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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION THREE

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JAMES F. BEHLA,  
*Appellant*

v.

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

*Respondents.*

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ON APPEAL FROM KLUCKITAT COUNTY SUPERIOR COURT  
HONORABLE RANDALL C. KLUG

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**BRIEF OF RESPONDENT**

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## **TABLE OF CONTENTS**

I.	INTRODUCTION .....	1
II.	PLAINTIFF’S OPENING BRIEF .....	2
III.	PLAINTIFF’S ASSIGNMENTS OF ERROR.....	5
IV.	STANDARD OF REVIEW .....	9
V.	PLAINTIFF’S ONLY EVIDENCE REGARDING CAUSATION AMOUNTS TO NOTHING MORE THAN SPECULATION, OR BALD, CONCLUSORY STATEMENTS.....	12
	A. Plaintiff asserted a negligence claim, which requires proof of causation. ....	12
	B. While causation is generally a jury issue, a jury is not permitted to speculate, so where the evidence offered would force a jury to speculate, the Court takes the claim from the jury and renders a judgment for defendant. ....	13
	C. The relevant facts regarding causation of plaintiff’s fall are few, and are inadequate to establish the causation element of the claim. ....	16
	D. Washington case law supports defendants here, and not plaintiff .....	18
VI.	OUT-OF-STATE CASE LAW IS IN ACCORD WITH WASHINGTON APPELLATE PRECEDENT, AS WELL AS THE TRIAL COURT’S DECISION HERE .....	29
VII.	CONCLUSION.....	31

## TABLE OF AUTHORITIES

### Cases

<i>Ainsworth v. Progressive Cas. Ins. Co.</i> , 180 Wn. App. 52, 322 P.3d 6 (2014) .....	4
<i>Albertson v. State</i> , 191 Wn. App. 284, 361 P.3d 808 (2015).....	12
<i>Asphalt &amp; Constr., LLC v. Lincoln Cty.</i> , 191 Wn.2d 182, 421 P.3d 925 (2018) .	11
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007).....	10
<i>Bullitt v. Lewis</i> , No. 56666-1-I, 2006 Wash. App. LEXIS 1930 (Ct. App. Sep. 5, 2006) .....	25, 26
<i>Byrne v. Wal-Mart Stores, Inc.</i> , 877 So.2d 462, 465 (P5) (Miss. Ct. App. 2004.....	30
<i>Clarke v. Nichols</i> , No. 35477-6-III, 2019 Wash. App. LEXIS 1, at *7-8 (Ct. App. Jan. 3, 2019) .....	14, 27, 28, 29
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	3, 4
<i>Daugert v. Pappas</i> , 104 Wn.2d 254, 704 P.2d 600 (1985).....	13
<i>De Heer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	3
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000) .....	10
<i>FPA Crescent Assocs., LLC v. Jamie's LLC</i> , 190 Wn. App. 666, 360 P.3d 934 (2015).....	4
<i>Frescoln v. Puget Sound Traction, Light &amp; Power Co.</i> , 90 Wash. 59, 155 P. 395 (1916).....	15
<i>Freund v. Hyman</i> , 103 A.2d 658, 377 Pa. 35 (Pa. 1954).....	30

<i>Gardner v. Seymour</i> , 27 Wn.2d 802, 180 P.2d 564 (1947) .....	passim
<i>Grange v. Finlay</i> , 58 Wn.2d 528, 364 P.2d 234 (1961).....	21
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	11
<i>Halder v. Dep't of Labor &amp; Indus.</i> , 44 Wn.2d 537, 268 P.2d 1020 (1954).....	15
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	13
<i>Hash by Hash v. Children's Orthopedic Hosp.</i> , 49 Wn. App. 130, 741 P.2d 584 (1987).....	11
<i>Hemenway v. Miller</i> , 116 Wn.2d 725, 807 P.2d 863 (1991) .....	5
<i>Hiatt v. Walker Chevrolet Co.</i> , 120 Wn.2d 57, 837 P.2d 618 (1992) .....	11
<i>Home Ins. Co. v. N. P. R. Co.</i> , 18 Wn.2d 798, 140 P.2d 507 (1943).....	20
<i>In re Disciplinary Proceeding Against Jensen</i> , 192 Wn.2d 427, 430 P.3d 262 (2018).....	3
<i>In re Guardianship of Lamb</i> , 173 Wn.2d 173, 265 P.3d 876 (2011).....	3
<i>Jankelson v. Sisters of Charity of House of Providence in Territory of Wash.</i> , 17 Wn.2d 631, 136 P.2d 720 (1943) .....	15
<i>Joyce v. Dep't of Corr.</i> , 155 Wn.2d 306, 119 P.3d 825 (2005).....	13
<i>Koukoulomatis v. Disco Wheels, Inc.</i> , 127 Ill. App. 3d 95, 468 N.E.2d 477 (1984) .....	30
<i>Kristjanson v. Seattle</i> , 25 Wn.App. 324, 606 P.2d 283 (1980).....	14
<i>Las v. Yellow Front Stores</i> , 66 Wn. App. 196, 831 P.2d 744 (1992).....	10

<i>Little v. Countrywood Homes, Inc.</i> , 132 Wn. App. 777, 133 P.3d 944 (2006).....	passim
<i>LK Operating, LLC v. Collection Grp., LLC</i> , 181 Wn.2d 117, 330 P.3d 190 (2014).....	3
<i>Lowman v. Wilbur</i> , 178 Wn.2d 165, 309 P.3d 387 (2013) .....	12
<i>Majetich v. P.T. Ferro Constr. Co.</i> , 906 NE2d 713 (Ill App3d Dist 2009) .....	30
<i>Manning v. 6638 18th Ave. Realty Corp.</i> , 28 AD3d 434, (NY App Div 2d Dep’t 2006) .....	30
<i>Marshall v. Bally’s Pacwest, Inc.</i> , 94 Wn. App. 372, 972 P.2d 475 (1999).....	passim
<i>Martin v. Gonzaga Univ.</i> , 191 Wn.2d 712, 425 P.3d 837 (2018).....	11
<i>Nielson v. Spanaway Gen. Med. Clinic, Inc.</i> , 135 Wn.2d 255, 956 P.2d 312 (1998).....	10
<i>Oltman v. Holland Am. Line USA, Inc.</i> , 163 Wn.2d 236, 178 P.3d 981 (2008).....	5
<i>Owens v. Kuro</i> , 56 Wn.2d 564, 354 P.2d 696 (1960).....	9
<i>Pennington v. Wjl</i> , 263 Ga. App. 758, 589 S.E.2d 259 (2003) .....	30
<i>Schmidt v. Pioneer United Dairies</i> , 60 Wn.2d 271, 373 P.2d 764 (1962).....	15
<i>Schneider v. Rowell’s Inc.</i> , 5 Wn.App. 165, 487 P.2d 253 (1971) .....	14
<i>Schooley v. Pinch’s Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	13
<i>Seven Gables Corp. v. Mgm/Ua Entm’t Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	11

<i>State v. McEnroe</i> , 181 Wn.2d 375, 333 P.3d 402 (2014) .....	4
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	3
<i>Tincani v. Inland Empire Zoological Soc'y</i> , 124 Wn.2d 121, 875 P.2d 621 (1994).....	12
<i>US W. Commc'ns, Inc. v. Utils. &amp; Transp. Comm'n</i> , 134 Wn.2d 74, 949 P.2d 1337 (1997).....	3
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	11

**Rules**

CR 56 .....	9
CR 56(e).....	9
Wash. R. App. P. 10.3(a)(6) .....	3

“[N]o legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, and without further showing that it could not reasonably have happened in any other way.”

*Gardner v. Seymour*, 27 Wn.2d 802, 810, 180 P.2d 564 (1947) (internal citations omitted; emphasis added).

## **I. INTRODUCTION**

Late in the evening of March 2, 2014, around 11:00 p.m., plaintiff fell while groping in the dark in search for a light switch through the planks of a wall of a shack sitting on a piece of rural property adjacent to the White Salmon River in Klickitat County. It had been snowing that evening, and an inch of snow covered both uneven gravel and concrete slabs on the ground where plaintiff fell. Plaintiff testified that all he can remember is that he was walking, and the next thing he knew he was on the ground. He picked himself up and looked around. He found an electrical cable on the ground and surmised that it must have caused his fall. He did not see or feel the cable before he fell, and it was not touching him or wrapped around his foot after the fall. He nevertheless assumed that it must have been the cable that caused his fall.

Plaintiff commenced suit against the property owners—defendants in this lawsuit—alleging negligence. As part of his negligence claim

plaintiff must establish causation. Causation cannot be left to surmise, conjecture or speculation, but that is exactly what plaintiff engages in when he says the cable caused his fall. Case law from both Washington and other jurisdictions regarding causation hold that where a jury is forced to speculate as to what caused plaintiff's fall, and where plaintiff cannot rule out other potential causes, his negligence claim fails and summary judgment is proper. That was the basis of defendants' arguments to the trial court, and the basis of the trial court decision here. The trial court did not err in reaching that conclusion, and this Court should therefore affirm.

## **II. PLAINTIFF'S OPENING BRIEF**

Plaintiff's Opening Brief is confusing to respondents in several respects. The trial court granted defendants' motion for summary judgment on the issue of causation and plaintiff's lack of non-speculative evidence regarding that element of his claim. The trial court briefing is short and concise. On appeal, plaintiff asserts *nine* assignments of error. Opening Brief, page 1. But he does not provide any argument or analysis regarding several of the assignments in his brief, and other assignments, including some that he does address in his brief, are directed at what he characterizes as findings of fact made by the trial court on summary judgment.

This Court should not consider assignments of error for which plaintiff offers no argument or analysis. *See, e.g., De Heer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (Court “will not consider an assignment of error where there is no argument in the brief in support thereof.”); *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 122 n.4, 330 P.3d 190 (2014) (“When a party does not make any argument in support of an assignment of error, an appellate court will not consider it. Wash. R. App. P. 10.3(a)(6).”); *In re Disciplinary Proceeding Against Jensen*, 192 Wn.2d 427, 440, 430 P.3d 262 (2018) (same). Washington appellate courts have consistently held that a party waives issues not fully argued in appeals briefs. *In re Guardianship of Lamb*, 173 Wn.2d 173, 183 n.8, 265 P.3d 876 (2011) (citing *US W. Commc’ns, Inc. v. Utils. & Transp. Comm’n*, 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997)). *See also State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (“Without argument or authority to support it, an assignment of error is waived.”); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) same).

For instance, plaintiff’s first assignment of error is addressed to the trial court’s denial of plaintiff’s motion to strike deposition testimony from the summary judgment record. Plaintiff had moved the trial court to strike *his own deposition testimony* from the record, presumably because that

testimony is harmful to plaintiff's arguments. Opening Brief, Page 1. But he offers no analysis or arguments in his brief in support of this assignment whatsoever, and he even relies on parts of his transcript that he moved to strike. Opening Brief, Page 9.

Plaintiff cannot correct these omissions in the reply brief either, for that would be patently unfair to respondent. *See, e.g., State v. McEnroe*, 181 Wn.2d 375, 387 n.11, 333 P.3d 402 (2014) (noting that "RAP 10.3(c) does not contemplate that parties will raise new arguments in a reply brief."); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); *FPA Crescent Assocs., LLC v. Jamie's LLC*, 190 Wn. App. 666, 679, 360 P.3d 934 (2015) ("An issue raised and argued for the first time in a reply brief generally will not be decided by an appellate court."); *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 78 n.20, 322 P.3d 6 (2014) ("To address issues argued for the first time in a reply brief is unfair to the respondent and inconsistent with the rules on appeal.").

Next, the Court should disregard the assignments of error aimed at the trial court's purported findings of fact because the trial court made no such findings, and because findings of fact are inappropriate on summary judgment, and are regarded as superfluous by an appellate court. *Oltman v.*

*Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 249 n.10, 178 P.3d 981 (2008) (“[F]indings and conclusions are inappropriate on summary judgment.”); *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991) (“[F]indings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court”). Here, while the trial court commented on the evidence before it on summary judgment, it did not make findings of fact. Stating that plaintiff’s evidence is insufficient to overcome summary judgment does not amount to an impermissible finding of fact. The trial court also did not make conclusions of law other than to hold that summary judgment in defendants’ favor was appropriate. To the extent that this Court is of the opinion that the trial court made impermissible factual findings, it may disregard them when conducting the appropriate *de novo* review.

### **III. PLAINTIFF’S ASSIGNMENTS OF ERROR**

Plaintiff asserts nine assignments of error. There should be one assignment of error in this case because the issue is simple and straightforward.<sup>1</sup> The issue presented is: did the trial court err when it granted defendants’ motion for summary judgment on the grounds that plaintiff presented insufficient evidence to support the causation element

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<sup>1</sup> There should possibly be a second assignment of error directed at the trial court ruling on plaintiff’s motion to strike his own deposition testimony if plaintiff intends to challenge that ruling. Because plaintiff offers no argument or analysis in support of this assignment of error, it is not clear whether he intended to challenge that trial court ruling.

of his negligence claim? The answer is no, the trial court did not err because the record demonstrates that the only evidence that plaintiff offered in support of the causation element of his negligence claim was impermissible speculation and conclusory statements.

Defendant will not separately address each of the nine assignments of error in the body of this brief, other than the bulleted points below, because plaintiff has waived several of them, and others are irrelevant because they are aimed at purported findings of fact. Here is how the Court should treat each of the nine assignments:

1. “The trial court erred when it denied Mr. Behla’s Motion to Strike.” This assignment has been waived because plaintiff appears to have abandoned it by not including any argument or analysis in the body of the brief at all.
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.” This assignment addresses a purported finding of fact. The trial court did not make findings of fact, and if it did, they are superfluous, and are not considered by an appellate court reviewing a trial court decision on summary judgment. The substantial evidence standard does not apply to any question presented in this appeal. The assignment should be disregarded.

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.” This assignment is also aimed at a purported finding of fact.
4. “The trial court erred when it found that it was ‘equally plausible’ that the (sic) 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 the evidence in the record supports the reasonable inference that Mr. Behla did not trip over his own feet.” This appears to be addressed at a purported finding of fact. To the extent that it is not, it is simply another way of saying that the trial court erred when it granted summary judgment on the grounds that plaintiff failed to submit evidence sufficient to overcome summary judgment on the issue of causation. Defendants will address that contention in the brief below.
5. “The trial court erred when it found 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.” This assignment is also directed at a purported finding of fact.

Moreover, there was evidence in the record regarding the conditions that were present at the time and place that plaintiff fell.

6. “The trial court erred when it failed to consider all the relevant evidence.” The trial court specifically stated in its order the things that it considered on the motion for summary judgment. Plaintiff does not point out what it is that the trial court was supposed to consider that was not on that list. This is just another way of stating that the trial court erred by not deciding the motion in favor of plaintiff. Defendants will address that issue in the brief below.
7. “The trial court erred when it failed to consider all the facts and reasonable inferences in the light most favorable to the nonmoving party.” This is also just another way of stating that the trial court erred when it granted summary judgment. Defendants will address this issue below in the brief.
8. “The trial court erred when it failed to properly apply Washington law to the facts.” This too is simply another way of saying the trial court erred by granting defendant’s motion for summary judgment.
9. “The trial court erred when it dismissed Mr. Behla’s claim on summary judgment.” This is the one proper assignment of error. Most of the other assignments attack the reason for the trial court’s

decision and not the decision itself. Defendant will address this assignment below.

#### **IV. STANDARD OF REVIEW**

The ruling on appeal is the trial court order and judgment granting summary judgment to defendants on plaintiff's negligence claim on the grounds that plaintiff lacks evidence sufficient to satisfy the causation element of his negligence claim. Summary judgment is governed by CR 56. CR 56(e) provides, in part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. \* \* \* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

“The prime purpose of \* \* \* the summary judgment rule is to secure the just, speedy, and inexpensive determination of every action.” *Owens v. Kuro*, 56 Wn.2d 564, 571, 354 P.2d 696 (1960). Another purpose is to “avoid a useless trial when no genuine issue of material fact

remains to be decided.” *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998).

The defendant may support a motion for summary judgment by merely challenging the sufficiency of plaintiff’s evidence as to a material issue. *Las v. Yellow Front Stores*, 66 Wn. App. 196, 197, 831 P.2d 744 (1992). In response, plaintiff may not rely on the allegations in the pleadings, but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Bare assertions that a genuine material issue exists will not defeat summary judgment in the absence of actual evidence. *Id.*

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. *See, e.g., Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

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. But “a nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.” *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 722, 425 P.3d 837 (2018) (citing *Seven Gables Corp. v. Mgm/Ua Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). *See also Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 191 Wn.2d 182, 191, 421 P.3d 925 (2018) (nonmoving party may not rely on speculation). Opinions and conclusory statements are insufficient to defeat summary judgment as well. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992) (the nonmoving party “must do more than express an opinion or make conclusory statements”); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (“The ‘facts’ required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions are insufficient. Likewise, conclusory statements of fact will not suffice.” (citation omitted)). *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987) (“Unsupported conclusory statements alone are insufficient to prove the existence or

nonexistence of issues of fact.”). As defendants discuss in more detail below, in response to defendants’ motion for summary judgment plaintiff offered evidence regarding causation that amounted to nothing more than conjecture, opinion, or conclusory statements, so the trial court properly granted summary judgment.

**V. PLAINTIFF’S ONLY EVIDENCE REGARDING CAUSATION AMOUNTS TO NOTHING MORE THAN SPECULATION, OR BALD, CONCLUSORY STATEMENTS**

A. Plaintiff asserted a negligence claim, which requires proof of causation.

Plaintiff asserted a claim for common law negligence against defendants. A negligence cause of action requires a plaintiff to establish four elements: “(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 Soc’y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

Proximate cause is the element at issue in this appeal. Proximate cause requires a reasonable connection between a defendant’s act or omission and the plaintiff’s injury. *Albertson v. State*, 191 Wn. App. 284, 296, 361 P.3d 808 (2015). “Washington law recognizes two elements to proximate cause: [c]ause in fact and legal causation.” *Lowman v. Wilbur*, 178 Wn.2d 165, 177, 309 P.3d 387 (2013) (quoting *Hartley v. State*, 103

Wn.2d 768, 777, 698 P.2d 77 (1985)).

Cause in fact “refers to the actual, ‘but for,’ cause of the injury, i.e., ‘but for’ the defendant’s actions the plaintiff would not [have been] injured.” *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). To establish cause in fact the plaintiff must show “a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff.” *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Cause in fact requires “a determination of what actually occurred.” *Schooley*, 134 Wn.2d at 478.

B. While causation is generally a jury issue, a jury is not permitted to speculate, so where the evidence offered would force a jury to speculate, the Court takes the claim from the jury and renders a judgment for defendant.

Whether a defendant’s act was a cause in fact of an injury is a question generally left to the jury. *Schooley*, 134 Wn.2d at 478. But it may become a question of law for the court if the facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006) (citing *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985)).

For instance, a jury is not permitted to speculate regarding causation, so if the only evidence plaintiff submits regarding the causation

element of his negligence claim is surmise or conjecture, the claim does not go to the jury. *Kristjanson v. Seattle*, 25 Wn.App. 324, 326, 606 P.2d 283 (1980) (“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.’”)<sup>2</sup>. While proximate cause may be established through circumstantial evidence, it still may not be established through speculation:

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 one 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).

The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. A verdict cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed

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<sup>2</sup> This Court has also recently said that “It may also become a question of law if evidence is so lacking that only by speculating can the injury be linked to a defendant’s acts.” *Clarke v. Nichols*, No. 35477-6-III, 2019 Wash. App. LEXIS 1, at \*7-8 (Ct. App. Jan. 3, 2019).

upon than two or more equally reasonable inferences from a set of facts, and under only one of the inferences would the defendant be liable, a jury will not be allowed to resort to conjecture to determine the facts.

*Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 276, 373 P.2d 764 (1962).

“Opinion testimony as to causation is insufficient to support a judgment if it is expressed in terms of speculation or surmise, *or if it is patently based upon speculation or surmise.*” *Halder v. Dep’t of Labor & Indus.*, 44 Wn.2d 537, 543, 268 P.2d 1020 (1954) (emphasis added)<sup>3</sup>. “The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another.” *Jankelson v. Sisters of Charity of House of Providence in Territory of Wash.*, 17 Wn.2d 631, 643, 136 P.2d 720 (1943) (quoting *Frescoln v. Puget Sound Traction, Light & Power Co.*, 90 Wash. 59, 63, 155 P. 395 (1916)). “Causation is speculative when, after consideration of the facts, ‘there is 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 a plaintiff would not be entitled to recover.’” *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 379, 972

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<sup>3</sup> In other words, a party cannot escape this rule by forcefully asserting conjecture as fact.

P.2d 475 (1999) (quoting *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947)).

C. The relevant facts regarding causation of plaintiff's fall are few, and are inadequate to establish the causation element of his claim.

Here, the facts in the summary judgment record fail to establish *prima facie* evidence of causation even when construed in the light most favorable to plaintiff, as they must be. Plaintiff's testimony amounts to nothing more than speculation, opinion or conclusory statements. What is relevant, for purposes of the motion for summary judgment, and for this appeal, is the following testimony regarding plaintiff's fall.

- It was late. CP 23, line 24; CP 24, lines 4-7.
- It was dark. CP 23, lines 24-25 (“It was late in the evening and it was dark.”)
- Plaintiff was not using a flashlight. CP 52 (page 31 of the depo transcript), lines 14-18.
- It was snowing. CP 17, lines 1-2
- There was an inch of snow on the ground. CP 23, lines 11-12.
- There were no witnesses.
- Plaintiff was walking on gravel and concrete, and the entire area had an inch of snow covering it. CP 32, lines 5-12; CP 23, lines 11-12 (there was an inch of snow on the ground).

- Plaintiff did not see the cord until *after* the fall. CP 51 (page 29 of the depo transcript), lines 17-19; CP 53 (page 34 of the depo transcript), lines 10-15 (“I never saw it until I woke up on the ground and went back and looked[.]”).
- He did not feel it touch his foot prior to falling, and it was not touching his foot after his fall. CP 27, lines 16-18; CP 33, line 13-CP 34, line 3 (“I don’t really recall anything”).
- He does not recall stumbling or tripping. *Id.*
- He was walking, and the “next thing [he] knew [he] was lying on the ground.” CP 26, lines 6-10.
- After the fall, plaintiff looked around and surmised that it must have been the cord that made him fall. CP 51 (page 29 of the depo transcript), lines 17-19; CP 53 (page 34 of the depo transcript), lines 10-15 (“I never saw it until I woke up on the ground and went back and looked[.]”); CP 27, line 18 (“I think my foot caught it[.]”).

Plaintiff asserts, emphatically, that it was the cord that tripped him, but even a cursory review of the evidence demonstrates that this is nothing but conjecture. Plaintiff did not see the cord before his fall because it was the middle of the night, dark, and he was not using a flashlight. He was walking over an uneven surface of both gravel and concrete, and

everything was covered in snow. He testified that he was walking and the next thing he knew he was on the ground. He looked around, saw the cord, and surmised that it must have been the cord that caused the fall. But no amount of forcefulness or assertiveness in his statement can change it from conjecture to fact.

D. Washington case law supports defendants here, and not plaintiff.

The rule prohibiting speculation regarding causation is well settled in Washington, and it has been applied in cases with similar facts.

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

In *Gardner*, the plaintiff's decedent died after he fell down an elevator shaft. *Id.* at 804. There were no witnesses to the fall. *Id.* The evidence established that the elevator at defendant's premises could be manipulated by jimmying open an elevator door and pulling on a cable, summoning the elevator.<sup>4</sup> *Id.* This could potentially leave an open elevator doorway leading to the elevator shaft. *Id.*

Plaintiff alleged that defendant was negligent, through the acts of its agents, by allowing the employees to use the unsafe method of elevator operation. She alleged that decedent's death was caused by another employee using the unsafe method of summoning the elevator, and by

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<sup>4</sup> This was apparently before a person could summon an elevator by pushing a button next to the elevator doors in a hallway.

leaving the elevator doors open, exposing the elevator shaft. She alleged decedent walked into the open doors thinking that he was entering an elevator, but instead fell to his death.

The Supreme Court found that there were two equally plausible theories of causation, but only one of which resulted in liability for defendant. *Id.* at 805. Under the first hypothesis, another employee opened the elevator door and left it open to the elevator shaft, which plaintiff walked through thinking he was boarding an elevator, but instead fell to his death. *Id.* Under the second hypothesis, the plaintiff's decedent himself opened an elevator door to manipulate the cables to summon the elevator. While doing this, plaintiff could have fallen to his death in the open elevator shaft. *Id.* Under the first hypothesis, defendant may be liable, but under the second, it may not. *Id.*

The Court held that plaintiff could not establish proximate cause. The Court described its inquiry: "The test to be applied here is whether the jury could have determined that the appellants were liable as a reasonable inference from the evidence, or whether the verdict rests on conjecture." *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). "The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture. \* \* \* In applying the circumstantial evidence submitted 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 808-09 (internal citation omitted).

The Court found that there were other potential causes of decedent’s fall, and that those causes would not establish defendant’s liability. The Court quoted from its own decision made a couple years earlier is *Home Ins. Co. v. N. P. R. Co.*, 18 Wn.2d 798, 140 P.2d 507 (1943):

In the present case, for example, the plaintiff was presumed to have been exercising due care and the jury so found but, so far as the evidence goes, he might, without any negligence on his part, have slipped or stumbled forward in front of the defendant's car or he might have been pushed or jostled by his companion, and the defendant would not have been liable for the accident.

*Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947).

When the plaintiff cannot rule out the other potential causes, and a jury would be forced to speculate, the cause is removed from the jury.

We have frequently said that, if there is 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 a

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plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

*Id.* at 809 (internal citations omitted).<sup>5</sup>

It is not sufficient to establish that an accident *might have happened* in a certain way. “[N]o legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, and without further showing that it could not reasonably have happened in any other way[.]” *Id.* Moreover, a defendant need not prove that it happened some other way. It is enough for defendant to show that the evidence supports other potential causes of the accident. “It seems to us that we may reasonably draw other conclusions as to the cause of this injury from the facts in evidence than those contended for by the plaintiff.” *Id.* at 810.

Here, plaintiff *might have* fallen by tripping on an electrical cord. But he might have fallen by tripping on the uneven gravel, or by tripping on the lip of the concrete slab, where the gravel meets the slab. He could have slipped in the snow. He could have just lost his balance and fell. Just as in

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<sup>5</sup> “[I]f 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 one or more of which there would be no liability upon him, a jury will not be permitted to conjecture how the accident occurred.” *Grange v. Finlay*, 58 Wn.2d 528, 531, 364 P.2d 234 (1961).

*Gardner*, there is no way to know what happened; there is only speculation, and that is insufficient to defeat summary judgment.

In the Opening Brief, plaintiff argues that the trial court made impermissible factual findings that were unsupported by substantial evidence when the trial court stated in its order that it was equally plausible that plaintiff could have tripped over his feet, slipped in the snow or tripped over a natural condition on the ground. But the trial court's remarks in this regard are not any different than what the court in *Gardner* did when it opined that the plaintiff could have caused his own fall.

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

In *Marshall*, the plaintiff sued her gym for negligence after she fell off a treadmill. *Id.* at 378. Like the plaintiff here, plaintiff could not remember her fall. *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.* “A

claim of liability resting only on a speculative theory will not survive summary judgment.” *Id.* at 381.

Critical to the Court’s decision in *Marshall* was the fact that plaintiff could not remember how the accident happened, despite her allegations that it happened a certain way. “Without any memory of the accident, Marshall simply offers a theory as to how she sustained her injuries. But a verdict cannot be founded on mere theory or speculation.” *Id.* at 379.

So too here. Plaintiff does not remember what happened. He simply offers his *theory* of what happened. CP 53 (page 34 of the depo transcript), lines 10-15 (“I never saw it until I woke up on the ground and went back and looked[.]”); CP 27, line 18(“I think my foot caught it[.]”).<sup>6</sup>

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

In *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006), Division I of the Court of Appeals addressed the trial court order granting summary judgment on the issue of proximate cause in similar circumstances. Jared Little apparently fell from a ladder while installing gutters on a house for defendant Countrywood. There were no

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<sup>6</sup> In other places, plaintiff omits the “I think,” and simply states that he tripped on the cord, but this is “patently based on speculation or surmise.” *Halder v. Dep’t of Labor & Indus.*, 44 Wn.2d 537, 543, 268 P.2d 1020 (1954) (“Opinion testimony as to causation is insufficient to support a judgment if it is expressed in terms of speculation or surmise, or if it is patently based upon speculation or surmise.”).

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, in part because Little could not establish the necessary element of proximate cause. *Id.* at 779.

Little contended the defendant breached its duty to provide a safe, secured ladder. But 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.<sup>7</sup>

Citing favorably to *Marshall*, the court stated, “[t]he 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, plaintiff here 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 only speculate.

**Bullitt v. Lewis, No. 56666-1-I, 2006 Wash. App. LEXIS 1930 (Ct. App. Sep. 5, 2006)**

Division I relied on *Gardner* when it affirmed summary judgment in a slip and fall case with facts somewhat similar to this case. There, the plaintiff slipped and fell on a sidewalk in front of defendant’s house. She alleged that she slipped on ice on the sidewalk, and that the ice was caused by melting snow defendants had shoveled from their driveway. But she never saw or felt ice before her fall. Instead, she testified that she saw ice further up the sides of defendant’s driveway, and inferred that it must have been ice that caused her fall.

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<sup>7</sup> This last sentence—that Little did not know how he was injured—is nearly identical to the trial court statements here that plaintiff characterizes as unsupported factual findings.

Just like plaintiff here, the plaintiff in *Bullitt* argued that the court must view the inferences in her favor because she was the nonmoving party. She argued that the evidence allowed the inference that her fall was caused by ice created by defendants' snow removal. The appellate court ruled that she had presented insufficient evidence to establish a *prima facie* case for causation. It stated that she could have fallen due to other causes: "But Bullitt might have slipped due to snow dislodging from her boot when it hit the sidewalk, or due to snow on the sole of her boot coming into contact with the sidewalk." *Id.* at 7.<sup>8</sup>

This case once again demonstrates that the defendant need not prove or establish an alternative causation theory. The Court can review all the evidence in front of it and find that the fall may have been caused by something other than what plaintiff alleges. For instance, plaintiff complains here that defendant did not present substantial evidence that plaintiff's fall was caused by snow, gravel, sticks or his own feet. Defendant does not need to do that. The evidence in the record allows the court to opine that something else could have caused plaintiff's fall. Plaintiff cannot eliminate those alternative potential causes, so any inference that the fall was caused by the cord is pure speculation. "[N]o legitimate inference can be drawn that an accident happened in a certain

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<sup>8</sup> This too sounds just like the statements made by the trial court here, which plaintiff incorrectly characterizes as unsupported factual findings.

way by simply showing that it might have happened in that way, and without further showing that it could not reasonably have happened in any other way.” *Gardner v. Seymour*, 27 Wn.2d 802, 810, 180 P.2d 564 (1947) (internal citations omitted; emphasis added).

In nearly every one of the causation cases, the courts opine about potential alternative causes from reviewing the evidence. That is what the trial court did here, and it is no different than what Washington appellate courts have done in numerous cases.

**Clarke v. Nichols, No. 35477-6-III, 2019 Wash. App. LEXIS 1 (Ct. App. Jan. 3, 2019)**

Just this year, this Court relied on the *Marshall* and *Little* cases discussed above when it affirmed the summary judgment dismissal of a negligence claim involving a fall. Plaintiff was assisting his friend, Jay Nichols, attach a piece of trim to the soffit of a shack on Mr. Nichols’ rural property. Mr. Nichols had set up two ladders that the men could use to perform the task. Both ladders were six feet tall and were spaced about six feet apart. Plaintiff’s ladder was made of wood. The piece of trim was six feet long and weighed about one pound.

As Mr. Clarke ascended the ladder, Mr. Nichols held it. Plaintiff had not asked him to hold the ladder, and did not expect him to continue holding the ladder. It felt steady to plaintiff. But the next thing plaintiff

remembers is that he was on the ground, his feet above his head, and his vision blurry. Plaintiff did not know if his ladder fell or broke. Mr. Nichols did not witness the fall because his back was turned.

Defendants moved for summary judgment on the issue of causation. In response, plaintiff offered eleven facts relating to negligence, such as the fact that defendants had not inspected the ladder before plaintiff used it, the ladder did not have slip resistant feet, the ladder was not properly braced, and that defendant did not warn plaintiff that he was about to let go of the ladder.

The trial court granted summary judgment on the issue of causation, and this Court affirmed. It first stated the rule:

Whether a defendant's act was a cause in fact of an injury is a question generally left to the jury. But it may become a question of law for the court if the facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006). *It may also become a question of law if evidence is so lacking that only by speculating can the injury be linked to a defendant's acts.*

*Id.* at page 7-8 (some internal citations omitted; emphasis added).

This Court then relied on the decisions in both *Marshall* and *Little* to illustrate its holding that plaintiff had failed to produce evidence sufficient to overcome summary judgment on the issue of causation. “The

11 facts emphasized by Mr. Clarke are the basis for his theories about the cause of his fall. But he lacks any evidence from which a reasonable juror could find, without speculating, that one of his 11 theories explains his fall. His effort to establish the essential element of proximate cause fails as a matter of law.” *Id.* at 8-9.

This Court should again rely on *Marshall* and *Little*, as well as *Gardner*, and hold that plaintiff failed to present facts sufficient to overcome summary judgment on the issue of causation. At most, plaintiff has presented facts that form the basis of his theory or opinion as to what happened, but those facts do not allow a juror to find, without speculating, that plaintiff’s fall was caused by the electrical cord.

**VI. OUT-OF-STATE CASE LAW IS IN ACCORD WITH WASHINGTON APPELLATE PRECEDENT, AS WELL AS THE TRIAL COURT’S DECISION HERE**

The rule against speculation is not a peculiarity of Washington law. It is a commonly accepted rule in jurisdictions across the country, many of which have affirmed the dismissal of claims on summary judgment for the same reasons the trial court dismissed plaintiff’s claim here. That is, the cases share a few key things in common: (1) the plaintiffs trip and fall; (2) nobody witnesses the falls; and (3) the plaintiffs cannot say that they saw or felt what they tripped on, and only after the fall did the plaintiff surmise that they must have tripped over something in

particular. *See, e.g., Freund v. Hyman*, 103 A.2d 658, 659, 377 Pa. 35 (Pa. 1954) (upholding nonsuit where plaintiff knew where she fell and photograph showed raised piece of sidewalk in that area, but where there was no evidence that raised step actually caused fall); *Byrne v. Wal-Mart Stores, Inc.*, 877 So.2d 462, 465 (P5) (Miss. Ct. App. 2004) (affirming summary judgment in a slip and fall case where plaintiff did not actually see what caused her fall, but surmised it must have been a cookie she saw on the floor after her fall); *Koukoulomatis v. Disco Wheels, Inc.*, 127 Ill. App. 3d 95, 101, 468 N.E.2d 477 (1984) (plaintiff could only surmise that the carpet “[m]ust have gone up a little bit that I tripped over it”; she had not seen or felt anything wrong with the carpet); *Pennington v. Wjl*, 263 Ga. App. 758, 760, 589 S.E.2d 259 (2003) (although plaintiff testified to a “feeling of falling” and assumed he had tripped on a nearby pile of hoses, he had no memory of his feet striking anything or of tripping at all); *Manning v. 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435 (NY App Div 2d Dep’t 2006) (“Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation”); *Majetich v. P.T. Ferro Constr. Co.*, 906 NE2d 713, 720 (Ill App3d Dist 2009) (affirming summary judgment on parking lot trip-and-fall case, reasoning that there was insufficient

evidence “to rule out that [the decedent] tripped or slipped for any one of the other countless reasons that people fall.”).

All of these cases are consistent with Washington appellate law, and with the trial court’s decision in this case.

## VII. CONCLUSION

The trial court did not err when it granted defendants’ motion for summary judgment on the issue of causation because the only evidence that plaintiff offered in opposition to the motion amounted to nothing more than conjecture, opinion or conclusory statements, all of which are insufficient to overcome summary judgment. This Court should therefore affirm.

DAVIS ROTHWELL  
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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 24<sup>th</sup> day of April, 2019, I served a true copy of RESPONDENTS' ANSWERING BRIEF, contained in a sealed envelope, with postage prepaid, addressed to said attorney at said attorney(s)' last-known address, as set forth below, and deposited the same in the post office at Portland, Oregon, on this day.

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**TABLE OF CONTENTS**

<i>Bullitt v. Lewis</i> , No. 56666-1-I, 2006 Wash. App. LEXIS 1930 (Ct. App. Sep. 5, 2006)	APP-1
<i>Clarke v. Nichols</i> , No. 35477-6-III, 2019 Wash. App. LEXIS 1, at *7-8 (Ct. App. Jan. 3, 2019)	APP-6

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**Bullitt v. Lewis**

Court of Appeals of Washington, Division One

September 5, 2006, Filed

No. 56666-1-I

**Reporter**

2006 Wash. App. LEXIS 1930 \*

DOROTHY BULLITT, *an individual person, Appellant*, v. YALE LEWIS and KATHERINE HENDRICKS, *husband and wife, and the marital community comprised thereof, Respondents*.

**Notice:** [\*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

**Subsequent History:** Reported at *Bullitt v. Lewis*, 134 Wn. App. 1053, 2006 Wash. App. LEXIS 2522 (2006)

**Prior History:** Appeal from Superior Court of King County. Docket No: 04-2-03389-6. Hon. Mary I Yu.

**Core Terms**

sidewalk, driveway, slipped, snow, costs, trial court, melted, respondents', inferences, glinting, surface, offset, hole, summary judgment, conjectural

**Case Summary**

**Procedural Posture**

Appellant injured party challenged a decision from the Superior Court of King County (Washington), which granted summary judgment to respondent owners in a personal injury action. The owners filed a cross-appeal on the issue of costs.

**Overview**

The injured party slipped and fell on the sidewalk in front of the owners' driveway. She contended that the fall was caused by shoveled snow that had melted and refrozen. However, she did not see or feel the ice that she allegedly slipped on. The trial court granted summary judgment for the owners, and the injured party sought review. In partially affirming, the appellate court determined that the injured party's inference that she fell on ice based on the violence of the fall and the fact that she saw some glinting further up the driveway was simply insufficient. This glinting could have been either ice or water; moreover, the injured party did not testify that there was any glinting where she actually fell. In addition, she had walked on the same surface earlier in the day without difficulty; therefore, something else could have caused her to fall. The testimony of a professional ergonomist did not alter this result. Finally, the trial court erred by not awarding costs under *Wash. Rev. Code §§ 4.84.010, 4.84.030* because the owners were the prevailing party, and a request by motion was unnecessary.

**Outcome**

The decision as it related to costs was reversed and remanded. As to all other issues, the decision was affirmed.

**LexisNexis® Headnotes**

2006 Wash. App. LEXIS 1930, \*1

Civil Procedure > ... > Summary  
 Judgment > Entitlement as Matter of  
 Law > Appropriateness

Torts > ... > Proof > Evidence > Province of  
 Court & Jury

**HN1** Entitlement as Matter of Law,  
 Appropriateness

Summary judgment is appropriate if there is no genuine issue of material fact or if the plaintiff cannot make a prima facie showing of each of the elements of his or her claim. The court must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. However, if there is 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 a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred. The plaintiff must show that there is room for those of reasonable minds to conclude that there is a greater probability that the accident happened in such a way that the trier of fact could determine the respondent to be negligent than there is that it did not so happen.

Civil Procedure > ... > Costs & Attorney  
 Fees > Costs > General Overview

Civil Procedure > Pleading &  
 Practice > Motion Practice > General Overview

**HN2** Costs & Attorney Fees, Costs

The allowance of costs is governed by statute. A prayer for them is unnecessary. *Wash. Rev. Code* §§ 4.84.010 and .030. The prevailing party in superior court is entitled to costs. § 4.84.030.

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**Judges:** Authored by Marlin Appelwick.  
 Concurring: Mary Kay Becker, Ronald Cox.

**Opinion by:** Marlin Appelwick

**Opinion**

**APPELWICK, C.J.**-- Dorothy Bullitt appeals the trial court's grant of summary judgment to respondents. Bullitt claimed that she slipped on ice on the sidewalk in front of respondents' driveway. She asserted that the ice was caused by snow respondents had shoveled from the driveway and corresponding sidewalk that had melted and refrozen. Bullitt never saw or felt the ice she allegedly slipped on. The trial court held that there was insufficient evidence that Bullitt had slipped on ice, and that respondents owed no duty to keep the sidewalk free of ice. We agree that Bullitt did not present sufficient [\*2] evidence that ice caused her fall. We also reverse the trial court's denial of costs and remand for a determination of allowable costs.

**FACTS**

On February 17, 2001, Dorothy Bullitt slipped and fell on the sidewalk as she crossed Yale Lewis's and Katherine Hendricks's (respondents') driveway. It had snowed in Seattle a day or two before, and Hendricks and her children had shoveled the driveway and the corresponding part of the sidewalk clear of snow on February 16. Hendricks and her children had piled the shoveled snow to the side of driveway. Bullitt slipped just as she stepped from the snowy part of the sidewalk to the shoveled part, fell, and rolled onto the parking strip.

The driveway had appeared "perfectly clear" as

2006 Wash. App. LEXIS 1930, \*2

Bullitt approached it, and as she lay on the ground, she "was unable to detect ice" where she fell. She did see some glinting further up the sides of the driveway where the sun was shining. She saw the small piles of snow next to the driveway, and inferred that some of the snow piles had melted down to the sidewalk and refrozen, and that she had slipped on ice formed from that melting and refreezing. She did not run her hand over the surface on which she fell [\*3] to see if it was icy. After about 20 to 40 minutes, some pedestrians came along and helped Bullitt get to the hospital. Bullitt's fall broke her right arm and right leg in numerous places. She has since had several surgeries.

In February 2004, Bullitt sued respondents, alleging they had created a hazard by altering natural conditions. After the parties deposed each other, respondents moved for summary judgment. Bullitt submitted a declaration of Daniel Johnson, a professional ergonomist. In June 2004, Johnson examined the area where Bullitt fell and determined that the area was slip-resistant both when dry and when wet.

The trial court granted the respondents' motion for summary judgment, but specifically crossed out language granting respondents their costs. The trial court apparently orally informed respondents that it denied costs because respondents had not requested costs in their summary judgment motion.

Bullitt moved for reconsideration. The trial court denied Bullitt's motion, stating:

there is insufficient evidence in the record to conclude that Plaintiff slipped on ice created by snow from Defendant's driveway. However, even if this court accepts Plaintiff's [\*4] rendition of the facts, the court grants summary judgment on the basis that there was no legal duty to keep the public sidewalk clear of ice after Defendants cleared their driveway of snow. The law does not require Defendants to undertake remedial measures when the snow melts from their driveway onto the public

sidewalk used by Plaintiff.

Bullitt appeals. Respondents cross-appeal the court's refusal to grant them costs.

#### ANALYSIS

##### I. Evidence of Slipping on Ice

Respondents contend that Bullitt's statements as to what happened to her on the day of the accident are "purely conclusory statements of fact that are insufficient to raise a genuine issue of fact." Respondents assert that because Bullitt stated in her deposition that she saw only a smooth, clear surface and was unable to detect ice even after she fell, she has submitted only conclusory facts. Respondents suggest Bullitt could easily have fallen on something other than ice, or that even if she did fall on ice, the ice could have come from some other source.

HNI [☒] Summary judgment is appropriate if there is no genuine issue of material fact or if the plaintiff cannot make a prima facie showing of each of the [\*5] elements of his or her claim. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The court must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). However, "if there is 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 a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred." Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947). The plaintiff must show that there is room for those "of reasonable minds to conclude that there is a greater probability that the accident happened in such a way that the trier of fact could determine the respondent to be negligent than there is that it did not so happen." Stevens v. State, 4 Wn. App. 814, 817, 484 P.2d 467

2006 Wash. App. LEXIS 1930, \*5

*(1971).*

Bullitt's claim fails because, viewing all of the facts and the reasonable inferences therefrom in the light most favorable to her, [\*6] she has not shown a greater probability that she slipped on ice and that the ice was the result of melted snow from the respondents' driveway. Bullitt testified in her deposition that when she looked at the driveway:

I observed what continued to appear a totally clear surface. I couldn't--The sun had stopped shining, so there was no light flickering on it. I was unable to detect ice. I mean, I knew there was ice because I just slipped so violently, but it still looked perfectly clear, perfectly smooth.

I saw no evidence of gravel or salt or any, any texture whatsoever.

She further elaborated:

There was some sun glinting on the driveway itself, on the edges of the driveway. This--Down along the side I did see ice glinting, but the sun was hitting on that. It was not hitting on this. So, I, as I lay there, I inferred that the--that water had, had slid--There had been some melting or--There's underground water in that area as well that had come down the side here and had, had altered the--I don't know about the rest of the driveway. I mean, I just--But this little side part, that's where I saw the sparkling.

Bullitt testified that she did not run her hand [\*7] over the surface where she fell.

This testimony is insufficient to establish a prima facie case that Bullitt slipped on ice. Bullitt did not see ice where she fell. She testified that she inferred that she slipped on ice, based on the violence of the fall and the fact that she saw some glinting further up the driveway. But Bullitt might have slipped due to snow dislodging from her boot when it hit the sidewalk, or due to snow on the sole of her boot coming into contact with the sidewalk. The only evidence supporting Bullitt's conclusion that she slipped on ice was the glinting she saw on the driveway. But this glinting could have been either ice or water, and Bullitt could not testify that there

was also glinting where she fell. There was also no evidence as to the condition of the sidewalk from the people who had helped Bullitt get off the ground. Further, Hendricks said that earlier that morning she walked on the driveway and sidewalk "without difficulty." Rational inferences from this evidence do not establish a prima facie case that Bullitt slipped on ice--they merely suggest a conjectural theory, which is insufficient.

The fact that Bullitt submitted a declaration from Johnson, [\*8] a professional ergonomist, does not alter this conclusion. Johnson examined the area of the fall in June 2004, and reviewed Bullitt's deposition. He stated that the sidewalk was slip-resistant when dry and when wetted with water. His opinion was that clear ice was present on the sidewalk that day. He further testified that:

By clearing the snow to the sides of the driveway, which slopes down toward the sidewalk, it is likely that as the snow melted water flowed down to the cleared sidewalk where it refroze. . . This slip and fall occurred because snow was piled along the sides of the driveway such that when it melted it flowed down to the sidewalk below where it refroze into a clear, highly slippery surface undetectable to pedestrians.

Johnson's declaration does not elevate Bullitt's inference that she slipped on ice to the level of a prima facie case. All that the declaration establishes is that the sidewalk was not slippery when dry or wet. But Johnson does not address whether any other substance **could have caused Bullitt's fall**, such as snow lodged in or dislodged from her boot.

Bullitt cites *Johnson v. City of Ilwaco*, 38 Wn.2d 408, 229 P.2d 878 (1951), [\*9] to support her contention that she produced sufficient evidence. In *Johnson*, the plaintiff alleged that she tripped and fell on a raised offset portion of a sidewalk and a hole in the sidewalk for a flagpole. *Johnson*, 38 Wn.2d at 410. The city argued that any relation between her fall and the offset and hole was conjecture. *Johnson*, 38 Wn.2d at 414. The court

2006 Wash. App. LEXIS 1930, \*9

noted the testimony of a witness who saw her fall, and concluded:

No claim is made that the sidewalk was slippery. There was claimed but one cause of appellant falling. The jury had the right to accept or reject the evidence in relation thereto. There was no occasion for speculation. Respondent also urges, in this connection, there was no substantial evidence that the flag pole hole near the curb had anything to do with appellant continuing to fall after turning her ankle when she stepped on the offset, and to connect the two factors one must further indulge in speculation. The testimony of appellant was to the effect that when she lost her balance by stepping on the offset she attempted to regain it, and in so doing the heel of her shoe caught in the hole. The jury had the right [\*10] to infer and conclude that the combination of the offset and the flag pole hole caused appellant to lose her balance and fall.

Respondents are correct. HN2 [↑] "The allowance of costs . . . is governed by statute. [\*11] A prayer for them is unnecessary." Lujan v. Santoya, 41 Wn.2d 499, 501, 250 P.2d 543 (1952) (citing RCW 4.84.010 and .030). The prevailing party in superior court is entitled to costs. RCW 4.84.030. We remand for the trial court to determine respondents' allowable costs.

We reverse and remand for determination of costs, and affirm on all other issues.

Appelwick, C.J.

WE CONCUR:

Cox, J.

Becker, J.

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Johnson, 38 Wn.2d at 415.

Johnson is distinguishable because in that case, there was no dispute as to the existence of the offset or the hole. Based on the plaintiff's description of how she lost her balance and then had her heel caught, in addition to the testimony of a witness who saw her fall, the jury was not forced to speculate as to the cause of her injury. But here, it is unclear whether ice was even present on the surface on which Bullitt slipped. Bullitt did not see or feel ice below her. Bullitt's conclusion that she slipped on ice was conjectural. Because we affirm the trial court on this ground, we need not consider the issue of whether respondents breached any duty of care.

## II. Respondents' Costs

Respondents argue that the trial court erred in not awarding them costs. They contend that, contrary to what the trial court held, the prevailing party does not have to request costs by motion. Bullitt does not

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Clarke v. Nichols

Court of Appeals of Washington, Division Three

January 3, 2019, Filed

No. 35477-6-III

**Reporter**

2019 Wash. App. LEXIS 1 \*; 2019 WL 81603

MICHAEL CLARKE, *Appellant*, v. JAY NICHOLS ET AL., *Respondents*.

**Notice:** RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

**Subsequent History:** Reported at Clarke v. Nichols, 2019 Wash. App. LEXIS 29 (Wash. Ct. App., Jan. 3, 2019)

**Prior History:** [\*1] Appeal from Spokane Superior Court. Docket No: 16-2-01769-4. Judge signing: Honorable Maryann C. Moreno. Judgment or order under review. Date filed: 06/27/2017.

**Core Terms**

ladder, proximate cause, summary judgment, trim, doctrine doctrine doctrine, law law law, infer, res ipsa loquitur, feet, speculating, ascended, remember, deposed, genuine, inspect, act act act, injuries, requires, affix, cases, juror, alteration, contractor, invitation, occurrence, nonmoving, resistant, treadmill, finished, theories

**Counsel:** For Appellant: Stephen Kenneth Meyer, Meyer Thorp Attorneys at Law PLLC, Spokane, WA.

For Respondents: Cheryl Rani Guttenbe Adamson, Bohrnsen Stocker Smith Luciani Adamson P, Spokane, WA; Geoffrey D. Swindler, Law Office

of Geoffrey D. Swindler, Spokane, WA.

**Judges:** Authored by Laurel Siddoway.  
Concurring: Rebecca Pennell, Robert Lawrence-Berrey.

**Opinion by:** Laurel Siddoway

**Opinion**

¶1 SIDDOWAY, J. — Michael Clarke appeals the summary judgment dismissal of his claim for negligence arising from his fall while helping a friend attach trim to a soffit. He posits duties that might have been breached but presented the trial court with no evidence creating a genuine issue of material fact on the essential element of proximate cause. For that reason, and because the facts do not support the application of *res ipsa loquitur*, his complaint was properly dismissed. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Because Michael Clarke's complaint was dismissed by summary judgment, we view the facts in the light most favorable to him as the nonmoving party.

¶3 One day in spring 2013, [\*2] Jay Nichols invited Mr. Clarke, a lifelong friend, to visit Nichols's property in Elk. Mr. Nichols co-owns the property with his wife, Margaret, and his sisters Veronica Nichols and Vicki Lane. None of the owners lives at the property, which is hilly and heavily wooded. The property has not been developed except for a few shack-like outbuildings

2019 Wash. App. LEXIS 1, \*2

and what Mr. Clarke describes as a “really nice fire pit.” Clerk's Papers (CP) at 24. Before the spring 2013 invitation to the property, Mr. Clarke had visited Mr. Nichols there at least 10 times, where they would build a fire and “sit around and yak.” *Id.*

¶4 On the day at issue, Mr. Nichols asked Mr. Clarke to help attach a piece of trim to the soffit of a shack that he had been finishing with siding. Mr. Clarke knew how to affix trim because he “used to do that for a living.” CP at 26.

¶5 Mr. Nichols had already set up two ladders that the men could use to perform the task. Both ladders were six-foot, A-frame stepladders, and were set up roughly six feet apart. The ladder Mr. Clarke used was made out of wood. The piece of trim was about six feet long, and weighed about a pound. Mr. Clarke and Mr. Nichols did not discuss in advance how they would affix the trim. When he was later [\*3] deposed, Mr. Clarke testified that he assumed he would hold one end of the trim in place while Mr. Nichols held the other end and used nails to affix the trim.

¶6 As Mr. Clarke began ascending one of the ladders, Mr. Nichols held it. Mr. Clarke did not ask Mr. Nichols to hold the ladder, and he did not expect Mr. Nichols to continue holding it. As he ascended the ladder, it felt steady to Mr. Clarke. Yet the next thing Mr. Clarke remembers is that he was on the ground, his feet above his head, and his vision was blurry. Mr. Clarke does not know if the ladder fell or broke. He never saw it after his fall.

¶7 Mr. Nichols drove Mr. Clarke to the hospital. He had suffered extensive injuries, including a punctured lung, torn spleen, multiple broken ribs, internal bleeding, loss of vision, and severe joint damage to his left shoulder, left knee, and right ankle. When Mr. Nichols visited him in the hospital a day or two after the fall, Mr. Clarke asked him what happened and Mr. Nichols said he did not know; he had turned his back and the next thing he knew, Mr. Clarke was on the ground. Mr. Clarke does not believe that Mr. Nichols or anyone else

did anything to cause his fall.

¶8 Almost three years after [\*4] the accident, Mr. Clarke filed the action below, naming as defendants not only Mr. Nichols, but also his wife and sisters. By the time Mr. Nichols was deposed in March 2017, he no longer had the ladder that Mr. Clarke fell from. It had been stolen from the Elk property; Mr. Nichols does not remember when.

¶9 When deposed, Mr. Nichols stated that the ladder Mr. Clarke fell from was set on fairly level, packed dirt next to the shack. The ladder was placed directly on the ground and did not have slip resistant feet. Mr. Nichols does not remember if he braced the ladder to prevent it from moving. He does not remember if he inspected the ladder before setting it up. He does not know when, prior to Mr. Clarke's fall, he had last used the ladder, or how old it was. He has owned several ladders and inspects them only when he has not used the ladders in a while.

¶10 Mr. Nichols was unable to recall whether, as Mr. Clarke ascended the ladder, Mr. Clarke was holding the trim or if it was laying on top of the ladder. He does recall that as Mr. Clarke ascended the ladder, he stood and held the ladder to keep it steady.

¶11 After Mr. Nichols and Mr. Clarke had been deposed, Mr. Nichols and Margaret and Veronica [\*5] Nichols moved for summary judgment. They argued that summary judgment was appropriate because Mr. Clarke failed to present evidence of proximate cause. Veronica Nichols made the further argument that she was not even present.

¶12 Mr. Clarke argued that the doctrine of *res ipsa loquitur* was available on the facts, stating in a declaration filed with the court that he “had extensive experience working with and on ladders ... and [has] descended ladders hundreds of times without ever falling, or even coming close to falling from a ladder.” CP at 94. He also identified the following 11 facts that he argued would allow a

2019 Wash. App. LEXIS 1, \*5

reasonable juror to infer breach and proximate cause:

- a. Jay did not inspect the ladder before Clarke's use;
- b. The ladder was set directly upon 'fairly level' soil and not a level support surface;
- c. The ladder was not braced in any manner to prevent accidental displacement;
- d. The feet of the ladder were not slip resistant;
- e. Jay did not know the age of the ladder or when it was last used;
- f. Jay did not know the maximum weight capacity of the ladder;
- g. Jay did not inspect the side rails to ensure they were straight;
- h. Jay cannot state whether the ladder was fully open;
- i. Jay cannot [\*6] state whether Clarke had finished climbing before he let go of the ladder;
- j. Jay did not warn Clarke that he was about to let go of the ladder; and
- k. Clarke had extensive experience with ladders and would not likely have fallen but for the ladder being unsteady.

CP at 134.

¶13 The trial court granted summary judgment. Mr. Clarke appeals.

#### ANALYSIS

¶14 Mr. Clarke argues that the trial court erred when it dismissed his claims because the 11 facts he identified to the court would allow a reasonable juror to find both negligence and proximate cause, and alternatively, liability could be based on the doctrine of *res ipsa loquitur*.

#### *Standard of review*

¶15 We review orders granting summary judgment *de novo*, engaging in the same inquiry as the trial court. *Volk v. DeMeerleer*, 187 Wn.2d 241, 254, 386 P.3d 254 (2016). Summary judgment is appropriate when there is "no genuine issue as to

any material fact and ... the moving party is entitled to a judgment as a matter of law." *CR 56(c)*. We view all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Volk*, 187 Wn.2d at 254. Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

*Mr. Clarke failed to demonstrate facts creating a genuine issue of proximate cause, an essential [\*7] element*

¶16 A negligence cause of action requires a plaintiff to establish four elements: "(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 Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). Proximate cause requires a reasonable connection between a defendant's act or omission and the plaintiff's injury. *Albertson v. State*, 191 Wn. App. 284, 296, 361 P.3d 808 (2015). "Washington law recognizes two elements to proximate cause: [c]ause in fact and legal causation." *Lovman v. Wilbur*, 178 Wn.2d 165, 177, 309 P.3d 387 (2013) (alteration in original) (quoting *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)).

¶17 Cause in fact, which is our concern here, "refers to the actual, 'but for,' cause of the injury, i.e., 'but for' the defendant's actions the plaintiff would not [have been] injured." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). To establish cause in fact the plaintiff must show "a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff." *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Cause in fact requires "a determination of what actually occurred." *Schooley*, 134 Wn.2d at 478.

2019 Wash. App. LEXIS 1, \*7

¶18 Whether a defendant's act was a cause in fact of an injury is a question generally left to the jury. *Id.* But it may become a question of law for the court if the facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006). It may also become a question [\*8] of law if evidence is so lacking that only by speculating can the injury be linked to a defendant's acts.

¶19 Two cases relied on by the respondents are illustrative. In *Little v. Countrywood Homes*, the appellant was injured while installing gutters on a home. *Id.* at 778. Little had no memory of the accident and there were no witnesses. While he presented expert testimony that the general contractor on the project had violated safety regulations, this court held that even if the evidence was sufficient to prove breach, Little still "needed to submit evidence allowing a reasonable person to infer, without speculating, that [the general contractor's] negligence more probably than not caused the accident." *Id.* at 781-82. Because such evidence was lacking, summary judgment was appropriate. *Id.* at 784.

¶20 Similarly, in *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 375, 377 P.2d 475 (1999), the appellant was injured while using a treadmill. She did not know how she was thrown from the treadmill. *Id.* While she offered a theory on how she was injured, this court observed that "a verdict cannot be founded on mere theory or speculation." *Id.* at 379. Summary judgment was again appropriate, because she could not present evidence that would support a finding of proximate cause. *Id.* at 379-80.

¶21 The 11 facts emphasized by Mr. Clarke [\*9] are the basis for his theories about the cause of his fall. But he lacks any evidence from which a reasonable juror could find, without speculating, that one of his 11 theories explains his fall. His effort to establish the essential element of

proximate cause fails as a matter of law.

*Res ipsa loquitur* does not apply

¶22 Mr. Clarke argues that if his evidence did not create a genuine issue of material fact as to the defendant's negligence, the court should have recognized that the doctrine of *res ipsa loquitur* could apply.

¶23 Generally, a plaintiff must affirmatively prove a defendant's negligence, it will not be presumed. *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 397, 305 P.3d 1108 (2013). "However, '[t]he doctrine of *res ipsa loquitur* spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent.'" *Id.* at 397-98 (alteration in original) (quoting *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003)). The doctrine "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) (quoting *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997)).

¶24 For *res ipsa loquitur* to [\*10] apply, the plaintiff must show that

- (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence,
- (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and
- (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

*Horner v. N. Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wn.2d 351, 359, 382 P.2d 518 (1963). The second

2019 Wash. App. LEXIS 1, \*10

and third elements of *res ipsa loquitur* generally merge and are analyzed together. *Tinder, 84 Wn. App. at 795*. Whether *res ipsa loquitur* applies is a question of law. *Curtis, 169 Wn.2d at 889*.

¶25 In *Horner*, the Washington Supreme Court identified three situations where negligence could be inferred without affirmative proof, thereby satisfying the first element of the doctrine:

(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

*62 Wn.2d at 360* (emphasis omitted). [\*11]

¶26 Here, the ladder was not within Mr. Nichols's exclusive control and it cannot be determined that Mr. Clarke's own action was not a cause of his fall. For those reasons alone, *res ipsa loquitur* does not apply.

¶27 It might be expected that a fall from a ladder will ordinarily be the result of *someone's* negligence. But it cannot be said that a fall from a ladder ordinarily does not happen in the absence of a negligent provider and placer of the ladder, which is Mr. Clarke's theory. For that further reason, the doctrine does not apply.

¶28 Affirmed.

¶29 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to *RCW 2.06.040*.

LAWRENCE-BERREY, C.J., and PENNELL, J., concur.

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