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NO. 62168-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TAMBRA CURTIS,

Appellant

v.

JACK LEIN and CLAIRE LEIN, husband and wife, and the
Marital community composed thereof; and WILLOW
CREEK FARM, INC., a domestic corporation,

Respondents.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The trial court did not commit error when it granted Defendants' Motion for Summary Judgment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court committed error when it granted Defendants' Motion for Summary Judgment where there was no evidence that Defendants negligently failed to inspect and discover a dangerous condition, and no legal basis for applying the doctrine of res ipsa loquitor.

III. STATEMENT OF THE CASE

A. Facts

This lawsuit arose out of an alleged incident that occurred on Jack (a.k.a John) and Claire Leins' farm in Sammamish, Washington. At the time, Plaintiff was living in a house on the farm with her boyfriend, Michael Stewart, and their five year old son, Jacob. Mr. Stewart was employed by the Leins as their farm manager. Plaintiff moved onto the Leins' Sammamish property in December 2003. There was a small pond with a dock on the farm. Plaintiff claims that on

April 25, 2004, she was injured when she took a few steps onto the dock and a plank under her left leg “gave way trapping her left leg just above the knee.” She claims that the Leins “knew or should have known of the dangerous condition of this dock and taken appropriate measures to remedy these dangerous conditions.” CP 31; CP 35 p. 6- 8; CP 36 p. 10; CP 37 p. 25.

The Leins sold the Sammamish farm in 2001 and purchased new property in Fall City. They continued to live on the Sammamish property until November, 2004, at which time they moved to the new Fall City property. According to Claire Lein, when she and her husband sold the Sammamish property in 2001, they learned that the new owners planned to remove their house, pond, and dock, as they were going to build a new school on the property. The pond and buildings were subsequently removed by the new owners, and the school was erected. CP 68 p. 21; CP 69 p. 22, 24; CP 74 p. 42, 43.

Plaintiff’s friend, Dana Carrothers, was visiting her at the farm at the time of the alleged incident. They were taking turns riding a horse. While Ms. Carrothers was on the horse, Plaintiff decided to walk onto the dock. She had never been on it before that day. According to Plaintiff, after taking two or three steps her left leg went

through the dock, causing the dock to break. She cannot describe how her leg went through the dock; where it went through the dock; the manner in which the dock broke; or where it broke. The only facts she can provide regarding the dock and her fall is that she took a few steps and her leg went through. CP 37 p. 25; CP 38 p. 26-28.

She testified as follows:

Q: ... when you stepped onto the board where your foot went through, do you recall—what was the impression that you got, did it feel like it was going to give? Did it feel weak? ...

A: Walked onto the dock, went down.

...

Q: How far down did your left foot or your leg go through, like how far up the leg?

A: Past my knee.

Q: ... was it more than one board that gave away?

A: I don't know.

Q: ... was it like a hole was created or ... did the board break in the middle or can you remember anything about the breaking of the board?

A: Like I said, I just walked onto the dock, couple steps, went right through.

CP 37 p. 25; CP 38 p. 26-28.

Plaintiff testified that the next morning following the incident she told Donna Lein, Jack and Claire Leins' daughter in law, that her leg went through the dock and she needed to see a doctor. Donna Lein lived on the Sammamish farm as well. According to Plaintiff, Donna drove her to a doctor's office. She doesn't recall whether she had any further conversation about the incident with Donna during their drive to the doctor's office. Plaintiff recalls telling Jack and Claire Lein about the incident but doesn't recall the substance of the conversation other than that she was going to get a bone scan of her leg. She doesn't recall when they had this conversation or whether she had a subsequent conversation with them about the dock incident. CP 38 p. 29; CP 31 p. 30, 31.

Plaintiff testified that she never had any conversations with any of the Lein family members about the dock prior to the incident. She believes the dock was removed or destroyed several days after the incident. She recalls someone from the Lein family telling her that the dock was removed because of the possibility it was unsafe. However, she doesn't remember who told her that or when she was told. She testified:

A: I don't remember which Lein told me this, but I remember a conversation I had with one of them that it was removed because of the possibility it was unsafe.

Q: But you don't remember who said that?

A: Huh-uh.

CP 39 p. 31, 32.

The only other conversation Plaintiff recalls having with any of the Leins about the dock after the incident is a conversation she had with Donna Lein. She recalls Donna stating that the dock was "weathered." She doesn't recall whether Donna said anything else about the dock. CP 40 p. 36.

Plaintiff never had any discussions about the dock with any of the Leins or Michael Stewart prior to the date of the incident. She testified that no one gave her any indication that the dock was in poor condition or in need of repair and she never had reason to believe it was. She had seen her son use the dock prior to the incident. He never indicated to her that there was anything wrong with the dock or that it was broken or in bad condition. CP 40 p. 34-36.

Plaintiff does not have any personal knowledge as to the condition of the dock prior to or after the incident. She testified as follows:

Q: ...After the incident occurred did you look at the dock?

A: No.

Q: And you said you hadn't been out to the dock before the incident occurred, correct?

A: Correct.

Q: So did you ever have an opportunity before or after the incident to really check out the dock and look at the condition of the dock?

A: No.

CP 40 p. 37.

Plaintiff testified that the only evidence she has to offer in support of her claim against the Leins is (1) the conversation she believes she had with Donna Lein about the dock after the incident (at which time Donna allegedly stated that the dock was weathered); and (2) a conversation she had with her son, Jacob, who was five at the time of the incident. According to Plaintiff, Jacob told her that the Leins' grandsons told him that the dock was unsafe, and that they had informed their parents and grandparents of this. CP 41 p. 57; CP 42 p. 58-61. She testified as follows:

Q:... In your answer to interrogatory number 12 you state... the defendants were aware that the dock was unsafe at the time of this

incident yet made no attempt to repair it or to warn others of this unsafe condition.

A: Uh-huh.

Q: Can you tell me what your basis is for that statement?

A: Conversation I had with, I believe it was with Donna Lein.

Q: Okay. Now, the defendants in this case are Claire and her husband?

A: Correct.

Q: Do you have any personal knowledge from them or did they make any statements to you that they were aware that the dock was unsafe at the time?

A: I don't recall.

Q: Okay. So this basis for your belief that they were aware comes from someone else? Donna Lein?

A: Yeah, their daughter-in-law.

Q: And what exactly did she say to you?

A: I don't recall.

Q: But somehow you believed from your conversation that she was telling you that her in-laws were aware that the dock was unsafe?

A: Correct.

Q: But you don't remember what she said?

A: Correct.

Q: Do you remember when she made the statement?

A: After the incident.

Q: And then in answer to number 14, the very last paragraph you state, 'It is my understanding that the defendants' grandsons Kevin, Justin, and Chris Lein were aware that the dock was not safe and had reported its dangerous condition to the defendants and to their parents.' And can you tell me what the basis for that statement is?

A: From my son Jacob Stewart.

Q: And what did he tell you?

A: Just as it's stated.

Q: He told you that defendants' grandsons were aware that the dock was not safe?

A: Not in those exact words, no.

Q: Okay. Did the defendants' grandsons Kevin, Justin and Chris Lein tell you themselves that they were aware that the dock was not safe and that they had reported this to the defendants, their grandparents?

A: I don't recall.

...

Q: Did you ever have any conversations with these three children, Kevin, Justin or Chris, about the dock?

A: I can't remember.

...

Q: Other than Donna Lein and your son, do you have any information from anybody else that my clients knew that this dock was dangerous prior to the incident?

A: Can you repeat the question.

MS. THOMPSON: Can you repeat it for me.
(The reporter read back as requested.)

A: No.

CP 41 p. 57; CP 42 p. 58-61.

Claire Lein was in charge of running the farm. She bred and raised Thoroughbred horses to sell. One or two days after the alleged incident, Mr. Stewart mentioned to Claire that Plaintiff had fallen through the dock and hurt her leg. According to Claire, "He didn't say much about it." She asked Mr. Stewart if Plaintiff had medical insurance and he told her that she did. Mrs. Lein didn't have any other conversations with Mr. Stewart about Plaintiff's injuries. She asked Mr. Stewart to remove the dock since it had reportedly broken when Plaintiff fell through it, and it didn't make sense to repair it since they were moving and the new owners were going to remove the pond and dock anyway. She didn't have any other conversations with Mr. Stewart about the dock. CP 66 p. 7; CP 68 p. 20, 21; CP 69 p. 24, 25.

Claire was very surprised to learn of this lawsuit because Plaintiff's accident "wasn't anything that was made out to be very serious by anybody..." She doesn't recall having any conversations with anyone about the dock not being safe. It was built in the late 80's. The pond was dry in the summer. During the times she was on the dock

prior to the date of the incident she never observed anything that led her to believe that the dock was in poor condition or in need of repair. She testified that if she had made such observations she would have asked someone to fix it. According to Claire Lein, no one ever told her that the dock was in need of repair, or in poor condition, or that it was dangerous or unsafe. According to Claire, the only conversation she had with anyone about the dock after the alleged incident was the conversation she had with Mr. Stewart when she asked him to remove the dock. CP 65 p. 5; CP 67 p. 16, 17; CP 70 p. 27, 28; CP 71 p. 30; CP 72 p. 37; CP 73 p. 38; CP 74 p. 42.

According to Michael Stewart, his job was to oversee the operation of the Leins' farm which included performing maintenance and repairs duties, which he described as, "Anywhere from building fences to gates to repairing fences and gates." He was working on the farm on the date of the incident, but did not witness the incident. He responded to the scene of Plaintiff's accident and found her sitting on the dock "on her rear." He saw that her foot had gone through the dock. CP 46 p. 13; CP 47 p. 14; CP 48 p. 21; CP 49 p. 22. He described his observations as follows:

A. It was—her foot was underneath the dock, actually on the ground, and the board had broken when she stepped on it and her leg

went through the dock, so she was basically sitting on her – part of the dock with her leg stuck through the dock.

Q. Okay. So she was—so it obviously occurred at the very beginning of the dock?

A. Correct, I would say four, five boards in, maybe three, four, five boards in. I don't remember exactly.

Q. And there was ground underneath?

A. I believe so.

Q. And you said it appeared that one of the boards had broken?

A. Yes.

Q. Okay. In what way? Describe it for me. Did the whole thing come off? Describe, if you can, how it broke, what you remember seeing.

A. I believe it broke right in the middle, so it was attached on each side of the dock, and when she stepped on the board it cracked in the middle and she fell through it.

Q. Okay. Do you recall seeing what kind of condition the board was in, I mean, like did it appear rotten or did you—what were your observations about the board where her foot went through?

A. No, it wasn't—I don't—

Q. You don't know?

A. – know how to answer that.

Q. Okay. How long did you look at the board?

A. I didn't.

...

CP 48 p. 21; CP 49 p. 22.

According to Mr. Stewart he told the Leins that Plaintiff fell through the dock but didn't say anything more. He testified:

Q. Okay. After the incident occurred, did you tell the Leins about it?

A. Yes.

Q. What did you tell them?

A. I believe that Tammy fell through the dock.

Q. When did you tell them?

A. I would say immediately after.

Q. Did you tell them anything about- did you say anything more than that, like to the degree of there's something wrong with the dock or anything like that?

A. No.

...

CP 48 p. 21; CP 49 p. 22, 24.

During the time he lived on the Sammamish property, Mr. Stewart was on the dock many times. He described the number of times as "More than I can remember." He never found the dock to be

in need of repair. He never observed that it was in poor condition. He testified as follows:

Q. You said that you were on that dock many times. During those times did you ever observe that the dock was in disrepair?

A. No.

Q. Did you observe that—did you make any observations that it was in poor condition, anything like that?

A. No.

Q. Okay. All right. When you first went to the dock after Tambra had fallen and was injured, did you make any such observations?

A. That particular board.

Q. Okay. Were you able to determine or did you even try to determine what caused the board to break?

A. No.

Q. And after the incident occurred did you have any communications with the Leins in which you, you know, suggested to them that the dock was in poor condition, any conversations like that?

A. No.

Q. Or that it was a dangerous dock?

A. No.

Q. Did you feel that it was safe?

A. I don't know that I looked at it either way.

CP 48 p. 21; CP 49 p. 22, 24; CP 50 p. 26; CP 51 p. 30, 31.

Exhibit 1 to Mr. Stewart's deposition is a copy of a photograph depicting the subject dock. Mr. Stewart placed an X on the area of the dock where he recalls the Plaintiff's foot went through. CP 48 p. 21; CP 49 p. 22; CP 53.

Defendant Jack Lein (a.k.a John Lein) is a medical doctor who retired from the University of Washington in 1996 after working as an associate dean of the medical school, and vice president of the health science school. According to Dr. Lein, he has never participated in running the Thoroughbred business. His wife handles the business affairs. It was his understanding that Mr. Stewart's job duties were to manage the farm, the horses, and do whatever his wife asked him to do. CP 60 p. 7, 8, 9; CP 61 p. 10, 13; CP 62 p. 15.

Dr. Lein testified that with respect to the subject pond, there were times when it didn't have much water in it. He doesn't recall seeing anyone swim or fish in the pond. He knew the dock was there but doesn't recall ever being on the dock. He was never in close proximity to the dock so as to be in a position to observe it close up before or after the incident. Prior to this incident no one ever told him the dock was in poor condition or in need of repair. He didn't know anything about Plaintiff's incident on the dock until he was sued. He

had “very little” contact with Plaintiff during the time she was living on their farm. He was unaware that she hurt her leg until he was served with this lawsuit. He never discussed the dock with Michael Stewart or Plaintiff prior to or after the alleged incident. He never discussed the incident with Michael Stewart or Plaintiff. He doesn’t know anything about the dock being removed. CP 61 p. 12, 13; CP 62 p. 15, 16, 17; CP 63 p. 18, 19.

According to Ms. Carrothers, she remembers only that Plaintiff fell through the dock but doesn’t recall what part of her body fell through or the location of her fall. She had never been on the dock before or close to it or in a position to observe it prior to the date of the incident. After this incident she did not observe or inspect the dock closely. She recalls seeing a hole on the dock after the incident but doesn’t remember where the hole was located, or its size. CP 55-57.

Michael Lein, Defendants’ son, was living on the Sammamish farm with his wife and children at the time of the alleged incident. He had lived on the farm since 1983. He became aware of the subject incident about two weeks later when the Plaintiff told him she had been down at the dock and her foot had gone through. That was all she said. They never discussed it again. He doesn’t know who built the dock.

He never had any reason to believe the dock wood wasn't in good shape. He never had any reason to believe that the dock was dangerous or in need of repairs prior to the incident. Nor did anyone ever tell him that the dock was dangerous or in need of repair or in poor condition prior the date of the incident. He never had any conversations with Mike Stewart about the dock after the incident. CP 76 p. 5; CP 77 p. 10, 11; CP 78 p. 14, 15, 16; CP 80 p. 25; CP 81 p. 28.

Donna Lein, Defendants' daughter in law, was living on the farm with her husband Michael Lein and their children at the time of the incident. She lived on the farm from 1983 to 2004. According to Donna Lein, her kids swam in the pond and fished off the dock. She and her kids would "hang out" around the dock, catching tadpoles and big frogs. She never noticed any "problems" or "potential hazard" related to the dock. She never had any concerns about her children playing on the dock. She estimated that from 1990 to 2004 she was on the dock "frequently." She never made any observations that led her to believe the dock was in poor condition or unsafe or dangerous. If she had, she wouldn't have gone on the dock herself or allowed her children on the dock. CP 84 p. 8,9; CP 85 p. 10, 11, 12; CP 87 p. 21.

According to Donna Lein, she never had any discussion with Jack or Claire Lein prior to the incident along the lines of there being problems with the dock. She doesn't recall when she learned that Plaintiff hurt her leg on the dock. She gave her a ride to a doctor's the day after the alleged incident occurred. However, it was not her understanding that the doctor appointment was related to a leg injury. It was her understanding that Plaintiff's doctor appointment was for purposes of discussing physical and verbal abuse problems she was experiencing with Michael Stewart. She had discussed the abuse problems with Plaintiff "many" times. CP 85 p. 12, 13; CP 86 p. 14.

According to Donna Lein, at some point after she gave Plaintiff a ride to her doctor's appointment, she became aware that Plaintiff said she had an accident on the dock, but Donna doesn't recall when she heard this or who she heard it from. She never had a discussion with Plaintiff about the incident on the dock or Plaintiff's alleged leg injury. She did not have any conversations with Michael Stewart or Jack or Claire Lein about Plaintiff's fall on the dock. None of her kids ever said anything to her along the lines of the dock having any problems. She has no knowledge as to whether the dock was removed. She and her husband moved away from the property. CP 86 p. 15-17; CP 18.

B. Procedure

Defendants filed a motion for summary judgment requesting dismissal of this case. The motion was heard on June 6, 2008. Judge Erlick granted Defendants' motion and signed an order dismissing the case with prejudice. CP 180-182. **Judge Erlick explained the basis for his decision which is found on pages 22-27 of the Verbatim Report of Proceeding (Hearing Transcript). He explained as follows:**

The owner or occupier of the land owes an invitee, such as Ms. Curtis in this case, a duty of ordinary care to keep the premises in a reasonably safe condition. *Degel v. Majestic Mobile Manor*, 129 Wash. 2d 3, 1996.

Ms. Curtis claims that the Leins did not reasonably protect her from the defective condition of the dock. The Leins respond the dock had no history of problems or defect and that their staff found no evidence of a defect during its use.

A landowner's duty to an invitee only attaches if the landowner knows, providing exercise of reasonable care, should have discovered a condition that involves an unreasonable risk of harm...

The landowner has a duty to inspect for dangerous conditions and to repair them or to warn the invitee. Highway at 96. To establish the knowledge element of premises liability, the plaintiff must show that the landowner had actual or constructive notice of the unsafe condition. **Ms. Curtis does not present any competent evidence that the Leins actually knew of the dock's alleged condition.**

The standard of burden is to show the unsafe condition had existed long enough to afford the Leins sufficient opportunity to have made a proper inspection to discover the defects. She fails to

meet this burden because she presents no evidence regarding what constitutes a, quote, proper inspection of the dock and what allegedly defective condition would have been discovered upon such an inspection.

Rather, the plaintiff here relies upon the doctrine of *res ipsa loquitor*, and evidentiary rule that recognizes that accidents may be of such a danger that its occurrence alone is sufficient to establish *prima facie* the defendants' negligence. *Tinder vs. Nordstrom*, 84 Wash App 787, a 1997 appellate case, *Metropolitan Mortgages Securities vs. Washington Water and Power*, 37 Wash App 241, a 1984 appellate case.

For the doctrine to apply, the plaintiff must establish the accident or occurrence is of the kind that ordinarily doesn't happen in the absence of someone's negligence, the injuries were caused by an agency or instrumentality in the exclusive control of the defendant and the plaintiff did not contribute to the injury causing accident or occurrence. *Howell v. Spokane Inland Empire Blood Bank*, 14 Wash. 2nd 42, a 1997 court case. *Zukowsky vs. Brown*, cited by both sides...

When *res ipsa* does apply, it provides... a jury may reasonably infer both negligence and causation by the mere occurrence of the event and the defendant's relationship to it. The *Metropolitan* case at page 243. The first element of the doctrine is met if there is a reasonable probability that the injury causing incident could not have occurred in the absence of negligence. *Tinder* at 792. Washington courts recognize three situations that normally do not occur absent negligence. When the act causing an injury is palpably negligent, such as when a surgeon leaves foreign objects in a patient. That is not applicable here, but general experience teaches us that the result could not be expected without negligence. That is the element that the plaintiffs are relying on. When experts in an exotic field provide proof that creates an inference of negligence, and that is all from the *Tinder* case at page 793.

Ms. Curtis relies on the second type of situation, contends that general experience tells us that docks—that dock steps do not break absent someone's negligence. Whether an accident is one that wouldn't ordinarily happen without someone's negligence is the

determination by judges applying their common experience in life. Metropolitan at 246.

Here, the alleged negligence would be the failure to inspect and discover a dangerous condition; however, you cannot state that any inspection would have revealed a dangerous condition because the plaintiff is unable to identify the nature of the dangerous condition...

... In my review of the case law, however, if there are other potential causes of the failure; in other words, other than the negligence of the plaintiff -- excuse me -- of the defendant, that res ipsa would not apply.

This instance is there are multiple other causes which could have caused the failure of the step on the dock. It could have been improperly constructed or it could have been a defective type of wood, and without some evidence that an inspection, a reasonable inspection, by the landowner would have discovered whatever the defective condition was, we have no clue what that defective condition was. Whether it was the type of wood that was chosen 20 years ago, whether it was the construction of the dock itself or whether it was the failure to maintain would be pure speculation on the part of this Court as well as the finder of fact.

Because there are other causes that could have resulted in the failure of the dock step other than the negligence of the landlord, that is failure to inspect or maintain, under these facts, the court concludes that the doctrine of res ipsa loquitor does not apply. Because the doctrine of res ipsa loquitor does not apply because the plaintiff has failed to present any evidence of what a reasonable inspection would have revealed in terms of dangerous condition, the motion for summary judgment is granted...

...

The Court: ... Any questions or comments?

Ms. Read: Well, just that all of the alternatives that you named are all things that were in full control of the defendant. They built the dock, they picked the wood.

The Court: I don't have those facts before me.

Ms. Read: You know that they built it.

The Court: I don't know whether they built it or whether a contractor built it and I don't know whether that defect would have been dis – in other words, if the contractor had negligently constructed the dock, whatever that negligent construction was, I don't know whether that was something that they would have discovered or not upon reasonable inspection.

...

Ms. Thompson: And just for the record, neither Claire or Jack built that dock, so...

Ms. Read: Well, not personally.

...

Verbatim Report of Proceeding (Hearing Transcript) p. 22-27.

IV. ARGUMENT

STANDARD OF REVIEW

“The standard of review on appeal of Summary Judgment is de novo, with the reviewing court performing the same inquiry as the trial court.” *Ski Acres v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992).

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young*, 12 Wn.2d at 225.

Once that initial burden has been met, the burden shifts to the nonmoving party to set forth “*specific facts* showing there is a genuine issue for trial.” *Rathvon v. Columbia Pac. Airlines*, 30 Wash. App. 193, 201, 633 P.2d 122 (1981), *review denied*, 96 Wn.2d 1025 (1982). In doing so, the nonmoving party can no longer rely on the allegations in the pleadings. *Ashcroft v. Wallingford*, 17 Wash. App. 853, 854, 565 P.2d 1224 (1977), *review denied*, 91 Wn.2d 10, 16 (1979).

A defendant may move for summary judgment by either: (1) setting forth its version of facts and alleging that there is no genuine issue of material fact, or **(2) alleging that the nonmoving party lacks sufficient evidence to support its case.** *Guile v. Ballard Comm.*

Hosp., 70 Wash. App. 18, 851 P.2d 689, review denied, 122 Wn.2d 1010, 863 P.2d 72 (1993). In the latter case, the moving party need not support its motion with affidavits, but must simply identify those portions of the record that it believes demonstrate an absence of a genuine issue of material fact. *Id.*

The purpose behind a summary judgment motion is “to examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists.” *Young v. Key Pharmaceuticals, Inc.*, at 226, citing *Zobrist v. Culp*, 18 Wash. App. 622, 637, 570 P.2d 147 (1977).

“Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *McKinney v. Tukwila*, 103 Wash. App. 391, 13 P.3d 631 (2000).

A. Plaintiff presented no evidence that Defendants breached their duty to maintain the dock in a reasonably safe condition.

A plaintiff cannot just assume that another party is liable simply because an accident occurred. *Grange v. Finlay*, 58 Wn.2d 528, 531, 364 P.2d 234 (1961). Moreover, the existence of facts cannot rest in guess, speculation, or conjecture. *Gardner v. Seymour*, 27 Wn.2d 802,

808, 180 P.2d 564 (1947). A party may not establish a theory using circumstantial evidence unless the party's theory is "the *only* conclusion that can fairly or reasonably be drawn" from the facts. *Id.* At 810.

The jury may not enter into the realm of conjecture or speculation, and the non-moving party cannot recover because of what they claim might have happened. *Nakamura v. Jeffery*, 6 Wash. App. 274, 277, 492 P.2d 244 (1972)

A cause of action for negligence requires the 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. *Pedroza v. Bryant*, 101 Wash.2d 226, 228, 677 P.2d 166 (1984). Where there is an absence of even one element necessary to establishing a prima facie case of negligence, plaintiffs' claim must fail as a matter of law. *See Versteeg v. Mowery*, 72 Wn.2d 754, 755, 435 P.2d 540 (1967).

The common law rule imposes a duty on residential landlords to maintain common areas in a reasonably safe condition. *Degel v. Majestic Mobile Manor, Inc.* 129 Wash. 2d 43, 49, 914 P.2d 728

(1996). The Restatement (Second) of Torts sec. 343 (1965) states the rule as follows:

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

- (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts sec. 343 (1965), *Degel* at 49.

Here, there was no evidence that Defendants breached their duty of care to maintain the dock in a reasonably safe condition. There was no evidence the dock was in need of repair prior to this incident. There were no witnesses who testified that the dock was in poor condition and in need of repair in the area where Plaintiff alleges she fell. There was no evidence that the Leins had knowledge that the dock was in poor condition and/or in need of repair.

Plaintiff's claim is based solely on speculation. Reasonable minds could only conclude that (1) there is no evidence the dock was dangerous and/or in need of repair prior to the incident, and (2) there is no evidence the Leins had any knowledge or reason to believe the dock

was dangerous and/or in need of repair. If this case were to proceed to trial Plaintiff would have no evidence to offer showing that a dangerous condition of which the Leins were aware caused the Plaintiff's claimed injury.

Plaintiff failed to establish that the Leins' dock was not maintained in a reasonably safe condition. There was no evidence that a dangerous condition existed with respect to the dock, much less that the Leins were aware of or should have been aware of a dangerous condition with respect to the dock. What the evidence did establish is that the dock was used over the years by Claire Lein; her son, Michael; her daughter in law Donna; her grandchildren; and Michael Stewart. None of these individuals noticed any visible or observable signs or indications that the dock was in need of repair, or in poor condition, or dangerous, or unsafe.

Defendants did not breach a duty to exercise reasonable care to inspect and repair the dock when there was nothing visibly wrong with the dock; there were no known repairs to be made; there had been no reports of problems; the dock, by all accounts, appeared to be in good condition; and numerous people had used the dock for years without incident.

Furthermore, Plaintiff offered no evidence from an expert or otherwise as to what type of “inspection” could or should have been conducted by Defendants in the exercise of reasonable care, and or whether such an inspection would have, on a more probable than not basis, led to the discovery of a problem or defect with the board. Plaintiff did not cite any law or regulation imposing a duty on the Leins to conduct formal inspections of the dock on a regular basis or at a particular period of time.

B. The doctrine of Res Ipsa Loquitor is inapplicable.

The doctrine is applicable only when the evidence establishes the following:

(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 plaintiff.

Pacheco v. Ames, 149 Wash. 2d 431, 436, 69 P.3d 324 (2003).

[The] “inference of negligence must be legitimate... The distinction between what is mere conjecture and what is reasonable inference from the facts and circumstances must be recognized... Thus, it is not enough that plaintiff has suffered injury or damage, for such things may result without negligence.

Zukowsky v. Brown, 79 Wash. 2d 586, 594, 488 P.2d 269 (1971).

[I]f defendant’s evidence shows so clearly that he was not guilty of any acts of negligence that the minds of reasonable men cannot differ

on this issue, then the cause of the injury to plaintiff has been fully explained, and plaintiff cannot rely on *res ipsa loquitur* to take his case to the jury.

Kemalyan v. Henderson, 45 Wash. 2d 693, 705, 277 P.2d 372 (1954).

Plaintiff could not establish that the alleged occurrence is the kind of occurrence that does not happen in the absence of someone's negligence. This element is satisfied when one of three conditions exist:

(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. *Pacheco* at 438, citing *Zukowsky* at 595.

Plaintiff contends that the second condition applies. In *Pacheco*, the court concluded that an oral surgeon's drilling on the wrong side of a patient's mouth would not ordinarily occur absent negligence. *Pacheco* at 439. In *Zukowsky*, the plaintiff was sitting on a helm seat in defendant's boat, when the seat collapsed. The court concluded that the collapse of a boat seat would not ordinarily occur absent negligence. In *Younger v. Webster*, 9 Wash. App. 87, 510 P.2d 1182 (1973), the court concluded that plaintiff's loss of sensory

perception in the lower half of his body after a spinal anesthesia was administered was a result that would not ordinarily occur absent negligence.

In *Horner v. Northern Pac. Beneficial Ass'n Hospital, Inc.*, 62 Wash. 2d 351, 382 P.2d 518 (1963), the court concluded that plaintiff's paralysis following surgery was a result that would not ordinarily occur absent negligence.

Here, there are other possible causes for the dock failure other than Defendants' negligence. Negligence is not the only possible cause.

Plaintiff could not establish the second element either. She failed to cite any legal authority in which courts have found that a wooden dock on a pond constitutes an "instrumentality" and/or that ownership, alone, of the dock would be considered "exclusive control" of such instrumentality. In *Pacheco*, the court concluded that the defendant oral surgeon had exclusive control over the instrumentality (the drill) he was using on the wrong side of plaintiff's jaw at the time of injury. *Pacheco* at 437.

In *Zukowsky*, the court concluded that the defendant had exclusive control over the instrumentality which allegedly caused plaintiff's injury (helm seat) in that immediately following the collapse

of the helm seat, it was found that the supporting flange was broken off, and the body of the screw was remaining in the wooden decking; evidence was presented that the defendant had removed the flange and supporting post on several occasions prior to the incident; and experts testified that the collapse may have been caused by defendant's failure to properly set the supporting post or properly inspect and maintain the supporting flange at its connection with the deck; all evidence from which a jury could infer negligence.

In *Younger*, the court concluded that the defendant anesthesiologist was in exclusive control over the instrumentality (the syringe) by which he administered the spinal anesthetic which allegedly caused plaintiff's injury. In *Horner*, the court concluded that the defendant hospital had exclusive control over the surgical and hospital equipment, the drugs administered to plaintiff, and the personnel involved with her surgery.

None of the cases cited by Plaintiff can be reasonably interpreted as legal support sufficient to establish the second element. The facts do not support a legitimate inference of negligence. The doctrine of *res ipsa loquitur* is not applicable here. As the Court explained in its ruling, there was no evidence that the Leins knew that

the dock was unsafe. No evidence was presented as to what the Leins were obligated to do inspection-wise. No evidence was presented regarding what would have constituted a proper inspection. No evidence was presented as to what defective condition, if any, would have been discovered had such an inspection been conducted. Plaintiff could not establish that an inspection would have revealed a dangerous condition.

In addition, the fact that there were other potential causes of the dock failure other than the Defendants' negligence, (perhaps it was improper construction by a contractor, over whom Defendants had no control, when the dock was built 20 years ago, or defective wood, etc...) renders the doctrine inapplicable.

Plaintiff's conclusion that the dock broke because of Defendants' failure to maintain it when there is no evidence that the dock failed because of lack of maintenance is an improper conclusion based on speculation. Likewise, Plaintiff's conclusion that the dock broke because of Defendants' failure to inspect it when there is no evidence that a reasonable inspection would have indicated a defect in the dock is an improper conclusion based on speculation.

V. CONCLUSION

For the above mentioned reasons, the trial court did not commit error when it granted Defendant's Motion for Summary Judgment. Defendants request this court to affirm the trial court decision.

RESPECTFULLY SUBMITTED this 11th day of December, 2008.

GARDNER BOND TRABOLSI
PLLC

By Kathleen Thompson #25767
Kathleen Thompson,
WSBA #25767
Attorneys for Respondents

APPENDIX

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COURT OF APPEALS
THE STATE OF WASHINGTON DIVISION I

SUPERIOR COURT OF WASHINGTON FOR COUNTY OF KING

TAMBRA CURTIS,)
Plaintiff,)
vs.) 07-2-05464-2 SEA
JACK LEIN and CLAIRE LEIN,) Court of Appeals No.
husband and wife, and the) 62168-8-I
marital community composed)
thereof; and WILLOW CREEK FARM,)
INC., a domestic corporation,)
Defendants.)

HEARING TRANSCRIPT
BEFORE THE HONORABLE JOHN P. ERLICK
(Transcribed from CD recording)

JUNE 6, 2008

TRANSCRIBED BY: CHERYL J. HAMMER, CCR 2512

1 walking out on the dock.

2 (Inaudible) the dock and her foot went
3 through, apparently, one of the boards on the dock and
4 this is defendants' motion for a summary judgment
5 based upon premises liability theory regarding no
6 action notices of the landlord of any defective
7 condition on the property and no indication that a
8 dangerous condition would have been discovered upon
9 reasonable inspection.

10 So, Ms. Thompson, this is your motion.

11 MS. THOMPSON: Thank you, Your Honor.
12 That just took care of two pages of my notes.

13 Essentially, we brought this motion
14 because my client believes that there is no reason or
15 there's no basis for proving that they failed to
16 maintain this dock in a reasonably safe condition, and
17 they, plaintiff, would be required to show that a
18 dangerous condition existed and they knew about this
19 condition and failed to do anything about it or failed
20 to warn the plaintiff.

21 And there appears to be sufficient
22 evidence that plaintiff -- excuse me -- that
23 defendants did not know about the dangerous condition,
24 alleged dangerous condition, had no reason to believe
25 there was a dangerous condition, or that the dock was

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1 in need of repair, that there was anything wrong with
 2 it; and on the other side, there is a real lack of
 3 sufficient evidence against defendants regarding the
 4 same.
 5 I believe the facts are very clear
 6 that a number of people over the course of about 20
 7 years that this dock was on the farm, that the
 8 defendants lived on the farm, a number of people who
 9 used the dock. Ms. Lein used it, essentially, to
 10 check the irrigation pipes and make sure they weren't
 11 clogged. That was basically the purpose that her son
 12 used it, Michael Lein.
 13 Michael Lein's wife, Donna, used it a
 14 little bit more, it sounds like, than anybody else.
 15 She was on the dock, according to her testimony,
 16 frequently, with the children playing on it, and
 17 Michael Stewart, apparently, according to his
 18 testimony, was on the dock many times during his time
 19 as farm manager there. Jack Lein didn't have anything
 20 to do with the dock, doesn't even recall being on the
 21 dock.
 22 So I think that the testimony is very
 23 consistent on all accounts. Nobody noticed anything
 24 about the dock that led them to believe that there had
 25 been a potential problem, that the dock or especially

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1 the area around where the plaintiff fell, that it was
 2 in poor condition, in need of repair or anything along
 3 those lines; therefore, we believe there's sufficient
 4 basis for the Court to grant this motion.
 5 Now, the plaintiff argues (inaudible)
 6 should apply here and our response to that is it
 7 shouldn't apply here. It's not applicable to the
 8 facts in this case. In order for it to apply, they
 9 have to show that the accident was a kind which
 10 ordinarily doesn't happen in the absence of someone's
 11 negligence, that the injuries were caused by
 12 (inaudible) that was in the exclusive control of the
 13 Leins and that it wasn't due to any voluntary action
 14 on the part of the plaintiff, which we concede.
 15 So with respect to these two elements,
 16 our argument is that they don't apply. They can't,
 17 they cannot establish those elements. The first one
 18 is satisfied when three different conditions are met.
 19 Plaintiffs are arguing the second one applies, when a
 20 general experience and observation (inaudible) that
 21 the result will not be expected without negligence,
 22 and plaintiff has cited (inaudible) authority in which
 23 courts have found the same with respect to these kinds
 24 of facts and this type of scenario having to do with
 25 the dock, a wooden dock.

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1 Plaintiff cited various cases in which
 2 it was found that where the courts concluded yes, this
 3 is the type of event that one would not ordinarily
 4 expect to have some negligence. In Chico the Court
 5 concluded an oral surgeon's drilling on the wrong side
 6 of the patient's mouth would not ordinarily occur
 7 absent negligence. The (inaudible) involved a
 8 plaintiff that was sitting on a helm seat on a boat,
 9 the seat collapsed. The Court concluded this is not
 10 something that would ordinarily occur absent someone's
 11 negligence, and (inaudible) vs. Webster, the plaintiff
 12 allegedly lost sensory perception after a surgery.
 13 The Court concluded this was not something that would
 14 typically happen absent negligence.
 15 THE COURT: (Inaudible) part of the
 16 dock.
 17 MS. THOMPSON: Well, with the seat I
 18 think the argument there would be -- I think the Court
 19 probably concluded more based on the other element,
 20 which was showing that it was in the exclusive control
 21 of the defendant. First of all, the way I would
 22 respond to that is that the dock is not the same as --
 23 a wooden dock out on a pond is not the same as a helm
 24 seat on a boat.
 25 There was evidence that this owner of

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1 the boat had essentially been working on the seat, had
 2 been manipulating it, had done something with the
 3 (inaudible). So there was additional testimony that
 4 there was a possibility that in so doing, he affected
 5 the safety of the seat.
 6 We don't have any such evidence with
 7 respect to the dock here. We don't have any evidence
 8 of anybody doing anything, making any repairs, messing
 9 around with the board or anything along those lines.
 10 THE COURT: Would you agree that a
 11 landlord has a duty to reasonably inspect the
 12 property, a landlord owes those duty to a licensee --
 13 this is a licensee -- to reasonably inspect the
 14 property to discover defective or dangerous
 15 conditions?
 16 MS. THOMPSON: Yes, but I think the
 17 key word there is reasonable, and you have to take
 18 into account what it is we're talking about and it
 19 doesn't appear -- you know, we're not talking about
 20 anything real complicated. We're talking about
 21 looking down at a board, at a dock. And the question
 22 is, you know, how far does that reasonable inspection
 23 go?
 24 What kind of inspection should they
 25 have done and if they'd done an inspection, if they'd

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1 done, you know, I mean, what does that mean? What
 2 were they obligated to do in terms of doing a
 3 reasonable inspection? Does that mean hiring someone
 4 to come in and go under the dock? There's no way to
 5 go under the dock.
 6 There was apparently a board that was
 7 basically on top of the ground. So I'm not sure
 8 reasonably what should have been done. It seems like
 9 --
 10 THE COURT: Isn't reasonableness
 11 usually an issue for a jury, what's reasonable?
 12 MS. THOMPSON: Yes. Yes, but I think
 13 that, however, the Court can conclude that where
 14 reasonable minds would conclude, so I think the Court
 15 can take that from the jury. Reasonable minds could
 16 conclude that there's nothing for them to do. If they
 17 -- nobody reported there was anything wrong with the
 18 dock, if the boards appeared to be fine, what was
 19 there to inspect and what could they have done to
 20 inspect it?
 21 THE COURT: You're saying that the
 22 boards appeared to be fine, based on testimony?
 23 MS. THOMPSON: From everyone.
 24 THE COURT: All right. Let me hear
 25 from Ms. Read, and you'll have an opportunity to

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1 reply.
 2 MS. READ: Well, (inaudible) is very
 3 much in line. In that case scaffolding had been built
 4 and a worker stepped on the scaffold and it broke and
 5 the Court said the breaking itself demonstrated with
 6 certainty that it was inadequate either by reasonable
 7 (inaudible) or latent defect. If you step on a board
 8 on a dock and it breaks, something's wrong with the
 9 board.
 10 THE COURT: That's an employer-worker
 11 relationship, correct?
 12 MS. READ: But this is under the
 13 Landlord-Tenant Act, the same nondelegable duty.
 14 THE COURT: So are you saying -- well,
 15 it's not the same nondelegable duty. You have a
 16 nondelegable duty to ensure a safe workplace, which is
 17 --
 18 MS. READ: Well, 1913 (inaudible).
 19 THE COURT: Well, I think that we need
 20 to look at the duty here. The duty here is to
 21 reasonably inspect to discover a dangerous condition.
 22 MS. READ: Right.
 23 THE COURT: All right. So what we
 24 don't know, or at least I can't tell you know or we
 25 don't have any evidence of, is what was the dangerous

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1 condition that a reasonable inspection would have
 2 discovered.
 3 MS. READ: The facts (inaudible), I
 4 mean, the burden here on (inaudible) because I think
 5 we have a (inaudible). One does not expect to
 6 (inaudible) out on a dock unless somebody wasn't
 7 taking care of the dock. The defendant --
 8 THE COURT: Well, but that's not a
 9 duty to take care of the dock. There is no duty to
 10 take care of the dock.
 11 MS. READ: I understand. It's a duty
 12 to keep the premises reasonably safe (inaudible).
 13 That is the duty (inaudible). Is reasonably safe
 14 (inaudible). The case law has held that the landlord
 15 has a duty of (inaudible) obligation to exercise
 16 reasonable care (inaudible).
 17 THE COURT: Correct, correct.
 18 MS. READ: What we're saying is, I'm
 19 saying is, I believe res ipsa loquitur applies because
 20 one would not expect this sort of event to happen
 21 unless there was a problem with the dock that
 22 (inaudible) and without us having to show exactly what
 23 the problem was. The burden then shifts to the
 24 defendant to show that it wasn't discoverable.
 25 THE COURT: But res ipsa applies if

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1 the accident could not have occurred but for someone's
 2 negligence. That's what res ipsa.
 3 MS. READ: In the usual realm of human
 4 experience, not that there was absolutely no way it
 5 could have occurred without negligence, but that in
 6 the usual realm of human experience there's
 7 negligence.
 8 THE COURT: Right.
 9 MS. READ: I would submit that at
 10 least it's a jury question whether or not that is
 11 reasonable in the human experience and if the
 12 defendant has given us explanation.
 13 THE COURT: But the negligence here
 14 under the law is defined as the failure to reasonably
 15 inspect.
 16 MS. READ: Right.
 17 THE COURT: That's how negligence is
 18 defined in the landlord-tenant law.
 19 MS. READ: I agree.
 20 THE COURT: All right. So what you
 21 would have to show is that a reasonable inspection
 22 would have disclosed a dangerous condition.
 23 MS. READ: Well, not if res ipsa
 24 (inaudible).
 25 THE COURT: So res ipsa only applies

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1 if the negligence would only -- if the accident would
 2 only have occurred but for the negligence of the
 3 landlord. That you can only prove the negligence of
 4 the landlord. The landlord is not strictly liable.
 5 Res ipsa is a variation of strict liability.
 6 MS. READ: It's a burden shifting,
 7 it's not strict liability. The defendant is --
 8 (inaudible) they haven't even been able to show what
 9 it was built of, if it was suitable material that it
 10 was built of 20 years before. They never inspected
 11 it. No one testifying can even remembering being on
 12 the dock a year before it happened. I mean, there was
 13 no inspection. No one looked at the dock.
 14 THE COURT: But you would have to show
 15 that had they inspected the dock, they would have
 16 discovered a condition like rotten wood and therefore
 17 they were negligent in failing to discover rotten
 18 wood.
 19 I don't know whether this is a patent
 20 defect or a latent defect or the type of defect that
 21 would have been discovered upon a reasonable
 22 inspection. I don't have any of those facts and I
 23 think that you have that burden.
 24 MS. READ: Well, except I will argue
 25 again, res ipsa loquitur applies here just like it

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1 does with (inaudible) and just like it does with the
 2 board on the scaffold. The fact that it broke shows
 3 you that there's something wrong with the board and in
 4 reasonable human experience we expect to be able to
 5 walk around without stepping through a wooden dock and
 6 the defendant had exclusive control of the dock, the
 7 duty to inspect --
 8 THE COURT: Well, they didn't have
 9 exclusive control because --
 10 MS. READ: Yes, they did.
 11 THE COURT: No, your argument is that
 12 there were other people. Mr. Stewart was out there,
 13 he was the caretaker on the premises.
 14 MS. READ: He worked for them.
 15 THE COURT: Right.
 16 MS. READ: So it was in the course of
 17 his work for them. They were the owners and they
 18 built it and they maintained it and it's at least a
 19 jury question, I think, under these facts. They
 20 destroyed the dock, no one looked at it and so no one
 21 has the ability to say how this happened. We can't --
 22 I mean, we could bring in someone (inaudible) but no
 23 one knows and they were the ones that had exclusive
 24 control.
 25 The burden should be on them to come

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1 forward and show that it wasn't negligence under res
 2 ipsa loquitur. And it's a jury question. I mean, the
 3 bottom line here is it's a jury question.
 4 THE COURT: The reason I'm struggling
 5 with this is that even under res ipsa, the Court is
 6 supposed to determine whether this accident is one
 7 that ordinarily would not happen without somebody's
 8 negligence. Negligence (inaudible) is defined by the
 9 failure to reasonably inspect or discover a dangerous
 10 condition.
 11 I don't have any evidence as to what
 12 either a reasonable inspection would have discovered,
 13 nor do I have any evidence as to what the dangerous
 14 condition was. So how can I make that determination?
 15 MS. READ: First of all, there's two
 16 different areas (inaudible) can apply here and the
 17 part that the defense keeps toting has to do with the
 18 interior of a house, that is a reasonable inspection.
 19 (Inaudible) and if we're talking about common areas, I
 20 think (inaudible) it's the duty of the landlord
 21 (inaudible).
 22 THE COURT: I thought you had agreed
 23 that the law was that you had a duty to reasonably
 24 inspect.
 25 MS. READ: Reasonably inspect and

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1 maintain and keep. (Inaudible.) I guess it's just
 2 the language in (inaudible) seems exactly on point,
 3 which is the fact that the board broke shows that for
 4 whatever reason there was a defect. I mean, it was
 5 either open or latent, and maybe it could or maybe it
 6 couldn't be discovered, but the burden shifts to the
 7 landlord in this case to show what happened or at
 8 least that they did an adequate inspection and they
 9 haven't shown any inspection, but the owners said
 10 Michael Stewart was supposed to be maintaining those
 11 areas. He said no one told me I needed to look at
 12 that dock and I never did.
 13 So it's a jury question whether their
 14 inspection was reasonable or not. What's obvious is
 15 something was wrong with the board. It broke under
 16 ordinary step.
 17 THE COURT: Right. But what we don't
 18 know is what was wrong with the board or whether it
 19 would have been discovered upon reasonable inspection.
 20 MS. READ: That's what the jury should
 21 decide.
 22 THE COURT: They would be speculating.
 23 They would be speculating.
 24 MS. READ: No. There was something
 25 wrong with the board.

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1 THE COURT: Right. But they would be
 2 speculating as to what was wrong with the board.
 3 MS. READ: Well, but in the ordinary
 4 experience of people, you don't step on a board on a
 5 dock and have your foot go through it unless someone
 6 has not been adequately maintaining that dock.
 7 THE COURT: So why not just have
 8 strict liability?
 9 MS. READ: It's not strict liability.
 10 The defense has the opportunity to say to the jury
 11 (inaudible) inspect.
 12 THE COURT: But don't you have the
 13 burden?
 14 MS. READ: (Inaudible) res ipsa
 15 loquitur, then it shifts to them, the person who has
 16 exclusive control of that dock, to show that they took
 17 reasonable steps. That's what the case law is. It's
 18 not absolute liability. That's a whole different
 19 case. The defendant can overcome that by showing that
 20 they took reasonable steps.
 21 The other thing that too is they built
 22 it, they're the ones who could say how it was built,
 23 what it was built of, whether it was suitable
 24 materials or not.
 25 MS. THOMPSON: Your Honor, may I

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1 respond, Your Honor?
 2 THE COURT: Give me just a minute.
 3 I'm just looking at some of the (inaudible). Ms.
 4 Thompson.
 5 MS. THOMPSON: Thank you, Your Honor.
 6 Just very briefly. (Inaudible) there's no basis for
 7 strict liability against my clients. Res ipsa does
 8 not apply; therefore, they have to show that a
 9 dangerous condition existed and that the Leins were
 10 aware of this. There's no evidence showing that there
 11 was a dangerous condition or that they were aware of
 12 any.
 13 THE COURT: But a board doesn't break
 14 unless there is -- obviously there is some type of
 15 defective condition.
 16 MS. THOMPSON: We don't know.
 17 THE COURT: Well, boards just don't
 18 break. A board breaks for two reasons, either
 19 improper design and manufacture of the board itself,
 20 or failure to maintain, one of the two. A board is
 21 not expected to break.
 22 MS. THOMPSON: The problem is here
 23 that we don't know what caused it to break. We don't
 24 know if it could have been prevented. We don't know
 25 if (inaudible) formal inspection by experts or

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1 something along those lines would have shown that the
 2 board was going to break.
 3 So without that, we're asking a jury
 4 to completely speculate on what caused it to break and
 5 whether an inspection, formal, some type of a formal
 6 inspection, what kind of inspection could have been
 7 done or should have been done and whether such an
 8 inspection would have shown it was going to break or
 9 that it was in poor condition.
 10 So there's going to be no further
 11 evidence than there is right now for the jury and
 12 there is no evidence. So we're going to ask a jury,
 13 Jury, what do you think caused this board to break,
 14 and they're not going to know.
 15 THE COURT: Well, what the plaintiff's
 16 asking here is under res ipsa loquitur the burden
 17 shifted to the defendant to show that they acted
 18 reasonably as landlords, put the burden on the
 19 defendant to show that you had no reason to expect
 20 that there was any problem with the dock or the board
 21 because all the evidence that you gave to the Court,
 22 which is that all these people had been out there,
 23 nobody saw any problems, that that was sufficient to
 24 fulfill the duty to inspect and that you had no reason
 25 to suspect there was any defective condition. That's

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1 what is requested, is that the burden be shifted to
 2 the defendant.
 3 MS. THOMPSON: I think plaintiff still
 4 has to show that there could be some sort of reason
 5 for my clients to have some concern. I mean, it's
 6 strict liability.
 7 THE COURT: No, it's not strict
 8 liability. Strict liability would mean that your
 9 clients are liable. That's strict liability. Res
 10 ipsa means that the jury would be instructed to the
 11 effect of that this is an accident -- well, I don't
 12 know what the instructions would be. Probably that
 13 the defendant has the burden of proving that they were
 14 not negligent, because they acted reasonably in
 15 inspecting and/or maintaining the dock.
 16 MS. THOMPSON: I think the big problem
 17 here is that plaintiff hasn't shown or indicated what
 18 more they should have done or what more they should
 19 have done or what inspection should have been.
 20 There's no expert testimony.
 21 THE COURT: Well, that's the question.
 22 There is the (inaudible), which is who has the burden.
 23 Do they have the burden of proving that there was a
 24 defective condition which would have been discoverable
 25 upon reasonable inspection or does the defendant have

Page 20	Page 22
<p>1 the burden of proving that they acted reasonably and</p> <p>2 that the inspections and maintenance that they did do</p> <p>3 met the standard of care. That's the issue I'm trying</p> <p>4 to resolve.</p> <p>5 Do you have anything further?</p> <p>6 MS. READ: Well, just I cited</p> <p>7 (inaudible), which I think it does, casts on the</p> <p>8 defendant (inaudible) at the proper time by furnishing</p> <p>9 an explanation of how the accident happened and</p> <p>10 showing that it did not occur by (inaudible). That's</p> <p>11 clearly a question for (inaudible).</p> <p>12 THE COURT: All right. Why don't we</p> <p>13 take a five minute recess and I'll (inaudible). Thank</p> <p>14 you both.</p> <p>15 MS. THOMPSON: Thank you, Your Honor.</p> <p>16 MS. READ: Thank you.</p> <p>17 THE COURT: The Court will be in</p> <p>18 recess.</p> <p>19 THE CLERK: Please rise.</p> <p>20 THE COURT: Matter before the Court on</p> <p>21 defendants' motion for summary judgment. The</p> <p>22 defendant in a civil action is entitled to summary</p> <p>23 judgment when that party shows that there is an</p> <p>24 absence of evidence supporting an element essential to</p> <p>25 the plaintiff's claim.</p>	<p>1 enters the land for purposes related to business</p> <p>2 dealings of the land's possessor. Zenkina vs. Sisters</p> <p>3 of Providence, 83 Wash App 556, a 1996 Washington</p> <p>4 Appeals case.</p> <p>5 The owner or occupier of the land owes</p> <p>6 an invitee, such as Ms. Curtis in this case, a duty of</p> <p>7 ordinary care to keep the premises in a reasonably</p> <p>8 safe condition. Degel vs. Majestic Mobile Manor, 129</p> <p>9 Wash 2nd 03, 1996.</p> <p>10 Ms. Curtis claims that the Leins did</p> <p>11 not reasonably protect her from the defective</p> <p>12 condition on the dock. The Leins respond the dock had</p> <p>13 no history of problems or defects and that their staff</p> <p>14 found no evidence of a defect during its use.</p> <p>15 A landowner's duty to an invitee only</p> <p>16 attaches if the landowner knows, providing exercise of</p> <p>17 reasonable care, should have discovered a condition</p> <p>18 that involves an unreasonable risk of harm. Highway</p> <p>19 at page 96, citing the statement of the courts, 2nd.</p> <p>20 The landowner has a duty to inspect</p> <p>21 for dangerous conditions and to repair them or to warn</p> <p>22 the invitee. Highway at 96. To establish this</p> <p>23 knowledge element of premises liability, the plaintiff</p> <p>24 must show that the landowner had actual or</p> <p>25 constructive notice of the unsafe condition. Ms.</p>
Page 21	Page 23
<p>1 The defendant may support the motion</p> <p>2 by merely challenging the sufficiency of the</p> <p>3 plaintiff's evidence as to any such material issue.</p> <p>4 In response, the nonmoving party may not rely upon the</p> <p>5 allegations in the pleadings, must set forth specific</p> <p>6 facts by affidavit or otherwise show the genuine</p> <p>7 issue. Additionally, any such affidavit must be based</p> <p>8 on personal knowledge, admissible at trial, and not</p> <p>9 merely on conclusatory allegations, speculative</p> <p>10 statements or argumentative assertions. Young vs. Key</p> <p>11 Pharmaceuticals, Inc., 112 Washington 2nd 216, a 1989</p> <p>12 Supreme Court case.</p> <p>13 To establish an action for negligence</p> <p>14 the plaintiff has to present evidence to show duty</p> <p>15 owed by the defendant to plaintiff and breached that</p> <p>16 duty resulting in an injury and proximate cause of any</p> <p>17 breach and resulted in an injury. Highway vs. State,</p> <p>18 129 Wash 2nd 84. The premises liability cases such as</p> <p>19 that before the Court, the scope of the duty owed by</p> <p>20 the owner or occupier of the premises is determined by</p> <p>21 the status of the plaintiff as either invitee,</p> <p>22 licensee or trespasser. Tincani vs. Inland Empire</p> <p>23 Zoological Society, 124 Wash 2nd 121, a 1994 Supreme</p> <p>24 Court case.</p> <p>25 An invitee is a business visitor who</p>	<p>1 Curtis does not present any competent evidence that</p> <p>2 the Leins actually knew of the dock's alleged</p> <p>3 defective condition.</p> <p>4 The standard of burden is to show the</p> <p>5 unsafe condition had existed long enough to afford the</p> <p>6 Leins sufficient opportunity to have made a proper</p> <p>7 inspection to discover the defect. She fails to meet</p> <p>8 this burden because she presents no evidence regarding</p> <p>9 what constitutes a, quote, proper inspection of the</p> <p>10 dock and what allegedly defective condition would have</p> <p>11 been discovered upon such an inspection.</p> <p>12 Rather, the plaintiff here relies upon</p> <p>13 the doctrine of res ipsa loquitur, an evidentiary rule</p> <p>14 that recognizes that accidents may be of such a danger</p> <p>15 that its occurrence alone is sufficient to establish</p> <p>16 prima facie the defendants' negligence. Tinder vs.</p> <p>17 Nordstrom, 84 Wash App 787, a 1997 appellate case,</p> <p>18 Metropolitan Mortgages Securities vs. Washington Water</p> <p>19 and Power, 37 Wash App 241, a 1984 appellate case.</p> <p>20 For the doctrine to apply, the</p> <p>21 plaintiff must establish the accident or occurrence is</p> <p>22 of the kind that ordinarily doesn't happen in the</p> <p>23 absence of someone's negligence, the injuries were</p> <p>24 caused by an agency or instrumentality in the</p> <p>25 exclusive control of the defendant and the plaintiff</p>

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1 did not contribute to the injury causing accident or
 2 occurrence Howell vs. Spokane, Inland Empire Blood
 3 Bank, 14 Wash 2nd 42, a 1997 court case. Zukowsky vs.
 4 Brown, cited by both sides, 79-7586.

5 When res ipsa does apply, it provides
 6 (inaudible) a jury may reasonably infer both
 7 negligence and causation by the mere occurrence of the
 8 event and the defendants' relationship to it. The
 9 Metropolitan case at page 243. The first element of
 10 doctrine is met if there is a reasonable probability
 11 that the injury causing incident could not have
 12 occurred in the absence of negligence. *Tinder* at 792.
 13 Washington courts recognize three situations that
 14 normally do not occur absent negligence. When the act
 15 causing an injury is palpably negligent, such as when
 16 a surgeon leaves foreign objects in a patient. That
 17 is not applicable here, but general experience teaches
 18 us that the result could not be expected without
 19 negligence. That is the element that the plaintiffs
 20 are relying on. When experts in an exotic field
 21 provide proof that creates an inference of negligence,
 22 and that is all from the *Tinder* case at page 793.

23 Ms. Curtis relies on the second type
 24 of situation, contends that general experience tells
 25 us that docks -- that dock steps do not break absent

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1 someone's negligence. Whether an accident is one that
 2 wouldn't ordinarily happen without someone's
 3 negligence is the determination by judges applying
 4 their common experiences in life. *Metropolitan* at
 5 246

6 Here, the alleged negligence would be
 7 the failure to inspect and discover a dangerous
 8 condition; however, you cannot state that any
 9 inspection would have revealed a dangerous condition
 10 because the plaintiff is unable to identify the nature
 11 of the dangerous condition.

12 This is a close case and I certainly
 13 understand the plaintiff's argument that the doctrine
 14 of res ipsa should apply in the facts of this case.
 15 In my review of the case law, however, if there are
 16 other potential causes of the failure; in other words,
 17 other than the negligence of the plaintiff -- excuse
 18 me -- of the defendant, that res ipsa would not apply.

19 This instance is there are multiple
 20 other causes which could have caused the failure of
 21 the step on the dock. It could have been improperly
 22 constructed or it could have been a defective type of
 23 wood, and without some evidence that an inspection, a
 24 reasonable inspection, by the landowner would have
 25 discovered whatever the defective condition was, we

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1 have no clue what that defective condition was.
 2 Whether it was the type of wood that was chosen 20
 3 years ago, whether it was the construction of the dock
 4 itself or whether it was the failure to maintain would
 5 be pure speculation on the part of this Court as well
 6 as the finder of fact.

7 Because there are other causes that
 8 could have resulted in the failure of the dock step
 9 other than the negligence of the landlord, that is
 10 failure to inspect or maintain, under these facts, the
 11 Court concludes that the doctrine of res ipsa loquitur
 12 does not apply. Because the doctrine of res ipsa
 13 loquitur does not apply because the plaintiff has
 14 failed to present any evidence of what a reasonable
 15 inspection would have revealed in terms of dangerous
 16 condition, the motion for summary judgment is granted.
 17 The Court will enter (inaudible).

18 MS. THOMPSON: I have an order here,
 19 Your Honor.

20 THE COURT: Show that to (inaudible).
 21 Any questions or comments?

22 MS. READ: Well, just that all of the
 23 alternatives that you named are all things that were
 24 in the full control of the defendant. They built the
 25 dock, they picked the wood.

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1 THE COURT: I don't have those facts
 2 before me.

3 MS. READ: You know that they built
 4 it.

5 THE COURT: I don't know whether they
 6 built it or whether a contractor built it and I don't
 7 know whether that defect would have been dis-- in
 8 other words, if the contractor had negligently
 9 constructed the dock, whatever that negligent
 10 construction was, I don't know whether that was
 11 something that they would have discovered or not upon
 12 reasonable inspection.

13 MS. READ: Okay. That's exactly what
 14 the cases are about.

15 THE COURT: And I looked at a number
 16 of cases during our recess on that issue.

17 MS. READ: Do you have a pen I can
 18 use?

19 MS. THOMPSON: And just for the
 20 record, neither Claire or Jack built that dock, so...

21 MS. READ: Well, not personally.

22 MS. THOMPSON: Correct.

23 THE COURT: Does this list all the
 24 pleadings (inaudible)?

25 MS. READ: No.

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1 THE COURT: It must list all the
 2 pleadings. Rule 56 requires a listing of all
 3 pleadings.
 4 MS. THOMPSON: What doesn't it
 5 include?
 6 MS. READ: It doesn't list any of the
 7 depositions that I...
 8 MS. THOMPSON: Okay. What I did is I
 9 --
 10 THE COURT: Does it list your
 11 declaration that --
 12 MS. READ: No. It says my motion with
 13 exhibits, I mean, my response with exhibits, which is
 14 not correct.
 15 MS. THOMPSON: Well, I'm sorry. I
 16 wasn't attempting to misrepresent.
 17 MS. READ: No, no, I'm sure you
 18 weren't, but I think I agree with the Court, that it
 19 needs to be listed.
 20 THE COURT: You don't have to list
 21 every deposition if it was attached to a declaration.
 22 MS. READ: But it doesn't list the
 23 declaration.
 24 THE COURT: It has to list the
 25 declaration.

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1 MS. THOMPSON: Why don't you just
 2 write that in?
 3 MS. READ: And it doesn't list yours
 4 either. Don't you have a declaration?
 5 MS. THOMPSON: Well, all I did is I --
 6 THE COURT: You did not submit the
 7 deposition testimony under declaration, did you?
 8 MS. READ: No, I submitted them each
 9 separately.
 10 THE COURT: Okay. It needs to list
 11 everything.
 12 MS. READ: That's what I thought.
 13 MS. THOMPSON: Why don't you just
 14 write it in, whatever it is?
 15 THE COURT: Counsel.
 16 MS. THOMPSON: Well, if you have an
 17 alternative one.
 18 MS. READ: Well, it doesn't grant the
 19 motion, but it has all the --
 20 MS. THOMPSON: I'm sorry. I typically
 21 have just put the motion and attachments, and so...
 22 Well, this one doesn't list any of -- it doesn't
 23 mention my exhibits. It just says my motion.
 24 MS. READ: But yours were attachments.
 25 THE COURT: Yours were attached to

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1 declaration, Counsel.
 2 MS. READ: They were actually attached
 3 to your motion.
 4 MS. THOMPSON: Why don't we just cross
 5 out denying. It's up to you.
 6 MS. READ: It's up to you.
 7 THE COURT: All right. Counsel,
 8 here's what I need. I need compliance by the rule.
 9 That's what I need. So I want you to prepare an order
 10 granting motion for summary judgment listing all of
 11 the pleadings that were submitted in support of and in
 12 opposition to the motion for summary judgment, email
 13 it to the Court or messenger it to the Court.
 14 MS. READ: Yeah, that shouldn't be a
 15 problem. There's not going to be a disagreement.
 16 MS. THOMPSON: Thank you.
 17 THE COURT: Ms. Reed (inaudible).
 18 MS. READ: Right.
 19 THE COURT: Thank you both for your --
 20 MS. THOMPSON: I will.
 21 THE COURT: -- submissions both by way
 22 of briefing and oral argument and your patience with
 23 the Court.
 24 MS. THOMPSON: Thank you, Your Honor.
 25 THE COURT: The Court will be in

1 recess.

2 THE CLERK: Please rise.

3 (END OF TRANSCRIPTION)

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REPORTER'S CERTIFICATE

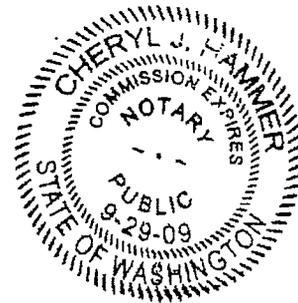
I, CHERYL J. HAMMER, the undersigned Certified Court Reporter and Notary Public, do hereby certify:

That the testimony and/or proceedings, a transcript of which is attached, was given before me at the time and place stated therein; that any and/or all witness(es) were duly sworn to tell the truth; that the sworn testimony and/or proceedings were by me stenographically recorded and transcribed under my supervision, to the best of my ability; that the foregoing transcript contains a full, true, and accurate record of all the sworn testimony and/or proceedings given and occurring at the time and place stated in the transcript; that I am in no way related to any party to the matter, nor to any counsel, nor do I have any financial interest in the event of the cause.

WITNESS MY HAND AND SEAL this 17th day of November 2008.

Cheryl J. Hammer

CHERYL J. HAMMER
Certified Court Reporter
CCR No. 2512
Notary Public in and for the
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