

NO. 66916-8-I

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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JULIA S. SINEX, as Personal Representative  
of the Estate of Matthew Richard Howard,  
and on behalf of DYLAN DAVID HOWARD,  
the surviving son of Matthew Richard Howard,

Appellant,

v.

WILLIAM L. BICE and SUSAN E. BICE, husband and wife  
and the marital community comprised thereof, and, LANDMASTER  
CORPORATION, d/b/a The Bathtub Doctor,  
a Washington corporation,

Appellees.

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Appeal from Superior Court of King County  
The Honorable Susan J. Craighead  
No. 09-2-46732-3

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

This case arises out of decedent Matthew Howard's fall down a stairway in the apartment complex where he resided.<sup>1</sup> Matthew suffered a traumatic brain injury and as a result had no memory of the fall. Because Matthew could not remember the fall or what caused him to fall, and because no one witnessed his fall, Defendants Landmaster Corporation and Bice both filed summary judgment motions asking the trial court to dismiss the Howard Estate's claims against them. Specifically, the Defendants argued that Plaintiff's case should be dismissed because there is no evidence of what caused Mr. Howard to fall down the stairway. Despite strong circumstantial evidence that Mr. Howard fell because of the defective condition of the stairway and inadequate lighting, the trial court nevertheless granted the Defendants' motions.

The trial court erred by failing to consider reasonable inferences from the evidence in a light most favorable to the Plaintiff and requiring a higher standard of proof of proximate cause than what the law requires. The law does not require precise knowledge of how an accident occurred in order to prove proximate cause. *Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978), citing *Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972). All elements of a negligence claim, including proximate cause, can be proved by inferences arising from circumstantial evidence. *Ibid.* The question of whether or not a defendant's conduct

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<sup>1</sup> Mr. Howard died about four months after this fall due to an overdose of pain medication (methadone) and an anti-depressant (citalopram). Plaintiff contends that his death was the direct result of the injuries he suffered in the fall.

caused a plaintiff's harm is generally a question of fact for the jury. *Moyer v. Clark*, 75 Wn.2d 800, 804, 454 P.2d 374 (1969).

The undisputed evidence in this case establishes that the apartment building stairway at issue deviated substantially from applicable code requirements. Two human factors experts stated that the defective condition of the stairs presented an inherently dangerous condition for people using the stairs. Mr. Howard's girlfriend stated that she heard a loud thumping noise like someone falling down stairs seconds after Mr. Howard left the apartment to go down the stairs. The circumstantial evidence, when viewed in a light most favorable to the Plaintiff as the nonmoving party, creates a strong inference that Matthew fell down the stairs as a result of the defective and inherently dangerous condition of these stairs.

Under the summary judgment standards of CR 56(c), this evidence raises genuine issues of material fact as to the Defendants' negligence, including the issue of proximate cause, making summary judgment improper. Because the evidence in this case raises genuine issues of material fact as to whether or not the Defendants' negligence in installing a new defective stairway at the subject apartment building was a proximate cause of Mr. Howard's injuries, the trial court erred as a matter of law in granting the Defendants' motions for summary judgment, and this case should be remanded back to the lower court for trial.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering an order dated March 16, 2011 granting Defendant Landmaster Corporation's Motion for Summary Judgment.

2. The trial court erred in entering an order dated March 16, 2011 granting Defendants Bice's Motion for Summary Judgment.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Did the trial court err in granting the Defendants' motions for summary judgment because the evidence in this case raises genuine issues of material fact as to whether or not the Defendants' negligence in installing a new defective stairway at the subject apartment building was a proximate cause of Matthew Howard's injuries?

## **IV. STATEMENT OF THE CASE**

### **A. Matthew Howard fell down a newly constructed stairway at the apartment building where he lived.**

Decedent Matthew Howard lived in a second floor apartment located at 17732 NE 88<sup>th</sup> Place, Redmond, Washington, with his girlfriend Julia Sinex and their nine-month-old son, Dylan Howard. CP 175. The apartment building was owned by Defendants Bice. CP 117.

Matthew was a smoker. CP 175. Because he did not want to expose Dylan to cigarette smoke, Matthew smoked outside and away from his apartment. CP 176. It was Matthew's customary practice to go outside and down to the ground level of the outdoor stairs leading up to his apartment when he wanted to smoke. CP 175-176.

At approximately 1:00 a.m. on the night of November 14, 2008, Matthew decided to smoke a cigarette. CP 175-176. At that time, Matthew was acting in a normal fashion and did not appear to be affected by alcohol or drugs of any kind. CP 175-176.<sup>2</sup> Within just a few seconds of Matthew stepping outside the apartment, Julia heard a loud thumping noise, as though someone was falling down the stairs. CP 176. Julia immediately went outside and saw Matthew at the bottom of the stairs, lying on the ground with a pool of blood near his head. CP 176. Julia did not see anyone else around or near the area where Matthew was lying. CP 176.

Julia then went to the bottom of the stairs to assist Matthew. CP 175. Matthew could not tell her what happened, because he had suffered a traumatic brain injury and was unable to speak. CP 176. As a result of suffering a traumatic brain injury, Matthew had no recollection of the fall. CP 146. Matthew suffered a fractured skull, a fracture of his left hand, and a torn ACL and fracture of his left knee. CP 147.

A matter of days before Matthew's fall, a new stairway had been built from his apartment to the ground level. CP 176. The new stairs were built by Defendant Landmaster Corporation. CP 43; CP 118. According to Julia, the new stairway was oddly shaped and oddly sized. CP 176. Julia stated that “[t]he stairs were much different than what had been there

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<sup>2</sup> Although he had consumed some beer the evening before his fall, Mr. Howard was not impaired at the time of his fall. Mr. Howard's blood chemistry taken at 3:15 a.m., a little over two hours after his fall (the incident occurred at approximately 1:00 a.m., CP 175), showed a blood alcohol level of just .013. CP 105; *see also* CP 100.

before” and that the stairway “seemed to be steeper and the steps did not seem to be as uniform as the ones that had been replaced, especially at the top of the stairs.” CP 176.

**B. The new stairway presented an inherently dangerous condition for people using the stairs.**

Julia Sinex’s testimony regarding the defective condition of the stairway was confirmed by two human factors experts, Dr. Daniel A. Johnson and Dr. Richard Gill. According to both Dr. Johnson and Dr. Gill, the new stairway at the Bice Apartment Complex violated applicable standards for both stair risers (vertical height of steps) and stair treads (runs/horizontal depth of stairs). In addition, the handrail and lighting also violated applicable standards. As a result of these violations, the stairway presented a dangerous condition for persons using the stairs.

**1. The Defendants’ stairs violated applicable safety standards.**

Dr. Daniel Johnson is a human factors consultant. CP 145. The field of human factors concerns the application of what we know about the capabilities of human beings to the design and operation of systems. CP 146. The purpose of human factors analysis is to design tasks and environments so that human beings will perform well and, where possible, free from error. CP 146.

On the afternoon of Monday, November 24, 2008, just ten days after Matthew’s fall, Dr. Johnson made a site visit to the apartment complex where Matthew’s fall occurred. CP 146. At that time, Dr. Johnson viewed the stairway, took measurements, and photographed the

stairway leading from Matthew Howard's second floor apartment to the ground level.<sup>3</sup> CP 146. He also interviewed Matthew, Julia, and Julia's father, David Sinex, who lived in the apartment below. CP 146.

**a. The risers and runs of the subject stairway violated safety standards.**

Dr. Johnson's measurements of the geometry of the stairway showed a mean for the "risers"<sup>4</sup> of 7.2", with a range of 6.91" to 8.3" and a variation of 1.39". CP 147. Dr. Johnson's measurements showed a mean for the "runs"<sup>5</sup> on the stairway of 9.43", with a range of 8.78" to 11.85" and a variation of 3.07". CP 147. The variations in the step geometry exceeded the 0.375 inch (3/8") maximum allowed by the Life Safety Building Code. CP 148. Run lengths of less than 10 inches also violate the Life Safety Building Code. CP 148.<sup>6</sup>

Dr. Johnson stated that excessive variation in step geometry causes falls:

It is uniformly recognized, and it is my opinion, that excess variation in step geometry causes falls. In a government sponsored analysis it was estimated that 101,000 falls each year are caused by excessive variation between risers or between runs. Irregularities

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<sup>3</sup> Some of Dr. Johnson's photographs of the stairs are attached as Appendix A.

<sup>4</sup> The risers are the height of one tread over an adjacent tread. CP 147.

<sup>5</sup> The "run" is the dimension of the tread in the direction of travel. CP 147.

<sup>6</sup> The Life Safety Building Code states that "[t]here shall be no variation exceeding 3/16 in. (0.5 cm) in the depth of adjacent treads or in the height of adjacent risers, and the tolerance between the largest and smallest riser or between the largest and smallest tread shall not exceed 3/8 in. (1.0 cm) in any flight" (LSC, 1991). The Life Safety Code has been adopted by the American National Standards Institute and is considered a national standard not only for stairs but also for other life safety issues. CP 149-150.

of as little as 0.25 inches between adjacent risers or runs "can disrupt the rhythm of the foot movements and cause a fall."

CP 148 (citations omitted).

Dr. Johnson explained that excessive variations in step geometry cause falls because such variations are unexpected and difficult for users of stairways to perceive:

Variations in stairway geometry are both unexpected and difficult for the user to perceive. A person must accurately place the ball of the foot near to, but back from, the nosing of the step. (The nosing is the foremost edge of a step or landing.) Any variation in riser height or run length increases the chance that the ball of the foot will be placed on or beyond the nosing so that when weight is transferred to that foot it will pivot or slide over the edge, thereby resulting in a fall.

CP 149.

According to Dr. Johnson, treads 9.0 inches or less in depth performed uniformly poorly in studies regardless of riser height. CP 150-151. In this case, Dr. Johnson noted that several of the treads on the subject stairway were less than 9 inches in depth. CP 147, 151. Since there was a repair and alteration of the stairway a short time before Mr. Howard's fall, the resulting stairway should have been built to conform to existing standards which require that runs/treads be a minimum of 10 inches. CP 153.<sup>7</sup> It was not. CP 153.

Dr. Johnson's measurements show that the first run at the top of the stairs was 11.85 inches, and the next run was 9.45 inches. CP 153. According to Dr. Johnson, since people rightfully expect uniformity in

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<sup>7</sup> International Residential Code (IRC) 2006, Sec. R311.5.3.2 & R102.7.1. The IRC has been adopted as the state building code by RCW 19.27.031.

tread geometry, it is expected and predictable that a person would assume subsequent treads would have similar usable run lengths. CP 148. Based on this, Dr. Johnson concluded that

As Mr. Howard started to descend it is more likely than not that he would have perceived the ample tread width on the first tread and expected, in the dim light, that the subsequent treads would be equally ample. But the usable space on the first tread was much greater than the usable spaces on subsequent treads.

This would, in my opinion, likely result in the placement of a foot too far forward on the second or third treads, thus causing the foot to pivot over and slip off of the nosing of a lower tread. The person would then most likely fall forward and down the stairway unless he could have quickly grabbed and held onto an adequately designed handrail. In my opinion this is what, on a more probable than not basis, occurred to Mr. Howard.

CP 153.

These deficiencies led Dr. Johnson to conclude that the reconstructed stairway failed to conform to applicable code requirements:

The stairway was rebuilt 11 days before Mr. Howard's fall. When a system, such as a stairway in an older building is altered, Code requires it to be brought up to current Code.

The stairway was rebuilt in such a manner as to make it steeper than allowed by Code....

The rebuilt stairway had variations in step geometry that greatly exceeded the variations allowed by Code....

A construction defect resulted in a large first run followed by much shorter runs so that during descent the usable space on the first tread was greater than the usable spaces on subsequent treads.

CP 157.

**b. The handrail on the stairway violated the applicable code.**

Dr. Johnson's measurements establish that the handrail on the subject stairway had overall dimensions of 1.5" x 3.5" x 5". CP 153.<sup>8</sup>

According to the National Bureau of Standards, one of the four critical functions of handrails is to provide a grab-bar for support in the event of a misstep on a stairway. CP 153-154. Dr. Johnson states that, to comprehend how an easy-to-grasp handrail can help a person avert a fall, it is important to understand how a person falls down stairs. CP 154. A person often starts to fall during descent because the ball of the foot being placed slips off the nosing of a lower step. CP 154. This results in a person whose feet are stationary, with one foot supporting the weight, and the other foot supporting little, if any weight. CP 154. However, the upper torso is still moving forward, and descending. CP 154. As the person's upper body continues to move forward and the feet remain stationary, the body can be visualized as an inverted pendulum; the upper body will describe an arc in relation to the stairs and handrail, which is initially upward, and then downward, as depicted in Appendix C. CP 154, 174.

According to Dr. Johnson, in the initial stage of a fall, the hand resting on the handrail may be pulled away in an upward direction. CP 154. Unless the person is able to tightly hold the handrail a fall may be inevitable. CP 154. A handrail must be smooth and designed so that the

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<sup>8</sup> A photograph showing the configuration of the handrail is attached to this Brief as Appendix B. The same photograph can also be found in the record at CP 172.

fingers can curl around it, grasping it comfortably and tightly. CP 154. Studies establish that a person falling forward and downward will grab a handrail and exert forces which are initially downward on the handrail followed immediately with forces that are upward, forward (along the centerline of the handrail), and inward (toward the centerline of the body). CP 154-155. The hand, which becomes stationary on the handrail as the torso continues to move forward, ends up behind the person as these forces are exerted. CP 155. In order for the hand to hold onto the handrail during a fall, the size of the handrail should be neither too small nor too large. CP 155.

The Life Safety Code Handbook<sup>9</sup> states that “People are incapable of exerting sufficient finger pressure to adequately grasp a handrail using only a ‘pinch grip’ as opposed to a ‘power’ grip when fingers curl around and under a properly shaped and sized railing. This would prohibit the use of rectangular lumber (e.g., 2x4s) for handrails.” CP 154. As such, the Life Safety Code<sup>10</sup> recommends that handrails have a circular cross-section with an outside diameter of at least 1.25 in. (3.2 cm) and not greater than 2.0 in. CP 155.<sup>11</sup>

The handrail that Mr. Howard had access to was, at a width of 3.5 inches, larger than allowed by the International Residential Code and too

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<sup>9</sup> *Life Safety Code Handbook* at 109 (1988). Quincy, MA: National Fire Protection Association.

<sup>10</sup> LSC (1988) at A-5-2.2.6.5 (b).

<sup>11</sup> The most recent International Residential Code (2006 IRC) allows a slightly wider dimension of 2.75 inches. CP 155.

large to be easily grasped. CP 155. Therefore, Dr. Johnson concluded that if Mr. Howard reached for the handrail after a misstep, the handrail would not have provided Mr. Howard with adequate graspability and would not have arrested his fall. *See* CP 159; 281.

**c. The lighting on the stairway was inadequate.**

The only lighting at the top of the stairway was a light fixture with a 40-watt bulb. CP 155. The distance from the luminaire to the landing at the top of the stairs, in the middle of the nosing of the landing, was 9.1 feet. CP 155. Dr. Johnson's testing determined that at 9.1 feet a new 40 watt bulb produced 1.1 foot candle (fc) of illumination. CP 155-156.

According to Dr. Johnson, treads below the top landing would not have been illuminated by this lighting for two reasons: (1) the treads were further away from the luminaire, and (2) the balusters on the stairway and the guardrail on the upper landing would have cast shadows onto the lower treads. CP 156. In addition, there was no light source provided for the lower section of the stairway, including the lower landing. CP 156.

Dr. Johnson stated that falls on stairs can occur when people are unable to adequately see where to place their feet. CP 156. The research indicates that 1 fc on stairs is not adequate illumination on a stairway. CP 156.

Dr. Johnson also stated that the single 40 watt light bulb located 9 feet from the center of the top tread did not provide adequate illumination of the stairway:

This luminaire was located so that an occupant had adequate light to recognize someone outside of the doorway. It also would be useful to a person attempting to insert a key into the door lock. The luminaire was clearly not of assistance to a stair user, since it was not “in the immediate vicinity”<sup>12</sup> of the top landing. Further, the presence of handrails and balusters between the light fixture and the stairs would have blocked much of this dim light from falling onto the stairs.

CP 157.

Dr. Johnson concluded that the inadequate lighting on the stairway contributed to Mr. Howard’s fall:

It is also my opinion that, on a more probable than not basis, the excessive changes in step geometry would not have been visible or obvious to Mr. Howard because of the low illumination provided by the single low wattage bulb by the front door. If this luminaire had been in the immediate vicinity of the stairway, as required by Code, then this fall, on a more probable than not basis, would have been prevented.

CP 157.

**2. The defective condition of the newly constructed stairway increased the risk that someone would fall.**

Dr. Johnson’s opinions are corroborated by another human factors expert, Dr. Richard Gill. Dr. Gill holds a Ph.D. in Mechanical Engineering and has 30 years of experience in the field human factors, with the focus being in safety and risk management. CP 178-179.

Dr. Gill stated that using stairs is a learned behavior, and that because of this we have certain expectations or pre-programmed motor skills that we call up whenever we ascend/descend a stairway. CP 181. He also stated that these pre-programmed motor skills are developed and

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<sup>12</sup> The 2006 International Residential Code provides that exterior stairways “shall be provided with an artificial light source located in the immediate vicinity of the top landing of the stairway.” CP 157.

patterned after basic stair tread geometry that we encounter day after day in our daily lives. CP 181. Because of these pre-programmed motor skills, Dr. Gill stated that tread geometries (i.e. riser heights and tread depths) that deviate from our expectations create a heightened risk for a misstep and fall on a stairway. CP 181.

Dr. Gill also stated that it is important for tread geometry to be consistent with the inherent biomechanics of the human body. CP 181. For this reason, architectural and safety guidelines, standards, and codes all mandate specific tread geometrics. CP 181. Based on these safety standards, Dr. Gill stated that riser heights should not exceed 7 inches, and tread depths should not be less than 11 inches. CP 181. To the extent that these parameters are violated (i.e. taller risers or shallower treads), a stairway becomes too steep for people to consistently safely negotiate. CP 181.

Dr. Gill stated that steep stairways put users at risk for missteps and falls, particularly during the descent phase. CP 181. As a person steps down from one tread to the next, their foot both drops in elevation and continues to move forward horizontally until it lands on the tread below. CP 181. However, if a riser is too tall, then the foot drops for a longer period of time, and hence it continues out further horizontally; as such, the person is at risk for “over stepping” the next tread (i.e., stepping too far forward such that the foot slips off the leading edge of the tread or the tread nose). CP 181. Likewise, if a tread is too shallow (i.e. inconsistent with our expectations and safety guidelines and codes), then

as the user steps down, they are at an increased risk of over stepping the tread nose. CP 181. The combination of both riser heights that are too tall and tread depths that are too shallow interact to create an extraordinarily hazardous stairway. CP 181-182.

Both of these dangerous conditions were present on the subject stairway: 14 of the 17 risers exceeded 7 inches, and 15 of the 16 treads were less than 10 inches, with 3 of them being less than 9 inches. CP 182. For these reasons, Dr. Gill concluded that the subject stairway was extraordinarily hazardous.

Like Dr. Johnson, Dr. Gill also emphasized that variability in tread geometry is an important factor in stairway safety:

As a user ascends/descends a stairway they develop a cadence or “fine-tune” their pre-programmed motor skills to match the actual tread geometry of the given stairway. If there is a sudden unexpected variation in the tread geometry, then the user is at an increased risk for a misstep and fall. This well-known and well understood inherent limitation/bias has been addressed in that for decades there have been a plethora of architectural and safety guidelines, standards, and codes that limit riser height and tread depth variability (i.e. the differences between their minimum and maximum values over the entire flight of steps) to no more than 3/8ths of an inch.

CP 182.

Dr. Gill stated that the variability in the riser height of the subject stairway -- 1.4 inches -- was over 370% more than permitted by applicable safety standards. CP 182. To put this in perspective, Dr. Gill stated that this is comparable to traveling over 220 MPH on a 60 MPH road. CP 182. Worse yet, the variability in the tread depth -- over 3 inches -- was over 800% more than permitted. CP 182. Dr. Gill stated that such gross

deviations from safe building practices for both riser height variability and tread depth variability created an extraordinarily dangerous stairway. CP 182.

According to Dr. Gill, distinctive tread nosings are another important safety feature in a stairway as they assist the user in detecting the leading edge of the tread so as to help prevent missteps and falls. CP 182. Dr. Gill stated that distinctive tread nosing is particularly important for steeper stairways and under conditions of low illumination levels, both of which existed at the subject stairway. CP 182. Again, the subject stairway failed to conform to this basic safety design principle because “the entire tread was uniform in material, color, and texture; as such the tread surface and tread nose of one step blends into the surface of the tread below thereby effectively camouflaging the tread nosing.” CP 183.

Like Dr. Johnson, Dr. Gill also stated that handrails are important to assist in restoring balance in the event of a loss of balance, as well as helping break/stop a fall in its early stages. CP 183. Dr. Gill noted that “[t]here are a plethora of architectural and safety guidelines, standards, and codes that set forth a number of parameters pertaining to the design of handrails,” the most relevant in this instance being that “a cross section of the handrail must comply with specific criteria such that it is graspable by a human hand.” CP 183.

Like the design of the stairs, Dr. Gill stated that the deviation of the handrail construction from applicable standards was so gross that the

handrail was virtually useless and exacerbated the inherent danger presented to users of these stairs:

Here again the design of the subject handrail was in gross deviation of a plethora of architectural and safety guidelines, standards, and codes. The handrail was far too big to be graspable by a human hand; so much so that it was virtually useless (i.e. it was so big that one could not wrap their fingers around it in order to hold onto it). In effect, this was a stairway without a handrail, which further exacerbated the inherently and extraordinarily dangerous design features of the subject stairway.

CP 183.

**C. There is no admissible evidence to support Defendants' speculation that Mr. Howard's injuries were caused by an alleged assault.**

In their summary judgment motions, both Defendants speculated that Mr. Howard's injuries may have been caused by an assault. CP 43-44; CP 91. Defendants based their speculation on the following statement in Mr. Howard's medical records:

The patient is a 20-year-old man admitted to Evergreen Hospital early this morning after having been assaulted and suffering a head injury and right temporal skull fracture.

CP 77.

This statement is nothing more than rank hearsay and therefore inadmissible under ER 802. The record does not indicate the source of this statement. Nor does the statement provide any corroborating information to support it. Other than this inadmissible statement, there is no evidence at all that Mr. Howard was assaulted.

It is well-established under Washington law that statements or opinions in medical records regarding how an injury occurred, which are not the result of an observed act, condition or event, are inadmissible:

[A] business record is admissible only in so far as it represents a record of a contemporaneous act, condition or event.

....

It was never intended that, under the guise of a business record, the exception to the hearsay rule would be extended so that the maker of a record could express, through the medium of the record itself, an opinion as to causation that he would not be permitted to express in open court, if he based his opinion solely upon the factual information which is shown in the report. As was said in *McGowan v. Los Angeles*, 100 Cal.App.2d 386, 392, 223 P.2d 862, 866, 21 A.L.R.2d 1206 (1950):

\* \* \* The statute does not change the rules of competency or relevancy with respect to recorded facts. It does not make that proof which is not proof. It merely provides a method of proof of an admissible 'act, condition or event'. It does not make the record admissible when oral testimony of the same facts would be inadmissible.'

....

We hold that a medical opinion as to causation, which is not the result of an observed act, condition or event, cannot be established by a business record.

*Young v. Liddington*, 50 Wn.2d 78, 84-85, 309 P.2d 761 (1957).<sup>13</sup>

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<sup>13</sup> See also *Theonnes v. Hazen*, 37 Wn. App. 644, 648-650, 681 P.2d 1284 (1984) (expert opinion based on speculation and conjecture may not go to the jury).

In this case, other than this inadmissible hearsay, there is no evidence to support Defendants' speculation that Mr. Howard's injuries may have been caused by an assault. The only evidence in this case is that, within seconds after Matthew Howard left the apartment, Julia Sinex heard "a loud thumping noise, as though someone was falling down the stairs." CP 176. Julia then "immediately went outside and saw Matthew at the bottom of the stairs." CP 176. Significantly, Julia testified that "there was no one around or near the area." CP 176.

By far the most logical and commonsensical inference from the evidence is that Matthew Howard fell down the recently constructed stairs due to the multiple unsafe conditions that increased the risk of someone falling when descending the stairs – the significant variation in the height and depth of the steps, the inadequate lighting, and the large handrail, which was too wide to grasp firmly in the event of a fall. The Defendants' speculation about Mr. Howard's injuries being caused by an assault is inconsistent with Julia Sinex's testimony that Matthew's injury occurred seconds after he left the apartment to go down the stairs and is based on nothing but inadmissible hearsay in a medical record. The Court should disregard Defendants' speculation

**D. Procedural Facts.**

Approximately four months after his fall, Matthew died. To recover for the injuries that he sustained in the fall and for his wrongful death, Matthew's Estate filed this action. The Estate's Complaint alleged among other things that the negligence of Defendants Landmaster and

Bice in reconstructing the subject stairway was a proximate cause of Matthew's fall. CP 23-26.

Both Defendants then filed their summary judgment motions. CP 40-41; 89-98. The trial judge subsequently granted both motions, and this appeal was then timely filed by Matthew's Estate. CP 271-274; 275-278.

## V. SUMMARY OF ARGUMENT

Causation is generally an issue of fact for the jury and may be established by inferences arising from circumstantial evidence. *Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978). Precise knowledge of how an accident occurred is not required to prove a negligence claim; all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence. *Klossner*, 21 Wn. App. at 692 (*citing Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972)).

The evidence in this case shows the following:

- Just a few days before Matthew fell down the exterior stairs at his apartment building, the stairway was rebuilt in a manner that violated applicable safety standards. CP 176. The rebuilt stairs differed significantly from what had been there before and were not as uniform, especially at the top of the stairs. CP 176.
- The stairs were examined, measured, and photographed by a human factors expert 10 days after Matthew fell. CP 146. The human factors expert, Dr. Daniel Johnson, found several dangerous conditions in the stairway, including the following:

- The height of the vertical risers on the stairs varied from 6.91” to 8.3” (a variation of 1.39”), which exceeds the variation of .375” allowed by code (CP 147, 148) and creates an unsafe condition because users of stairs do not expect such significant variation in the height of steps and will be taken by surprise, causing falls. CP 148-149; *see also* CP 182.
- The depth of the horizontal treads on the stairs varied from 8.78” to 11.85” (a variation of 3.07”), which exceeds the variation of .375” allowed by code, as well as the minimum tread depth of 10 inches required by code. CP 147-148; *see also* CP 182. Like the significant variation in the heights of the steps, the even greater variation in the depths of the steps created an unsafe condition because users of stairs do not expect such significant variation and will be taken by surprise, causing falls. CP 148-149, 181.
- Descending stairs is a learned behavior that involves certain expectations and pre-programmed motor skills based on a person’s experience with stairs. When the height and depth of stairs deviates from a person’s expectations, there is an increased risk for missteps and falls. CP 181.
- The inherent difficulty of identifying unexpected variations in steps while descending stairs (CP 149) was made even worse at the subject stairway because of the inadequate lighting at the top of the stairs. 156-157.
- The handrail on the stairway also violated code requirements and was too wide for a person’s hand to grasp so that a person could avert a fall in the event of a misstep due to the significant variation in the height and depth of the steps. CP 155, 159, 183, 281.

- Moments after Matthew left the apartment to go down the stairs to smoke a cigarette, his girlfriend, who was inside the apartment, heard a loud thumping noise that sounded like someone falling down stairs. CP 176. She immediately went outside to the stairs and found Matthew at the bottom of the stairs with a pool of blood near his head. CP 176. Matthew's injuries included a fractured skull, a fracture of his left hand, and a torn ligament and fracture in his left knee. CP 147.

A reasonable inference from these facts is that the defective condition of the stairway was a proximate cause of Matthew Howard's fall and resulting injuries. Under these facts, it was improper for the trial court to decide the factual question of proximate cause as a matter of law.

## VI. ARGUMENT

### A. Standard of Review

Appellate courts review a summary judgment order de novo, conducting the same inquiry as the trial court. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Summary judgment is appropriate only when there is no genuine issue of material fact. CR 56(c).

In ruling on a motion for summary judgment, a court should merely determine whether a genuine issue of material fact exists. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) ("The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact."); *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 461, 166 P.3d 807 (2007). In making this determination,

the Court must consider all the material evidence and all reasonable inferences from the evidence 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). ***If reasonable persons considering the evidence and inferences could reach different conclusions, summary judgment must be denied.*** *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502, 834 P.2d 6 (1992).

Summary judgment also must be denied if the record shows a *reasonable* hypothesis that would create a genuine issue of material fact. *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). It is improper for a court to grant summary judgment based merely on a belief that the moving party is likely to prevail at trial. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 882, 431 P.2d 216 (1967). Conflicting assertions of fact in affidavits and counter-affidavits, or in other supporting and opposing documents, raise an issue of credibility requiring that summary judgment be denied. *Balise*, 62 Wn.2d at 200.

**B. The evidence in this case raises genuine issues of fact as to the cause of Matthew Howard's injury that preclude summary judgment as a matter of law.**

"The term proximate cause means a cause which in a direct sequence produces the event complained of and without which such event would not have happened." WPI 15.01. There can be more than one proximate cause of an event. *Ibid*.

By its very nature, the issue of proximate cause is ordinarily a question of fact for the jury. *Bordynoski v. Bergner*, 97 Wn.2d 335, 340,

644 P.2d 1173 (1982). It is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that proximate cause can be decided as a matter of law by the Court. *Bordynoski*, 97 Wn.2d at 340; *Mathers v. Stephens*, 22 Wn.2d 364, 370, 156 P.2d 227 (1945); *Harris v. Burnett*, 12 Wn. App. 833, 532 P.2d 1165 (1975). As the evidence set forth above indicates, that is not the case here.

Circumstantial evidence is sufficient to establish a question of fact as to proximate cause if it affords room for reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not. *Hernandez v. Western Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969); *Wise v. Hayes*, 58 Wn.2d 106, 108-109, 361 P.2d 171 (1961).

The rationale underlying this rule was explained by our Supreme Court over 70 years ago:

There are very few things in human affairs, and especially in litigation involving damages, that can be established to such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for the damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause.

*Nelson v. West Coast Dairy Co.*, 5 Wn.2d 284, 296-297, 105 P.2d 76 (1940); *see also Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978) (precise knowledge of how an accident occurred is not

required to prove negligence; all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence).

An example of a case applying this rule is *Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972). *Raybell* involved the death of a motorist whose car left a state highway and plunged to the bottom of a canyon. There were no witnesses. *Raybell*, 6 Wn. App. at 796. The evidence was that the decedent was generally unfamiliar with the highway in that area. *Raybell*, 6 Wn. App. at 798. On behalf of the decedent, the plaintiff contended that there was inadequate warning of the narrowing of the roadway and the absence of a shoulder or guardrail. *Raybell*, 6 Wn. App. at 799. At the outset, the court noted that “all elements of a negligence action, including proximate cause, may be established by inferences based upon circumstantial evidence.” *Raybell*, 6 Wn. App. at 801. The court held that the circumstantial evidence was sufficient to support a verdict in favor of the plaintiff on the inadequate warnings claim:

\* \* \* There is a growing awareness that highway design and the manner in which drivers are informed of the design plays more than an incidental part in highway accidents.

In the case at bar, the evidence was sufficient, in our judgment, to establish a fact question for the jury that the locus in quo was inherently dangerous and of such character as to mislead a traveler exercising reasonable care. The type of harm which occurred was reasonably foreseeable. [citation omitted] There was, likewise, ample testimony that the state breached its duty, both in failing to adequately warn of the hazard and in failing to install a feasible barrier system along the roadway to protect those who reasonably became confused by the design of the highway.

\* \* \*

Defendant urges, however, that where causation is based upon circumstantial evidence, the factual determination may not rest upon speculation and conjecture; and if 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. [citations omitted]

That rule is applicable only where the jury must speculate on how the accident occurred. While we cannot know with certainty why decedent's vehicle left the road, there is neither a presumption that he did so negligently nor that he committed suicide. [citation omitted] [T]here were substantial and not conjectural theories as to why his vehicle left the roadway and the outcome depended upon which circumstantial evidence the jury chose to believe. In our view, the rule contended for is not applicable here.

*Raybell*, 6 Wn. App. at 803.

Another illustrative case is *Schneider v. Yakima County*, 65 Wn.2d 352, 397 P.2d 411 (1964), which involved the death of a teenager who was a passenger in a car that left a county road on a curve at the top of a steep declivity and hurtled downward, landing 120 feet below the road. There were no advisory speed signs or other warnings that one's speed should be reduced for the curve. The legal speed limit on the road was 60 mph, but there was evidence that any speed in excess of 35 mph was dangerous on the curve. *Schneider*, 65 Wn.2d at 355. Although the driver survived, he did not testify at the trial. Thus, there was no direct evidence from the driver as to whether he was familiar with the presence of the curve and the need to reduce his speed, or whether he was actually deceived by the lack of warning signs. Despite this lack of direct evidence from the driver of the vehicle, the Supreme Court held the evidence to be sufficient to support a verdict for the plaintiff:

From this testimony [of the passengers in the front seat], it can be inferred that the signs posted did not convey an adequate warning of the situation ahead and that had there been any signs to indicate the urgent necessity to reduce speed, this accident would have been averted.

This is far from conclusive proof of proximate cause, as must always be the case where the negligence relied upon is a failure to give adequate warning; ***but it clearly rises above speculation and conjecture to the level where reasonable minds can conclude that more likely than not adequate warnings would have prevented the accident which caused the injuries.***

*Schneider*, 65 Wn.2d at 359 (emphasis added).

Numerous other cases stand for the proposition that proximate cause may be proved by circumstantial evidence. *See, e.g., Hernandez v. Western Farmers Association*, 76 Wn.2d 422, 425, 456 P.2d 1020 (1969) (“Circumstantial evidence is sufficient to establish a prima facie case of negligence, if it affords room for . . . reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not.” (quoting *Wise v. Hayes*, 58 Wn.2d 106, 108-109, 361 P.2d 171 (1961))); *Papac v. Mayr Bros. Logging Co.*, 1 Wn. App. 33, 38, 459 P.2d 57 (1969) (“Inferences based upon circumstantial evidence may be, and in this case are, sufficient to establish proximate cause.”).

A fact is not based upon speculation when the fact is based upon reasonable inferences drawn from admissible circumstantial evidence. When there are conflicting inferences that can be drawn from the evidence, it is for the ***jury*** to draw from the evidence any reasonable inferences fairly deducible therefrom. *Harrison v. Whitt*, 40 Wn. App.

175, 177-179, 698 P.2d 87 (1985); *State Farm Mut. Ins. Co. v. Padilla*, 14 Wn. App. 337, 339, 540 P.2d 1395 (1975). That is certainly the case here.

As in *Raybell* and *Schneider*, there is evidence in this case that the decedent was relatively unfamiliar with the instrumentality that caused his injuries, because the stairs were rebuilt a matter of days before he fell. CP 176. There was also evidence from his girlfriend, who had used the previous stairway and the rebuilt stairway, that the new stairs were much different from the old stairs, were not as uniform, and had odd shapes and sizes. CP 176. There was also evidence from expert witnesses that the variation in the height and depth of the stairs violated safety standards and significantly increased the risk of someone falling on the stairs. The undisputed evidence further showed that Mr. Howard's injuries occurred seconds after he left the apartment to descend the newly rebuilt stairs, at night, under low light conditions. CP 176.

Construing all the evidence in this case in a light most favorable to the Plaintiff, as a court is required to do on summary judgment, reasonable inferences can be drawn that Matthew Howard fell down the Defendants' stairs due the negligent design and construction of the stairs as well as the inadequate lighting on the stairs. These factual determinations rest with the jury rather than the court and should have precluded summary judgment as a matter of law under CR 56(c).

**C. The cases that the Defendants relied on in support of their summary judgment motions do not apply here based on the inferences that arise from the circumstantial evidence in this case.**

In their summary judgment motions, both Defendants made much of the fact that Matthew had no memory of how his injury occurred. Relying on *Marshall v. Bally's Pacwest*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999), *Johanson v. King County*, 7 Wn.2d 111, 109 P.2d 307 (1941), and *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001), Defendants claimed that because Matthew could not remember what caused his injury, they were entitled to summary judgment. But these cases are inapposite here because of the admissible circumstantial evidence in this case and the clear inferences that this circumstantial evidence creates.

In *Marshall v. Bally's Pacwest*, *supra*, the plaintiff alleged that she was exercising on the treadmill at the defendant's fitness facility when the treadmill stopped abruptly in the middle of her program. After the treadmill stopped, the plaintiff reprogrammed the treadmill and pushed the "start" button. The treadmill then allegedly restarted at 6.2 miles per hour rather than its usual 2.5 miles per hour. The plaintiff contended that because of the sudden and unexpected start, she was violently thrown from the treadmill, causing severe injuries when her head struck a plexiglass wall behind the machine. The plaintiff later testified in her deposition that (1) she did not recall how abruptly the treadmill reached full speed; (2) she did not recall being "thrown" from the treadmill; and (3) she did not recall hitting the glass behind the wall. Rather, the last thing the plaintiff recalled was resetting the machine after it stopped. In addition, no one

ever examined the subject treadmill to determine if it functioned properly. *Marshall*, 94 Wn. App. at 376.

Based on this evidence, the court in *Marshall* upheld the trial court's order dismissing the plaintiff's case on the basis that there was no evidence of what caused the plaintiff to be thrown from the treadmill or of a defect in the treadmill:

Even assuming the treadmill was defective, Marshall has offered no evidence as to how she fell or what caused her to be thrown from the machine. It follows that she cannot show that her injuries were caused by any defect in the machine. Thus, a jury would be required to speculate that a defect in the treadmill *caused* Marshall's accident. A claim of liability resting only on a speculative theory will not survive summary judgment. *See Gardner*, 27 Wash.2d at 808, 180 P.2d 564 (jury is not allowed to resort to conjecture to determine the facts) (citation omitted).

*Marshall*, 94 Wn. App. at 380-381.

Unlike the lack of evidence in *Marshall*, the circumstantial evidence in this case raises a strong inference that Matthew Howard fell down the Defendants' stairs due to the defective condition of the stairway. Unlike the treadmill in *Marshall*, the stairs in this case were inspected by an expert 10 days after the incident and found to present several safety hazards. Dr. Johnson and Dr. Gill both identified hazardous conditions in the stairway that violated safety standards and building code provisions and are known to cause people to fall, and they concluded based on all of the evidence that Matthew's fall was caused by the unsafe condition of the stairs. Also unlike *Marshall*, there is testimony from a witness who was present at the time of the event that provides a basis for a reasonable inference as to how it occurred. Within a few seconds of Matthew leaving

the apartment to go down the stairs, Julia Sinex heard what she described as “a loud thumping noise, as though someone was falling down the stairs.” CP 176. She immediately went outside and saw Matthew at the bottom of the stairs, lying on the ground with a pool of blood near his head. CP 176.

The same analysis holds true for *Johanson v. King County, supra*. In *Johanson*, the plaintiff, who was injured in a motor vehicle accident, argued that the County was negligent in failing to remove old road lines which could mislead drivers into thinking that the road was a two-lane, rather than a four-lane road. The plaintiff asserted that the driver who caused the accident “*might have been* and probably was deceived and misled by the yellow line.” But since the driver who caused the accident was killed in the accident, the plaintiff could not offer any testimony to show that the driver was in fact deceived by the old lines and that the driver’s misunderstanding caused the accident. The Washington Supreme Court affirmed dismissal of the claim against the County because even if the County breached its duty of care, the plaintiff failed to present any “testimony, or inference which can reasonably be drawn from [the] testimony, that the location of the [road] line was a proximate cause of the accident.” In reaching this conclusion, however, the *Johanson* court suggested that a reasonable inference that the driver of an automobile was misled or deceived by the residue of a directional yellow line in a highway that had been recently expanded would be sufficient to defeat summary judgment. *See Johanson*, 7 Wn.2d at 122. But because the *Johanson*

plaintiff and his passenger both testified that they knew nothing of how or where the accident had happened, the trial court properly granted the County's summary judgment motion. *Johanson*, 7 Wn.2d at 116-117.

Again, in this case the evidence creates a reasonable inference that Matthew Howard's fall and resulting injuries was caused by the substandard condition of the stairway. As described by Dr. Johnson, the extreme variations in the risers and treads of the Defendants' stairs have been identified in research studies as factors that cause falls. CP 148-152. And as discussed by Dr. Gill, variations in the height and depth of stairs that exceed the standards established by various safety and building codes (which we have become accustomed to expect as a result of our experience with stairs) increase the risk of falls occurring on stairs because they are unexpected and likely to cause a misstep when someone is taken by surprise descending stairs due to the mechanics and forces involved when a person descends stairs. CP 181-182. Likewise, the substandard handrail and the inadequate lighting on the stairs that night are also known to increase the risk of someone falling on stairs. CP 153-157. Julia Sinex's testimony establishes that the fall occurred moments after Mr. Howard left the apartment to go down the stairs, and that the first two steps differed significantly in depth. CP 153. Unlike the facts in *Johanson*, the facts in this case raised a reasonable inference that the Defendants' negligence caused Matthew to fall.

In *Miller v. Likins, supra*, the defendant's vehicle hit a 14-year-old boy at a curve in the road where two streets converged. The defendant,

who was 87 years old at the time of the accident, subsequently died from causes unrelated to the accident. The boy's mother filed suit against the defendant driver, as well as the city for failure "to adequately or properly perform design, engineering and maintenance duties instrumental to keeping the roads, streets and sidewalks and lighting in a reasonably safe condition for ordinary travel by persons using them."

The trial court entered summary judgment in favor of the city. The appellate court affirmed on the basis that there was no evidence that any of the defects suggested by the plaintiff actually confused or misled the defendant driver:

In this case, Miller contends that the accident occurred when Likins' vehicle crossed over the fog line and onto the shoulder of the road, striking Quirnbach. Miller claims that if the City had taken additional precautions, such as installing raised pavement markings on the fog line, lowering the speed limit, or posting additional road signs, Likins "would have been likely to be more alerted to possible presence of pedestrians, enabling him to avoid a collision." But like the driver in *Johanson*, Likins passed away before he could give his own sworn account of how the accident happened. ***There is no direct or circumstantial evidence showing that Likins was in fact confused or misled by the condition of the roadway.*** Like the plaintiffs in *Johanson* and *Kristjanson*, the most Miller can show is that the accident *might* not have happened had the City installed additional safeguards. Miller's contentions "can only be characterized as speculation or conjecture." Accordingly, a jury could not reasonably infer that had the City implemented the additional precautions [plaintiff's expert] suggested, Likins would not have crossed the fog line and hit Quirnbach. We conclude summary judgment was proper here because Miller failed to satisfy her burden of producing evidence showing that the City's negligence proximately caused Quirnbach's injuries.

*Miller*, 109 Wn. App. at 147 (emphasis added).

As in the other cases relied upon by the Defendants, the outcome in *Miller* turned on the fact that there was no evidence, circumstantial or otherwise, tending to prove that the defendants' negligence caused the plaintiff's injuries. Again, that is not the case here. In this case, the reasonable inferences drawn from the evidence establish a genuine issue of material fact as to whether or not the negligence of the Defendants was a proximate cause of Matthew's falling down the subject stairway.

**D. Cases from other jurisdictions involving falls down stairways resulting in death or the plaintiff not remembering the fall have found causation based on circumstantial evidence.**

Courts in other jurisdictions have held that causation may be inferred based on circumstantial evidence in cases involving unwitnessed falls down stairways. For example, in a wrongful death case involving a fall down some basement stairs, *Majerus v. Guelsow*, 113 N.W.2d 450, 451 (Minn. 1962), the Supreme Court of Minnesota held that it is not necessary to prove proximate cause by the testimony of an eyewitness. The court stated that when there is direct evidence that the defendant was negligent in maintaining a stairway, and that the decedent fell down the stairs, a causal link may be inferred by the jury without direct evidence on the point. The court also stated that the plaintiff was not bound to negate all possible circumstances which would excuse the defendant.

In *Majerus*, the decedent told his wife during lunch that he was going to do some work that afternoon and that when he returned home he was going to fix the sump pump in the basement of the apartment house where they resided. The decedent failed to return home that evening. The

next morning, his wife discovered his bruised body, face down at one the end of the basement.

Among other things, the evidence in the case showed that one of the steps on the stairs was much shorter than the others. The evidence also established that the stairway lacked uniformity, as in the present case. *Majerus*, 113 N.W.2d at 453.

Based on the circumstantial evidence in the case, the court upheld the jury's verdict in favor of the plaintiff:

A review of the record in its entirety satisfies us that there was evidence here from which a jury could reasonably determine that the stairway involved was defective in places and that defendant was negligent in so maintaining it. There was also evidence from which a jury could infer that the death of decedent resulted from a fall down the stairway; for example, the flashlight and tools under the stairs and the fresh splinter on the third step from the bottom, as well as the testimony of Dr. Davis as to fracture at the base of decedent's skull, and his opinion that decedent fell downstairs.

It is the finding that the fall was caused by the negligence of defendant which is most strenuously attacked here. Even if negligence and the fall down the stairs be admitted, plaintiff still had to prove that the negligence was the proximate cause of the fall. However, it is not the law that there must be an eyewitness to the accident; it is enough if the evidence is such that the jury can reasonably infer that the defective stair was the cause of the injury and death.

*Majerus*, 113 N.W.2d at 454-455.

In *Hall v. Winfrey*, 27 Conn. App. 154, 604 A.2d 1334 (1992), the estate of a deceased guest who died after falling down a stairway brought a wrongful death action against the homeowner of the house where the fall occurred. Nobody had witnessed the decedent's fall. The plaintiff claimed that that the defendant failed to maintain sufficient lighting in the

upstairs hallway during hours of darkness and failed to warn her houseguests of the allegedly dangerous and unsafe condition. The plaintiff further alleged that this dangerous and unsafe condition caused the decedent to fall down the stairs to his death. A jury found for the estate and the defendant appealed.

On appeal, the defendant argued that the plaintiff had failed to present sufficient evidence to support the jury's finding of causation. The Connecticut appellate court upheld the jury's verdict based on the inferences that could be drawn from the circumstantial evidence in the case:

In the present case, the plaintiff presented no direct evidence that the lack of light in the hall was the proximate cause of the decedent's fall. Rather, the plaintiff relied on circumstantial evidence. The plaintiff, in effect, asked the jury to infer that the absence of proper lighting was the proximate cause of his fall. Although inferences may be drawn from circumstantial evidence, "such inferences 'must be reasonable and logical, and the conclusions based on them must not be the result of speculation and conjecture.'" *Boehm v. Kish, supra*, 201 Conn. at 389, 517 A.2d 624.

"Circumstantial evidence ... may provide a basis from which the causal sequence may be inferred. Thus it is every day experience that unlighted stairs create a danger that someone will fall. Such a condition 'greatly multiplies the chances of accident, and is of a character naturally leading to its occurrence.' When a ... person tumbles down the steps, it is a reasonable conclusion that it is more likely than not that the fall would not have occurred but for the bad lighting.... Such questions are peculiarly for the jury; and ... are questions on which a court can seldom rule as a matter of law. And whether the defendant's negligence consists of the violation of some statutory safety regulation or the breach of a plain common law duty of care, the court can scarcely overlook the fact that the injury which has in fact occurred is precisely the sort of thing that proper care on the part of the defendant would be intended to prevent, and accordingly allow a certain liberality to the jury in drawing its conclusion." W. Prosser & W. Keeton, *Torts* § 41.

....

In the present case, the jury's inference that the fall would not have occurred in the manner that it did if there were light in the hallway was both reasonable and logical. It was also reasonable and logical for the jury to infer that the lack of light in the hallway was a substantial factor in the fall of the decedent.

*Hall*, 604 A.2d at 1337, 1338.<sup>14</sup> See also *Kurczy v. St. Joseph Veterans Association, Inc.*, 713 A.2d 766 (Supreme Court of R.I. 1998) (jury verdict finding lack of causation was overturned because no evidence was presented that could adequately explain how a minor child, who was found lying unconscious at the bottom of an unlit basement stairway, got to the bottom of the stairway other than as a result of the defendant's failure to remedy the dangerous condition created by the lack of adequate lighting on the stairway); *Wochner v. Johnson*, 875 S.W.2d 470 (Tex. Ct. App. 1994) (the fact that a witness did not see the decedent fall down the stairs does not establish as a matter of law that a defect in the stairs did not cause the fall).

## VII. CONCLUSION

The evidence clearly indicates that Matthew Howard fell down the recently constructed defective stairway seconds after he left the apartment to go down the stairs. The undisputed evidence shows that the stairway violated safety standards with regard to the variation in the height and depth of the stairs, the lighting, and the width of the handrail. The evidence shows that these conditions are known to cause falls on stairs.

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<sup>14</sup> As pointed out in the *Hall* opinion, Connecticut uses the substantial factor test of proximate cause.

As a matter of logic and common sense, the only reasonable inference supported by the evidence is that Mr. Howard fell due to the safety hazards present on the newly constructed stairway.

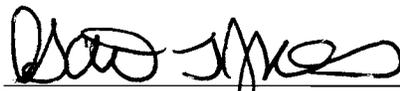
No other explanation for Mr. Howard's fall makes sense. Defendants' suggestion that he may have been assaulted is not consistent with Ms. Sinex's testimony that the fall occurred seconds after he left the apartment and that there was no one else around when she went to help him moments later. Defendants' suggestion that he may have been assaulted is rank speculation based on nothing but inadmissible hearsay in a medical record. Likewise, Defendants' suggestion that he may have fallen because he was trying to light a cigarette as he descended the stairs is rank speculation without any evidentiary support. There is no evidence that a cigarette or a cigarette lighter were found near the stairs or near Mr. Howard's body after the fall. Nor is there any evidence that Mr. Howard fell because he was intoxicated. His blood alcohol level was tested within two hours of the fall and found to be very low -- .013. The circumstantial evidence in this case gives rise to one strong and reasonable inference -- that Mr. Howard fell as a result of the defective construction of the stairway and the inadequate lighting, which made it difficult to perceive the dangerous conditions of the stairs at night.

As explained above, precise knowledge of how an accident occurred is not required to prove proximate cause. It has been the law of Washington for decades now that all elements of a negligence claim, including proximate cause, can be proved by inferences arising from

circumstantial evidence. *Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972).

The evidence in this case shows that the stairs failed to comply with applicable safety standards and building codes and that these safety violations are known to cause falls on stairs. Although Matthew had no memory of how he sustained his injuries, the circumstantial evidence in this case raises a very strong and reasonable inference that the hazards presented by these substandard stairs were a proximate cause of Matthew's fall and resulting injuries. Because there are genuine issues of material fact as to whether or not the Defendants' negligence caused Matthew to fall down the stairway, the trial court erred in granting the Defendants' motions for summary judgment. The trial court must now be reversed and this case remanded for trial to allow a jury to decide these factual issues.

Dated this 6<sup>th</sup> day of July, 2011.



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**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on the date below, I mailed the foregoing document, Appellant's Opening Brief, properly addressed as follows:

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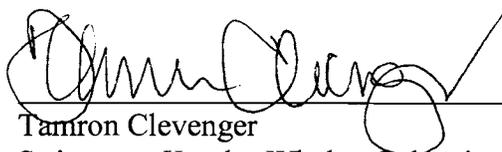
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Dated this 6<sup>th</sup> day of July 2011.

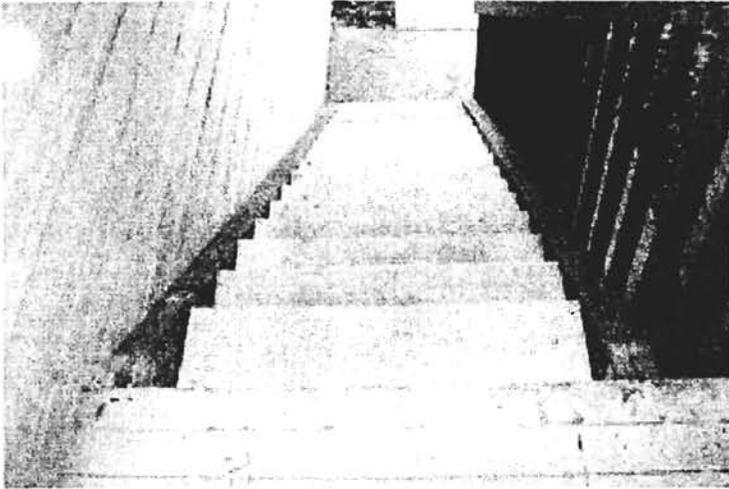


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## **APPENDIX**

- APPENDIX A      Photographs of stairs by Dr. Daniel Johnson.
- APPENDIX B      Photograph showing configuration of handrail.
- APPENDIX C      Figure depicting how a person falls forward.

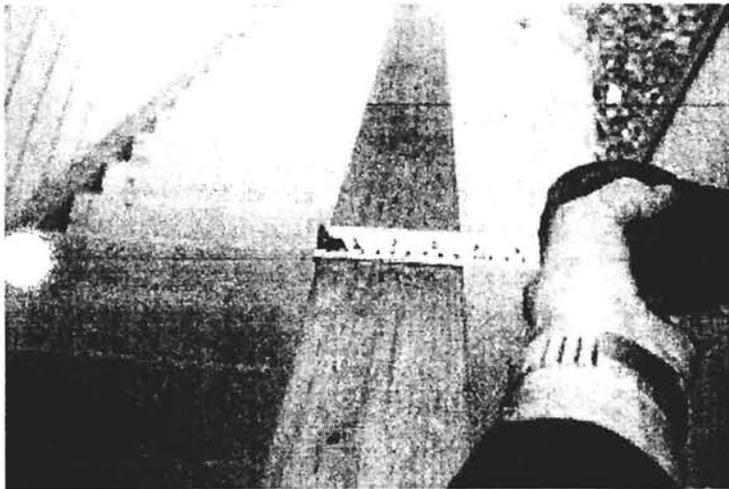
## **APPENDIX A**



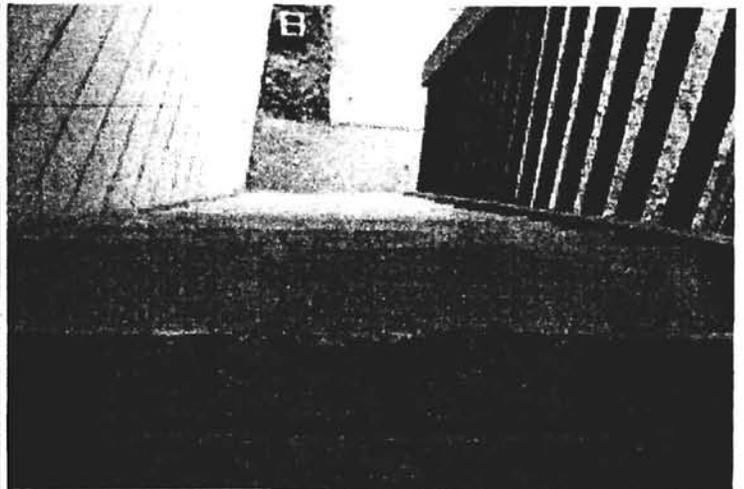
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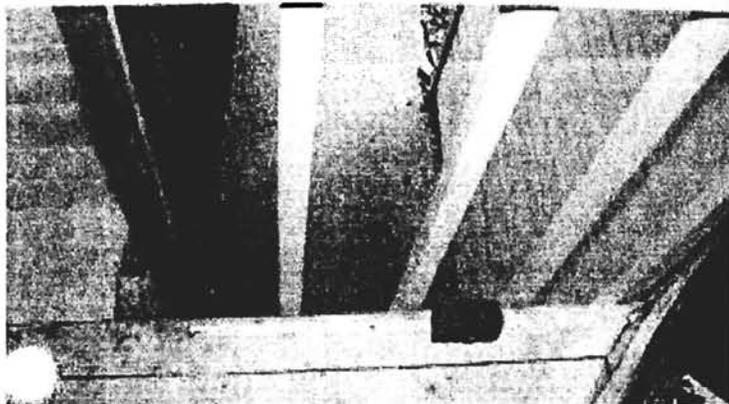
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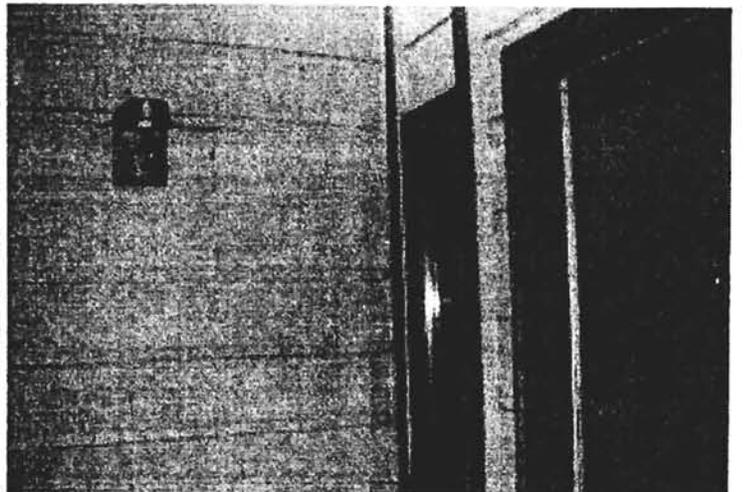
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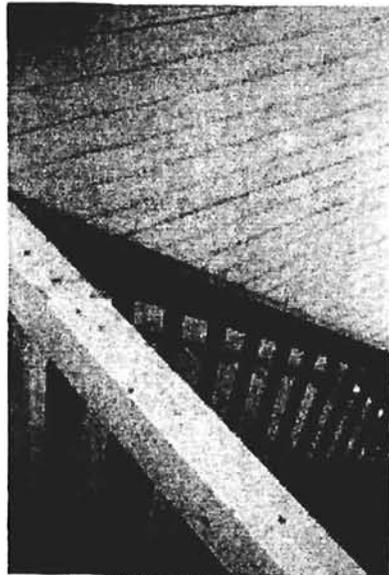
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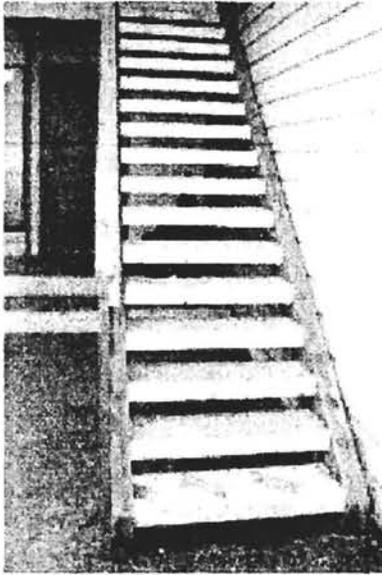
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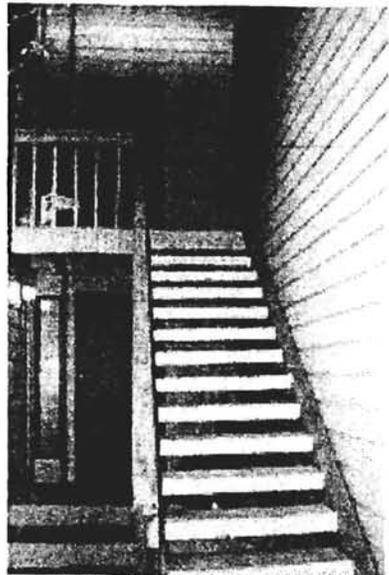
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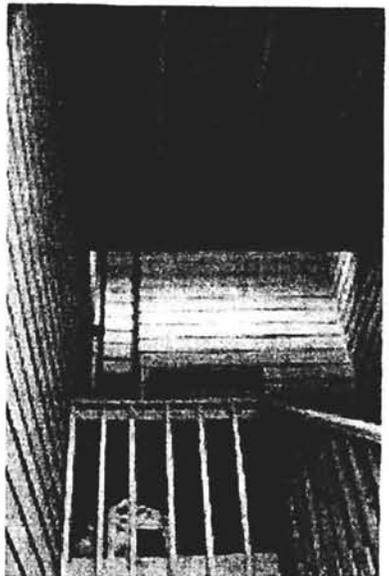
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## **APPENDIX B**

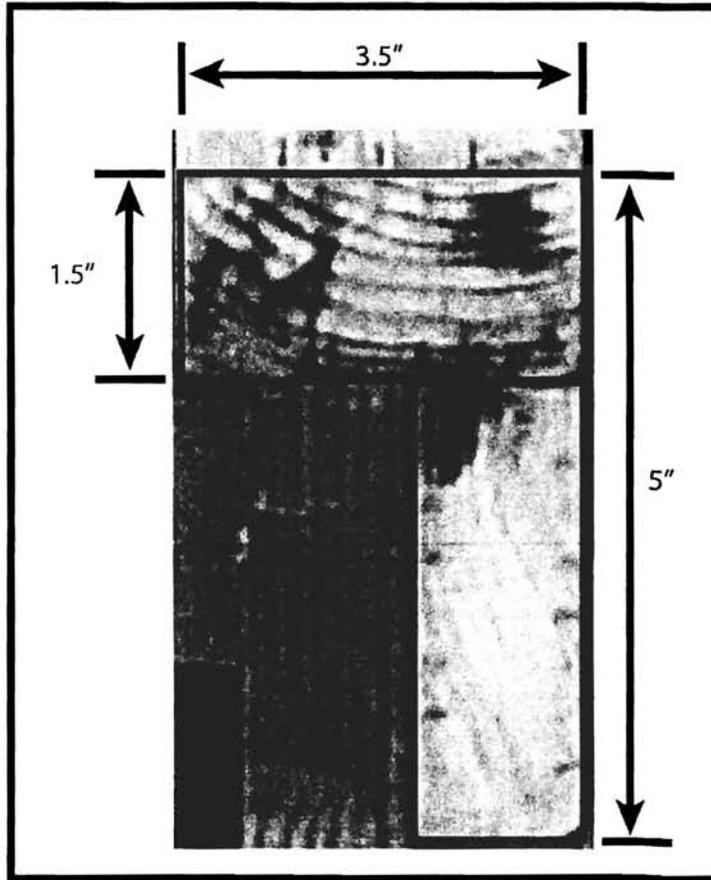


Figure 3. A photograph of the end of the handrail that was available to Mr. Howard. The rail was comprised of two 2X4s (actual 1.5X3.5s) having the dimensions shown. They are attached to a vertical support shown in the lower left quadrant of the figure.

## **APPENDIX C**

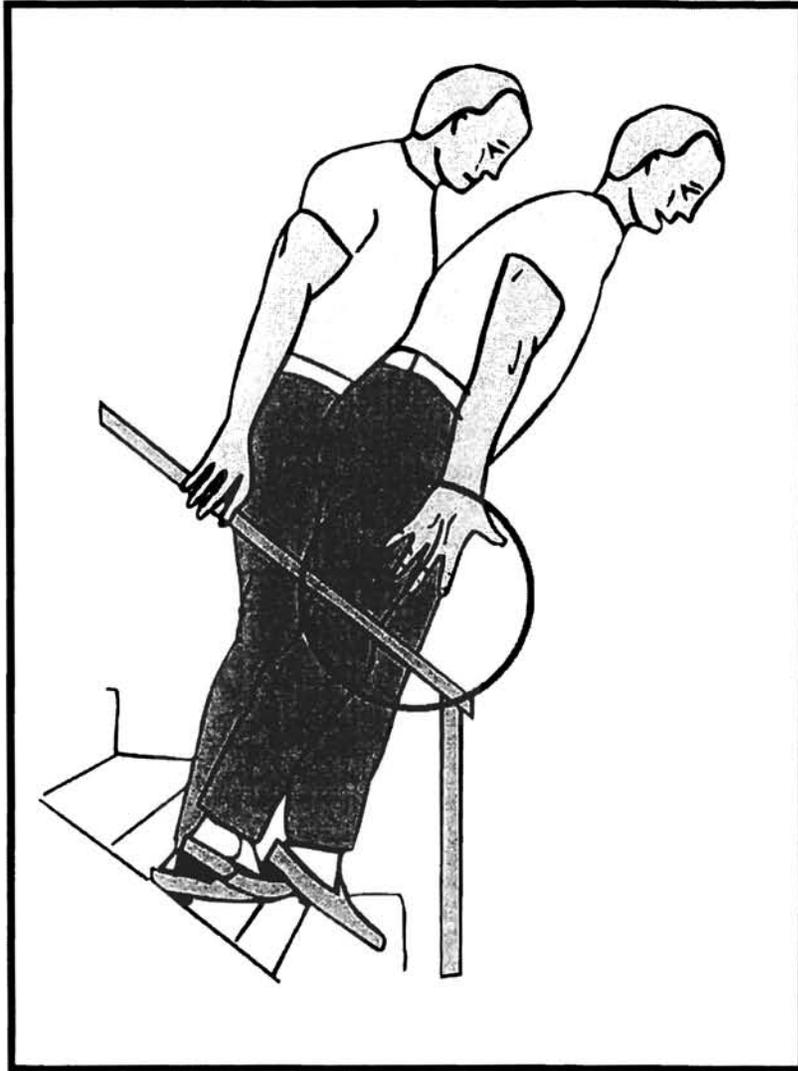


Figure 4. If a person falls forward down a stairway the hand must be able to curl under the handrail to prevent a fall.