foregoing to the following individuals were made in the manner indicated:

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