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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 AUG -5 PM 1:05

No. 66916-8-I

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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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,

vs.

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,

Respondents.

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RESPONDENTS BICES' RESPONSE BRIEF

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**I. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Sheer speculation cannot form the basis to prove proximate cause in a negligence case. Appellant Sinex will never be able to explain **how, where or why** the accident occurred and without physical evidence or eyewitness testimony this Court should affirm the trial court's grant of summary judgment to Mr. and Mrs. Bice.

**II. COUNTER STATEMENT OF THE CASE**

**A. Introduction**

Ms. Sinex can produce no evidence to establish proximate cause. CP 240. At best, Ms. Sinex can only offer evidence to find minor code violations with a stairwell. *Id.* There is no physical evidence to link any condition of the stairs to Howard's alleged fall. *Id.* The unfounded conclusory opinions and theoretical arguments of Ms. Sinex's experts can only amount to guesswork that is inadmissible before a jury. *Id.* In fact, Ms. Sinex's experts must overlook *available* evidence to reach their conclusory assertions. CP 241.

**B. Statement of Facts**

Matthew Howard, (hereinafter "Howard") died after a drug overdose months after an injury he sustained at a residential duplex ("duplex") owned by Appellees Mr. and Mrs. Bice. CP 90. There is one rental unit upstairs, and one downstairs and an outdoor stairwell that

connects the upper unit to the ground level. CP 117. Howard was never a tenant at the duplex, but was apparently staying at either the upstairs unit with his girlfriend, Ms. Sinex and her father, or the downstairs unit with his friend. CP 90.

In October 2008 the Bices contracted with Landmaster Corporation, a licensed professional contractor, to make a number of repairs to the property including work on the outdoor stairwell between the upper and lower units. CP 118. The stairs were replaced by Landmaster, but not changed in any material way. *Id.* Until the time of this lawsuit no one ever complained about the stairs, lighting in the area of the stairs, the handrail, or any other condition of the stairwell. *Id.*

Ms. Sinex's Complaint alleges that on November 14, 2008 at approximately 11:45 p.m., Howard fell while allegedly traveling on the stairs from the upper unit to the ground floor. CP 91. First responders from the Redmond Fire Department arrived on the scene at approximately 2:00 a.m. *Id.* Howard self-reported that he had several beers before his accident. CP 103. Contrary to Ms. Sinex's Declaration, she told first responders Howard **came by her apartment to get an iPod** and *some*

time **later** she heard a loud crash. *Id.*<sup>1</sup> By the time she went outside, Howard was lying at the base of the stairs. *Id.*

It is undisputed there were no witnesses to Howard's fall. CP 91. It is further undisputed Howard had no memory of the accident, or for 36 hours after the fall. *Id.* In fact, not only did Howard have no recollection of the event or how it happened, he never said the stairs played any role in his fall whatsoever. *Id.*

Howard's blood alcohol level was still .013 hours after his injury from a specimen collected after 4:00 a.m. CP 105. No one knows if any other drugs were in his system because no drug screen was performed in the emergency room. CP 91. Howard did have a history of drug and alcohol addiction prior to the alleged fall. *Id.*

Medical records document a variety of causes for Howard's fall immediately following the accident. *Id.* Emergency medical records indicate Howard fell while going up the stairs and that he "missed a step." CP 108 and 110. One record reports Ms. Sinex found Howard unconscious after being "struck on the head;" and another states Howard was admitted to hospital after "having been assaulted." CP 107 and 111.

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<sup>1</sup> The King County Medical Incident Report Form completed by the Redmond Fire Department is attached to this Response Brief, Appendix at A1. It is also in the record as CP 103.

**C. Reasonable Inferences Are Impossible**

The bottom line is this: there is **no evidence**, circumstantial or otherwise, connecting Howard's alleged fall to any condition related to the stairwell. CP 92. In fact, you have to ignore available evidence to conclude Howard fell because of any condition of the stairs. CP 241. To call the declarations of Ms. Sinex and her experts "circumstantial evidence" rising above speculation is contrary to long-standing legal precedent, all notions of common sense, logic, justice and public policy. This so-called evidence is **nothing but pure speculation**. The Court should exercise its important gatekeeper function, follow well-established legal precedent, and preserve a meaningful limit on tort liability especially warranted on the facts in this case.

**D. Medical Records Evidencing Possible Causes of Howard's Injury Are Admissible and Not Hearsay**

As a threshold matter, Sinex did not raise the argument that any portion of Howard's medical records were inadmissible hearsay at the trial court level and should not be permitted to raise it for the first time on appeal. RAP 2.5(a); *see also Sourakli v. Kyriakos, Inc.*, 144 Wn.App. 501, 182 P.3d 985 (2008).

Even so, Howard's medical records are not offered to prove the truth of the matters asserted therein. Sinex cannot establish a greater

probability that Howard fell due to some violative condition of the stairs as opposed to some condition(s) *unrelated* to the stairs which is why liability **cannot** ever attach to the Bices. Howard's medical records are offered to show that emergency room records prepared immediately following Howard's alleged fall evidences *multiple* potential causes of Howard's injury. One medical record recounts Howard's report that he fell while running up the stairs and/or "missed a step;" another documents information provided by Ms. Sinex that Howard "stepped out for a minute and his girlfriend [Ms. Sinex] then heard a loud thump and went out to find him unconscious, having been struck on the head;" another states Howard was admitted after "having been assaulted and suffering a head injury and right temporal skull fracture." These records are further offered to prove that not once did Sinex or Howard tell any emergency health care provider that Howard fell because of any condition of the stairs.<sup>2</sup>

These records do *not* constitute inadmissible medical opinion as to causation, let alone "rank hearsay." App. Brief at 17. ER 803(4) specifically identifies these statements as exceptions to the hearsay rule:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the **inception or general character of the**

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<sup>2</sup> These medical records are attached to this Response Brief, Appendix at A2-5. They are also in the record as CP 107, 108, 110 and 111.

**cause** or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(Emphasis added).

Howard and/or Sinex's statements as to how the injury occurred are an exception to the hearsay rule. By the plain language of the rule these medical records are admissible. *See generally State v. Woods*, 143 Wash. 2d 561, 23 P.3d 1046 (2001).

Furthermore, statements by Sinex contained in the medical records are also admissible as (a) an excited utterance and/or (b) an admission by party-opponent and therefore not hearsay. ER 801(d)(2), 803(a)(2).

An excited utterance is a statement relating to a startling event or condition made while the declarant, Sinex, was under the stress of excitement caused by the event or condition, and is not objectionable as hearsay. ER 803(a)(2). A statement can be an excited utterance even though it is made in response to a question, and even when there is no independent evidence, beyond the statement in question, that the underlying startling event actually occurred. *State v. Williamson*, 100 Wash. App. 248, 996 P.2d 1097 (2000); *State v. Young*, 160 Wn.2d 799, 161 P.3d 967 (2007). Excited utterances "are reliable because circumstances produce a condition of excitement that temporarily stills the

capacity of reflection and produces utterances free of conscious fabrication.” *Young*, 160 Wn.2d at 816.

Sinex provided statements to emergency medical providers relating to the startling event and shortly following the event. Sinex was questioned by emergency medical providers because Howard could not respond.<sup>3</sup> Sinex was Howard’s only voice for recounting the events and obtaining proper medical treatment and diagnosis. She had *every incentive* to provide complete and accurate information to help her loved one obtain appropriate medical care. Sinex stated she heard a loud thump and found Howard unconscious *having been struck on the head*. She did not state Howard made any indication to her that he fell *due to* any condition of the stairs or that there was any suggestion that the stairs caused Howard to fall, if in fact he fell at all. She certainly had every opportunity to say so *if* that had been true.

Sinex made these statements under the stress of her loved one’s injury and without the necessary time for capacity of reflection and conscious fabrication. These statements are unobjectionable as exceptions

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<sup>3</sup> Evergreen Hospital Medical Record at A2, also found at CP 107, provides that the doctor was called to provide emergency treatment to Howard “early this morning at about 4 a.m. and met [Howard] shortly thereafter when I **immediately** came to the emergency room...[Howard] was...unable to provide any information...but **I was able to obtain the following information from his long-time girlfriend** with whom he has a child...[Howard] stepped out for a minute and his girlfriend then heard a loud thump and went out to find him unconscious, **having been struck on the head**...Since that time, [Howard] has been agitated confused and fully responsive.” (Emphasis added).

to the hearsay rule as excited utterances. Their propensity for truthfulness under the stress of Howard's injury makes her statements reliable even though Sinex now rejects them.

An admission by party-opponent may be written or oral, and it need not be "against interest" at the time it was made. *See State v. Anderson*, 44 Wn.App. 644, 723 P.2d 464 (1986). The statements are admissions **regardless** of the party's firsthand knowledge of facts stated, and they do not become inadmissible if it is in the form of an opinion. *See Barnett v. Bull*, 141 Wn. 139, 250 P. 955 (1926).<sup>4</sup> Rule 801(d)(2)(i) expressly includes statements made in either an individual or representative capacity.

An admission may also be made by silence under circumstances that would normally elicit a response or denial. *See State v. Neshund*, 50 Wn.App. 531, 749 P.2d 725 (1988). This rule is not based upon the notion that the out-of-court statement is true or specifically adopted by the silent party. Rather, the party's silence in the face of the statement raises an

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<sup>4</sup> The general rule that a witness is required to testify on the basis of personal knowledge and should give factual testimony as opposed to personal opinion is relaxed with respect to admissions because the underlying reason for the rules would not be served by applying them. An out-of-court admission is unlikely to have been made with any thought to the proper form of courtroom testimony, and yet is likely to be reliable. To apply the rules regarding personal knowledge and opinion would often result in the total exclusion of an admission – a cure that is deemed worse than allowing the trier of fact to hear the admission. *See generally* Washington Practice Guide 5B Wash. Prac., Evidence Law and Practice §801.38-.39.

inference that he or she believes the statement. *State v. Freidrich*, 4 Wn.2d 29 P. 1055 (1892). Thus, hearsay is not involved at all because the statement is not introduced to prove its truth but to prove the party's conduct to show his or her belief. *Neslund*, 50 Wn.App. 531.

Sinex's statements in response to emergency medical providers questions about the cause of Howard's injury for purposes of medical diagnosis and treatment are an admission by a party-opponent and are not hearsay. Sinex stated she found Howard unconscious, "having been struck on the head." Appendix at A2, and CP 107. Again, Sinex had *every incentive to provide a complete and accurate description of what caused Howard's injury*. If she had any indication Howard fell because of some condition of the stairs, or even *on* the stairs, she would have provided this information. The fact that she never stated anything about the stairs raises an inference that she did not believe a condition of the stairs was to blame. Sinex's statements to medical providers are simply *not* hearsay because they are offered to show her belief shortly after Howard's injury and are therefore admissible on several levels.

### **III. SUMMARY OF ARGUMENT**

The only question before the Court is whether Ms. Sinex's declaration and the declarations of her human fall-factor experts rise above a speculative theory that Howard fell because of some condition of the

stairwell in violation of code proving proximate cause. Sinex **must** produce evidence proving how the accident happened. **She cannot.** *No one will ever know how the accident happened* because Mr. Howard had no memory of how or why he was injured. At best, Sinex can prove minor code violations of the stairs and propound a theory that Howard *might* have fallen because of one or more of them. Because there are **no facts** from which to infer Howard fell without having to speculate (i.e. a fresh chip on one of the stairs, a scratch in the handrail, a scuff of *something somewhere*), **legal responsibility cannot attach to Mr. and Mrs. Bice.** This Court must affirm summary dismissal by the trial court.

Sinex's opening brief confuses the issue on appeal. The Bices do not contend summary judgment is warranted solely because Howard could not remember the alleged fall or what caused it. App. Brief at 1. The Bices do not argue they are entitled to summary judgment because Sinex can only produce circumstantial evidence. *Id.* It is well-understood that proximate cause may be proved by *sufficient* circumstantial evidence. The Bices do not argue exact knowledge is required to prove proximate cause. *Id.* **Summary judgment is required in this case because no reasonable inferences may be drawn from the circumstantial evidence presented by Sinex absent sheer speculation.**

#### IV. ARGUMENT

##### A. Standard of Review

An appellate court reviewing a summary judgment order places itself in the position of the trial court. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). If the plaintiff fails to show sufficient evidence to establish the existence of an element essential to the plaintiff's case, a court should grant the motion. *Id.* at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986)). To succeed on a negligence claim, the plaintiff must prove: (1) the existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) **proximate cause**. *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

The mere occurrence of an accident and an injury does not automatically lead to an inference of negligence. *Tinder v. Nordstrom, Inc.*, 84 Wn.App. 787, 792-93, 929 P.2d 1209 (1997) (citation omitted); *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967) (citation omitted). For legal responsibility to attach to negligent conduct, the claimed breach of duty must be a proximate cause of the resulting injury. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 378, 972 P.2d 475 (1999) (citation omitted).

Plaintiff must submit evidence allowing a reasonable person to conclude, without resorting to speculation, that Howard's injury, more probably than not, would not have occurred but for Mr. and Mrs. Bice's breach. *Gardner v. Seymour*, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947); *Little v. Countrywood Homes, Inc.*, 132 Wn.App 777, 133 P.3d 944 (2006). This proof need not be to absolute certainty, but reasonable inferences cannot be based upon conjecture. *Gardner*, 27 Wn.2d at 808. **An inference is based on conjecture when one must assume a fact in order to reach a conclusion.** *Home Ins. Co. of New York v. Northern Pac. Ry. Co.*, 18 Wash.2d 798, 140 P.2d 507 (1943).

Where a plaintiff only alleges a defendant theoretically *could* have prevented an accident instead of being the cause in fact, such speculation fails proximate cause. *Tortes v. King County*, 119 Wn.App. 1, 84 P.3d 352 (2003) (citing *Miller v. Likins*, 109 Wn.App. 140, 34 P.3d 835 (2001) with approval). In Sinex's case, expert Johnson and Gill's suppositions and projections regarding minor code violations in the stairwell **fails to meet this burden**. An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e. information as to **what took place**; an act, an incident, something that exists in reality as distinguished from supposition or opinion. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Sinex argues “the most logical and commonsensical inference from the evidence” is that Howard fell down the stairs due to “the multiple unsafe conditions that increased the risk of someone falling when descending the stairs.” App. Br. at 18. This sentence summarizes the fatal flaw of Sinex’s argument: **a “reasonable inference” is not rooted in just commonsense, nor is it a leap in logic.** Commonsense alone is simply *too subjective* to provide a basis for attaching legal responsibility. **For an inference to be reasonable it must be rooted in fact.** Appellant is missing vital facts.

**B. Proximate Cause Cannot be Proven by Speculation  
(Conjecture v. Reasonable Inference)**

Appellant’s proximate cause theories are supported by threads of speculation and **no evidence**. Sinex has theories as to what caused Howard to fall, and assumes that somehow some characteristic(s) of the stairs in violation of the building code were involved. Sinex’s case ultimately rests on expert opinion. Her experts, Johnson and Gill, do not base their assumptions on physical evidence or eyewitness testimony, but merely on circular logic. It is undisputed Howard had no recollection of the incident itself, or for 36 hours after the incident, there are no eyewitnesses, and no direct or physical evidence. CP 91. The fatal flaw

is this: **there is no physical evidence connecting Howard's alleged fall to any condition of the stairs.**

Washington appellate courts have made clear that circular reasoning of expert witnesses will not support a jury verdict where it is based on supposition. “A fact is not based upon speculation when the fact is based upon **reasonable** inferences drawn from **admissible circumstantial evidence.**” App. Br. at 26 (emphasis added). Sinex argues that her opinion and the opinions of Gill and Johnson meet this burden. *Id.* 19-21. **They cannot.**

To apply circumstantial evidence to prove a fact, one “must recognize the distinction between that which is mere conjecture and what is a reasonable inference.” *Home Ins. Co.*, 18 Wn.2d at 803.<sup>5</sup>

Regarding speculative expert testimony, it has long been established that a jury will not be allowed to render a verdict based on reasoning that “assumes a fact necessary to establish a cause of action, but concerning which assumed fact there is no evidence, and then employs the suppositions fact as the basis for conjecture as to the possible cause of a particular physical result.” *Prentice Packing and Storage Co. v. United*

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<sup>5</sup> These principles are defined and discussed in a long history of Washington Supreme Court decisions, among them the following: *Parmelee v. Chicago, M. & St. P. R. Co.*, 92 Wash. 185, 158 P. 977 (1916); *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wash.2d 144, 106 P.2d 314 (1940); *Nelson v. West Coast Dairy Co.*, 5 Wash.2d 284, 105 P.2d 76 (1940); *Letres v. Washington Co-Op. Chick Ass'n*, 8 Wash.2d 64, 111 P.2d 594 (1941).

*Pac. Ins. Co.*, 5 Wn.2d 144, 162-163, 106 P.2d 314 (1940).<sup>6</sup> To prove a fact by circumstances, there must be positive proof of facts from which inference or conclusion is to be drawn, and circumstances must be shown and not left to rest in conjecture. *Id.* at 163 (internal citation omitted). Proof which does nothing further than show an injury *could* have occurred in an *alleged* way does not warrant the conclusion that it did so occur, where from the same proof, the injury can be equally attributed to some other cause. *Id.* at 163 (internal citation omitted, emphasis added).

The Washington Supreme Court explained where to draw the line between mere conjecture and reasonable inference:

As a theory of causation, a conjecture is simply an explanation consistent *with known facts or conditions*, but not deductible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, **if the evidence is without *selective application to any one of them, they remain conjectures only.*** On the other hand, if there is *evidence* which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

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<sup>6</sup> The *Prentice* court reversed a jury verdict based on the testimony of an expert witness that testified the pressure of a refrigerant could have caused the rupture of a pipe *if* the pipe were worn to a thinness of approximately one-thousandth of an inch; the rupture did occur; therefore, the pipe must have been worn to the required point. *Id.*

*Id.* at 163 (emphasis added) (internal citation omitted).

It is well settled: “[p]resumptions may not be pyramided upon presumptions, nor inference upon inference. *Id.* at 164. *See also Johnson v. Western Express Co.*, 107 Wn. 339, 181 P. 693 (1919); *Mumma v. Brewster*, 174 Wn. 112, 24 P.2d 438 (1933). Stated differently, presumptions and inferences may only rest on *established* facts; one inference may not legally be based on another. *Johnson*, 107 Wn. at 344-345; *Mumma*, 174 Wn. at 117-118. “To hold that a fact inferred or presumed at once becomes an established fact, for the purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumptions into the regions of the barest conjecture.” *Johnson*, 107 Wn. at 344-345 (internal citation omitted).

Here, Gill and Johnson contend their findings show that the new stairway had variations in step geometry, a wide handrail, and inadequate lighting which individually and/or as a whole increased the risk of falling. Since Howard was found injured near the stairs, some condition of the stairs must have caused Howard’s injury. App. Br. 5-16. This is *exactly* the circular, tortured reasoning prohibited to establish proximate cause.

It is and will *always* be impossible to establish legal liability in this case because one cannot leap from (A) a breach of duty to (C) Howard’s injury without *assuming* a fact necessary to connect the two (i.e.

proximate cause). No one will ever know *where* on the stairs Howard fell from, or *if* he fell on the stairwell at all. One **must first assume** that Howard was on the stairwell and **second** that he misjudged the tread width on the second or third treads which caused his fall; or that he reached for the handrail but his hand was too small to grasp it; or that he could not adequately see where he was stepping in order to get from point A to point C. To sustain Sinex's position "we would have to indulge in a presumption in order to support a conjecture and to pyramid inference upon inference, which is **not permissible.**" *Brucker v. Matsen*, 18 Wn.2d 375, 382, 139 P.2d 276 (1943) (emphasis added).

Opinions of expert witnesses are of **no weight** unless they are founded on established facts. *Prentice*, 5 Wn.2d at 164. The law demands verdicts rest upon testimony and not upon conjecture and speculation. *Id.*<sup>7</sup> "[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to

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<sup>7</sup> "A verdict cannot be founded on mere theory or speculation." *Sortland v. Sandwick*, 63 Wn.2d 207, 210-211, 386 P.2d 130 (1963). "The cause of an action may be said to be speculative when, from a consideration of all of the facts, it is as likely that it happened from one cause as another." *Rasmussen v. Bendotti*, 107 Wn.App. 947, 959, 29 P.3d 56 (2001). **In Sinex's case, it is just as likely Howard tripped on his own feet, dropped something in his hand, tripped on something he dropped, was intoxicated, was distracted, or fell before even reaching the stairs as it is that he fell because of any condition of the stairs. Sinex cannot produce evidence that Howard reached for the handrail and could not grasp it, could not see because of the lighting, or overstepped because of step geometry. There is no evidence as to where Howard fell if he fell on the stairs at all, let alone a reasonable inference to be drawn therefrom.**

recover, a jury will not be permitted to conjecture how the accident occurred.” *Gardner*, 27 Wn.2d at 809.

**Where experts opine that additional improvements *might* have caused an individual to react in a different way and thereby avoid an accident, is characterized as classic speculation or conjecture.**

*Johanson v. King County*, 7 Wn.2d 111, 109 P.2d 307 (1941); *Kristjanson v. City of Seattle*, 25 Wn.App. 324, 326-327, 606 P.2d 283 (1980). It is undisputed no one knows if Howard fell on the stairs. Johnson and Gill can not opine what *might* have caused Howard to fall, and/or what changes in the stairwell *may* have prevented him to fall. They do not even know he fell as compared to tripped on his own accord or was assaulted as originally claimed. Their opinions can only provide a basis to speculate on how the accident might have occurred. They most certainly do **not** provide a basis from which to form a *reasonable* inference of proximate cause.

Sinex’s declaration that she “heard a loud thumping noise as if someone was falling down the stairs” and that the stairs were “different than what had been there before” because they “seemed to be steeper” and not “as uniform” as the old stairs likewise does not provide a basis for a *reasonable* inference to establish probable cause. App. Brief at 4-5. Even if we *assume* Howard indeed fell while on the stairs, which is only

assumed for Sinex's benefit here, there is not one scintilla of evidence linking his fall to any violative condition of the stairs.

Any number of scenarios resulting in his fall not due to some condition of the stairs in violation of code is equally, if not more plausible: Howard could have fallen before reaching the stairs; he could have tripped on his shoelace; he could have dropped his lighter or cigarettes or iPod and fallen while reaching for it; he could have tripped on a step that was code compliant; he could have been assaulted or struck on the head; etc. The number of equally plausible explanations are endless.

Even assuming for purposes of this motion only that the declarations of Sinex and her experts are true and accurate, a reasonable person **cannot** conclude Howard fell due to some violative condition of the stairs *without first speculating* that (a) he was on the stairs when he fell; (b) he fell from a step that was in violation of the building code and/or reached for the handrail but could not grab it and/or could not see where he was stepping; and (c) that he just as likely did not trip and fall because of **some other reason** unrelated to a code violation. Speculation is required on all these facts. As such, proximate cause can only be established by inherently **unreasonable** inferences.

Liability does not spring from a negligent act, but upon **proof** that the act of negligence was a proximate cause of the injury. *Wilkie v.*

*Chehalis County Logging and Timber Co.*, 55 Wn. 324, 327, 104 P. 616 (1909). A breach of a duty is **not** a proximate cause of injury if the event which produced the injury would have occurred regardless of the defendant's conduct. *Lunt v. Mt. Spokane Skiing Corp.*, 62 Wn.App. 353, 362, 814 P.2d 1189 (1991). There is **no evidence** indicating Howard would not have sustained injury but for variable step geometry, a too-wide handrail and/or insufficient lighting. Sinex's theory that *if* one or more of those characteristics of the stairwell had been different, Howard would not have sustained injury is nothing but **rank speculation and conjecture.** App. Br. at 31.

**C. Proximate Cause Requires More than "Maybe"**

No legitimate inference that an accident happened in a certain way can be drawn from simply showing that it **might** have happened in that way without further showing that it could not reasonably have happened in any other way. *Gardner*, 27 Wn.2d at 810. A theory is not established by circumstantial evidence "unless the facts relied on are of such a nature, and so related to each other, that it is the **only conclusion** that can fairly or reasonably be drawn from them." *Id.* at 810 (internal citation omitted).

Sinex is correct in stating she is not obligated to produce proof of proximate cause to an absolute certainty. App. Brief at 23. She correctly

states the law that proximate cause can be proved by reasonable inferences from circumstantial evidence. App. Br. at 24. **This is not the issue.**

**The issue is: whether Sinex’s circumstantial evidence permits a reasonable inference as opposed to mere guesswork.** It does not.

Washington State has well-established precedent delineating reasonable inferences from conjecture. This precedent coupled with reliable and compelling judicial principles and policy reasons explains why summary judgment is appropriate and why the trial court did not err.<sup>8</sup>

Proof is **only** sufficient if it affords persons of reasonable minds to conclude that there is a “*greater* probability that the thing in question...happened in such a way as to fix liability on the person charged therewith than it is that it happened in a way for which the person charged would not be liable.” *Home Ins. Co.*, 18 Wn.2d at 803. This is the boundary line between reasonable inference and conjecture. This line is essential from a policy and justice standpoint because this requirement limits the liability boundary to fault based on reliable proof as opposed to fault based on mere assumptions.

Ample precedent from Washington State mandates affirming dismissal on summary judgment. Washington Appellate Courts have

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<sup>8</sup> In fact, at the conclusion of oral argument of all parties, Judge Craighead took this case under advisement for seven weeks before entering the Order granting summary judgment to Defendants.

upheld summary judgment dismissals where the plaintiff failed to produce evidence of proximate cause beyond mere conjecture or speculation. *See Marshall*, 94 Wn.App. 372; *Little*, 132 Wn.App. 777; *Moore v. Hagge*, 158 Wn.App. 137, 241 P.3d 787 (2010); *Miller*, 109 Wn.App. 140; *Kristjanson*, 25 Wn.App. 324. The plaintiffs in all of these cases rested on their statements and opinions of expert witnesses who speculated as to what the plaintiff *might* have seen or how the plaintiff *might* have reacted. Such opinions were considered speculation not allowed to be considered by a jury. These cases illustrate and uphold the boundary line between reasonable inference and conjecture.

Similarly, the Washington Supreme Court has entered judgments notwithstanding the verdict for defendants where plaintiff failed to produce evidence of proximate cause. *Gardner*, 27 Wn.2d 802 (reversing jury verdict and trial court's entry of judgment for plaintiff and dismissing the action); *Johanson v. King County*, 7 Wn.2d 111 (affirming trial court's judgment notwithstanding the verdict). These cases likewise explain and maintain the boundaries of tort liability.

**D. Ample Legal Precedent Requires Dismissal**

Sinex's case is analogous to the situation in *Marshall, supra*. 94 Wn.App. 372. Kim Marshall was injured while exercising on a treadmill at her health club. 94 Wn.App. 372. She sued the club, the treadmill

manufacturer, and the company that installed and maintained the treadmill. *Id.* Marshall asserted the treadmill stopped abruptly while she was on it. She claimed it restarted at 6.2 miles per hour rather than 2.5 miles per hour as was usual. *Id.* She contended she was thrown from the treadmill and was injured when her head struck a plexiglass wall behind the machine. *Id.*

Marshall testified at her deposition that she did not recall (1) how abruptly the treadmill reached full speed; (2) being thrown from the treadmill; or (3) hitting the plexiglass. *Id.* The Court of Appeals assumed the treadmill was defective. *Id.* 380. Marshall offered no evidence as to how she fell or what caused her to be thrown from the machine. *Id.* The court determined at best Marshall could offer only a *theory* as to the cause of her injuries. *Id.* at 379.

The court explained “[a] jury would be required to speculate that a defect in the treadmill *caused* Marshall’s accident.” *Id.* at 381. “A claim of liability resting only on a speculative theory will not survive summary judgment.” *Id.* at 381 (citations omitted). Without evidence to explain *how* the accident occurred, she could not establish proximate cause and could not withstand summary judgment. *Id.* The appellate court held summary judgment was proper because Marshall could not establish proximate cause. *Id.*

This is exactly the issue in our case. Even assuming for purposes of this motion only that the stairs were dangerous, and *further assuming* Howard fell on the stairs, Sinex can offer **no evidence** as to how Howard fell or that some violative condition of the stairs caused the fall. Howard never remembered how or why he fell and never indicated to anyone that he fell because of any condition of the stairs. Just like *Marshall*, Sinex can do no more than offer a *theory* as to the cause of Howard's injury.

In fact, the basis for dismissal in this case is even *more* compelling than in *Marshall*. Unlike *Marshall* where so much time had passed that the treadmill could not be inspected, expert Johnson investigated the stairwell just ten (10) days after the accident and **no evidence existed to connect the fall to some violative condition of the stairs**. CP 146. There was no scratch in the handrail indicating Howard had tried to grab it, no fresh chip in any of the wooden stairs, no bloodstains, no scuff on a tread, no broken or loose baluster<sup>9</sup> *nothing* to indicate where Howard fell or how he did so.

Sinex points out only one difference between *Marshall* and the present case: that Sinex declares she heard a noise as if Howard was falling down the stairs. As discussed at length, *supra*, the fact that Sinex heard a noise like someone falling down stairs does **nothing** to explain

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<sup>9</sup> A baluster is the vertical post that holds up a handrail.

how or why Howard fell. Her declaration does not eliminate the need for guesswork. Just like *Marshall*, Sinex cannot establish proximate cause.

*Little, supra*, illustrates the distinction between the admissibility of testimony and its sufficiency to establish proximate cause. 132 Wn.App. 777. In that case, Jared Little was injured while installing gutters on a house for Countrywood Homes, Inc. *Id.* Jared's brother Kenny was also working at the jobsite. *Id.* Kenny heard Jared call him, and found Jared on the ground trying to stand up. *Id.* Jared's ladder was on the ground. *Id.*

Neither Little nor anyone else knew how he was injured. *Id.* at 779. Little sued Countrywood for negligence, claiming Countrywood failed to comply with regulations requiring ladders be secured at both the top and bottom and used on stable surfaces. *Id.* The only evidence Little presented was his expert's conclusion that Countrywood violated numerous safety violations. *Id.* at 781. Countrywood moved for summary judgment, arguing Little could not prove proximate cause. *Id.* The trial court granted the motion. *Id.*

On appeal, this court agreed Little failed to produce evidence sufficient to establish proximate cause. *Id.* at 779. This court again emphasized that "reasonable inferences cannot be based on conjecture." *Id.* at 781. In affirming the trial court, this court concluded:

One may *speculate* that the ladder was not properly secured at the top or that the ground was unstable. But *even assuming that those conditions constituted breaches of a duty* that Countrywood owed Little, he **did not provide evidence showing more probably than not that one of those breaches caused his injuries.**

Id. at 782 (emphasis added).

This court also rejected Little's argument that evidence of his habit of using a ladder to install gutters cured the lack of evidentiary support on the element of proximate cause: "Little...needed to provide more than evidence that he was working on a ladder, which was required to be secured at the top and placed on stable ground. He needed to establish **proof** that Countrywood's negligence caused his injuries." *Id.* at 783 (emphasis added).

*Little* purges Sinex's reliance on her statement that she heard a noise as a basis to reasonably infer Howard fell because of some condition of the stairs. More than just hearing a noise, Jared's brother Kenny also found Jared with the ladder Jared had been working from on the ground next to him. The problem was not establishing Jared had fallen from the ladder. That was apparent. The problem was Jared could have just as likely been injured due to breaches of Countrywood's duties as to some other cause unrelated to a breach in duty – like falling due to his own

conduct. **This is exactly true in this case.** No one knows *how* Howard was injured. This is why liability can **never** attach to the Bices absent sheer speculation.

The most recent decision of this court addressing this issue is *Moore, supra.* 158 Wn.App. 137. There plaintiff Moore was struck by Hagge's vehicle at an unmarked crosswalk. *Id.* Moore sued Hagge and the City of Des Moines ("the City") alleging the unsafe road caused the accident and his injury. *Id.*<sup>10 11</sup> The trial court granted summary judgment to the City, and this court affirmed dismissal because Moore failed to establish proximate cause. *Id.*

Neither Hagge nor any other witness actually saw Moore before the collision or witness Hagge's vehicle collide with Moore. *Id.* at 142. The responding officer assessed the scene and damage to Hagge's car and testified he was unable to (1) determine the point of impact, (2) find evidence Moore was crossing the street at the time of impact, or (3) find evidence Moore was in an unmarked crosswalk at the time of impact. *Id.* at 142. The officer concluded Moore was on the paved surface of the street at the time of impact. *Id.* at 142.

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<sup>10</sup> Under Washington law, municipalities are subject to the same fundamental negligence principles as ordinary citizens. *Keller v. City of Spokane*, 104 Wn.App. 545, 551, 17 P.3d 661 (2001).

<sup>11</sup> Moore settled with Hagge prior to the appeal. *Moore*, 158 Wn.App. at 146 fn. 6.

Moore submitted his own declaration, declarations of three witnesses who arrived at the scene of the accident. *Id.* Moore had no recollection of the accident or any other events on that day. *Id.* at 142. Moore's declaration set forth his walking habits he had developed over the years as proof that he followed those habits on the day of the accident. *Id.* Moore also submitted his expert's declaration opining that the accident vicinity was inherently dangerous and that the inherent dangers:

were more likely than not a substantial factor in causing Moore's injuries and that, had the City implemented the safeguards, such as improving the north shoulder or installing crossing provisions and signage, Hagge's vehicle more likely than not would not have struck Moore.

*Id.* at 145-46 (internal quotation omitted).

This court noted, despite the use of "more likely than not" and "more probable than not" language, the expert "arrives at these opinions without evidence establishing the point of impact and without any quantitative analysis." *Id.* at 156. The court held this testimony to be impermissibly speculative. *Id.*

Moore argued his habit testimony supported a reasonable inference to satisfy causation. *Id.* at 152. This court disagreed. *Id.* Without ruling on the admissibility of that testimony, this court relied on the distinction between the admissibility and sufficiency of testimony set forth in *Little*,

*supra*. *Id.* at 154. This court held Moore’s walking habits “cannot cure the lack of evidentiary support for the element of proximate cause because this evidence does not establish that the harm, more probably than not, happened in such a way that the City should be held liable.” *Id.* at 154.

This court also stated the City correctly noted that “it is equally plausible that Moore incurred his injuries after tripping and falling in front of Hagge’s car. Since ‘there is nothing more tangible to proceed upon than two or more conjectural theories,’ summary judgment is therefore appropriate.” *Id.* at 154, fn. 54 (quoting *Gardner*, 27 Wn.2d at 809).

In affirming the trial court’s grant of summary judgment, this court emphasized there was “no evidence establishing the point of impact, no evidence showing where Moore came from, and no evidence about what he was doing just before or at impact.” *Id.* at 151. Further, this court found there was “no evidence that the additional safeguards would have made Moore more aware of the conditions of the roadway at the time of the accident” and “no evidence that Moore was confused or misled about the roadway conditions.” *Id.* at 151. This court held there was “no direct or circumstantial evidence showing that the City’s alleged negligence caused his injuries” and Moore failed to establish proximate cause. *Id.* at 151. The most Moore could show “is that the accident might not have happened if the City had installed additional safeguards.” *Id.* at 151.

Just like *Moore*, Sinex's testimony cannot cure the absence of evidentiary support for the element of proximate cause because her statement that she heard a noise does not establish that Howard's fall, more probably than not, happened in such a way that was the fault of the Bices. Just like the expert in *Moore*, here, the experts' opinions that variations in step geometry are "*factors that cause falls*" and "*increase the risk of falls* occurring on stairs" and that a "substandard handrail and inadequate lighting" are "also known to *increase the risk* of someone falling on stairs" **cannot** establish where Howard fell or why. App. Brief at 31. Just like *Moore*, the most Sinex can show is that the accident might not have happened had some characteristic of the stairway been different.

**This does not establish proximate cause.**

The cases cited by Sinex: *Raybell v. State*, 6 Wn.App. 785, 496 P.2d 559 (1972) and *Schneider v. Yakima County*, 65 Wn.2d 352, 397 P.2d 411 (1964) also support the Bices' position that proximate cause requires evidentiary support so that the jury is not required to speculate. Both are negligent road design cases.

*Raybell* involved a one-car fatal accident where temporary guardrails had become damaged and ineffective. 6 Wn.App. 785. The plaintiff argued the absence of properly installed and maintained guardrails caused the driver's death. *Id.* In direct contrast to the present

case, the plaintiff presented physical evidence to show that the vehicle actually came in contact with the defective guardrail. *Id.* at 799. The Division Two Court of Appeals found this physical evidence of the decedent's contact with the defective guardrail was sufficient to present to the jury. *Id.* In stark contrast, Sinex does not have any physical evidence to link Howard's alleged fall to any violative condition of the stairwell.

Similarly, *Schneider, supra*, is another negligent road design case where a vehicle left the road on a sharp curve, killing the driver. 65 Wn.2d 352. It was undisputed where the vehicle had left the roadway. *Id.* The plaintiff argued the city negligently failed to warn of the sharp curve in the road and/or to decrease speed. *Id.* Two passengers that survived the crash testified that everyone in the vehicle discussed the roadway before reaching the curve and determined the road was straight, which was why the driver did not decrease his speed. *Id.* at 358-59. The court held this evidence sufficiently rose above speculation and conjecture and that reasonable minds could conclude "more likely than not adequate warnings would have prevented the accident which caused the injuries." *Id.* at 359.

Unlike *Schneider*, where it was undisputed where the vehicle left the roadway, Sinex has no evidence as to where Howard allegedly fell. Nor does she have any physical evidence to link any contended defect in the stairwell with Howard's alleged fall. Sinex can only present a theory

that Howard fell because of some violative condition of the stairs. *Raybell* and *Schneider* do nothing to alter the proximate cause analysis under these facts.

**E. Out-Of-State Case Law is Contrary to Established Washington Precedent and Irrelevant**

Washington State's requirement that evidence *beyond speculation* be produced to establish proximate cause and survive summary judgment is well-established. Plaintiff's preference for the outcome of cases involving stairway falls in Minnesota, Connecticut, Rhode Island and Texas is insufficient to overturn Washington's long history of well-established precedent. Existing law mandates production of direct or circumstantial evidence showing Howard fell due to some violative condition of the stairs. At best, Sinex can produce evidence that the stairwell was not to code. This falls far short of establishing proximate cause in Washington State.

Sinex's out-of-state cases are unconvincing. They (a) apply the substantial factor test of proximate cause which the Washington State Supreme Court has refused to adopt; (b) do not support her position that proximate cause can be established by speculation and conjecture; and/or (c) are subject to a standard of review different than summary judgment.

It is pointless to discuss *Majerus v. Guelow*, 262 Minn. 1, 113 N.W.2d 450 (1962), *Hall v. Winfrey*, 27 Conn.App. 154, 604 A.2d 1334 (1992), or *Wochner v. Johnson*, 875 S.W.2d 470 (Tex. Ct. App. 1994) as Minnesota, Connecticut and Texas follow the substantial factor test of proximate cause which the Washington State Supreme Court has **refused to adopt**. See *Blasick v. City of Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954) (Stating: “We hope we have made it clear that we are not disposed to substitute the ‘materially contributed’ or ‘substantial factor’ test either as a definition of or a substitute for ‘proximate cause’ (as defined in our cases) in determining what is actionable negligence.” at 315).

*Kurczy v. St. Joseph Veterans Association, Inc.*, 713 A.2d 766 (Supreme Court of R.I. 1998) is easily distinguished because (a) comparative negligence of the injured child was not argued by the parties and (b) the Rhode Island Supreme Court assessed grounds for a motion for new trial based on Rhode Island rules and precedent.

In fact, *Majerus, supra*, is contrary to Sinex’s position that speculation is sufficient to establish proximate cause. *Majerus* affirmed judgment entered for the plaintiff where a landlord was found negligent in maintaining a stairway on which a tenant fell and that such negligence was the proximate cause of the tenant’s fall which resulted in death. The evidence included: expert testimony that the third step was loose and had a

“rubbery” effect when stepped on; the second step from the bottom had a gouge in it “as if something hard had hit it”; a fresh splinter on the third step from the bottom; there was no handrail on either side of the bottom five steps; the decedent’s belongings under the stairs; blood under the second step of the stairway; and expert testimony from the pathologist who performed the autopsy that the skull fracture was consistent with a fall down the stairs. *Id.* Even with that evidence, two Minnesota Supreme Court justices dissented based on the absence of evidence to support proximate cause beyond pure speculation and conjecture. *Id.* at 457-58. (Otis, J., and Knutson, C.J., dissenting).

## V. CONCLUSION

Sinex’s circumstantial evidence consisting entirely of her statement that she “heard a thumping noise like someone falling down the stairs” coupled with her experts’ testimony that the stairs were not to code and that some violative condition(s) thereof would have increased the likelihood of a fall does not lead to a reasonable inference that Howard fell due to a violative condition of the stairwell. Pursuant to well-established precedent in Washington State, Sinex’s evidence cannot rise above speculation and conjecture. Sinex cannot establish proximate

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cause. The trial court's order granting the Bice's Motion for Summary Judgment should be affirmed.

DATED this 4 day of August, 2011.

McGAUGHEY BRIDGES DUNLAP, PLLC

By:



Shellie McGaughey, WSBA #16809  
Caroline S. Ketchley, WSBA #40938  
Attorneys for Respondents Bice

# APPENDIX

**KING COUNTY MEDICAL INCIDENT REPORT FORM**

Trauma Band #			Agency Name <b>REDMOND FIRE</b>			Agency No. In # <b>612</b>		
Mo. <b>11</b>	Day <b>14</b>	Yr. <b>08</b>	Incident Address <b>17732 NE 88th Pl</b>			City <b>REDMOND</b>		4045513
Patient Name (Last, First, Middle Init.) <b>HOWARD, MAT</b>					Birthdate <b>3/16/88</b>	Age <b>20</b>	GENDER <input checked="" type="checkbox"/> M <input type="checkbox"/> F <input type="checkbox"/> Unk	
Patient Address <b>17732 NE 88th Pl</b>			City & State <b>Redmond WA</b>			Phone		Patient Healthcare Provider
Medical Control Physician/Hospital					<b>SPHERE</b>	Hypertension <input type="checkbox"/> Hx <input type="checkbox"/> Alert	Diabetes <input type="checkbox"/> Hx <input type="checkbox"/> Alert	CONFIRM <input type="checkbox"/> Address <input type="checkbox"/> Phone #
Time	<b>02:00</b>							Notes
Blood Pressure	<b>120/60</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>1</b>		
Pulse Rate	<b>60</b>							<b>Uptaxis - dx 1/2 min</b>
Respiratory Rate	<b>16</b>							
ECG Rhythm								<b>ECG normal/normal</b>
Oxygen (L/min)								
Pulse Oximetry (%)	<b>97</b>							
Glucometry (mg/dl)	<b>111</b>							
IV fluids (liters)								
DC Shock (joules)								
Home Medications <input checked="" type="checkbox"/> None					Allergies <input type="checkbox"/> None <b>unk</b>			

**Narrative:**

① 20 yr old male found by 20 call. Guckward st Pl came by her apt to get ipod and 1 min later heard loud crash and found him on the ground. She believes he fell down outside stairs from his second story apt above. At pt was eating normally when she saw him first. At device drug box, PD report cocaine by At. St he had H-S hours earlier. At pt is not responding normally now.

② pt found prone skin w/ptn DLOC  
 BP 120/60  
 HR 60  
 RR 16  
 O<sub>2</sub> 97% RA  
 GLE III  
 Pt could to be minimally responsive and unresponsive. Pt would not answer questions.

③ Possible head trauma

④ Med/Trauma exam, vitals leading. C-spine/backboard pre-att. Med. and Triage BLS → EMT/EMR

Person Completing Form (PLEASE PRINT) <b>BEVAN MARTIN</b> Signature of Person Completing Form	EMT Crew Names 1 <b>MARTIN</b> 2 <b>LARAY</b> 3	Paramedic crew names: 8001308728 RM#: EXAM 6 11/14/2008 HOWARD, MATTHEW PHYS: KAUKONEN, LARISA A MD (425) 899-1711 01060003 03/16/1988 20Y M
	Date/Time <b>062181</b>	Barcode

\*\*This document contains only a portion of the EMS report and does not constitute the fu

**PATIENT COPY**

Patient Name: **Howard, Matthew R**  
MRN: 01060003  
Acct#: 8001308728

Attending Physician: Ali J Naini, MD  
Ordering Physician: N/A  
Copies To: N/A

### Transcribed Documents

**EHMC Consultation**

11/14/2008 00:00:00

Auth (Verified)

ECON

CONSULT: 11/14/2008 ADMITTED: 11/14/2008  
REFERRED BY:

REFERRING PHYSICIAN:  
Dr. Jack Handley.

CHIEF COMPLAINT:  
Posttraumatic epidural hematoma.

**HISTORY OF PRESENT ILLNESS:**

The patient is a 20-year-old man about whom I was first called about early this morning at about 4 a.m. and met shortly thereafter when I immediately came to the emergency room. He was agitated and unable to provide any information regarding his clinical history, but I was able to obtain the following information from his long-time girlfriend with whom he has a child. Apparently, at about 1:30 a.m., the patient came back to their home and was completely lucid at that time. He stepped out for a minute and his girlfriend then heard a loud thump and went out to find him unconscious, having been struck on the head. Loss of consciousness lasted approximately 10 minutes until the paramedics arrived. Since that time, he has been agitated, confused and fully responsive. Cranial nerve CT study revealed a significant right temporal epidural hematoma and a neurosurgery consultation was requested thereafter.

ALLERGIES:  
(ACCORDING TO HIS GIRLFRIEND) ALLERGIES DENIED.

CURRENT MEDICATIONS:  
None.

PAST SURGICAL HISTORY:  
Hip surgery as a child for resection of bone tumor. Prior medical conditions are otherwise negative.

Legend: A = Abnormal C = Critical J = Interp Data @ = Corrected L = Low H = High # = Ref Lab fm = Footnote



12040 NE 128th Street • Kirkland, WA 98034  
425 - 899 - 1000

Patient Name: **Howard, Matthew R**  
Pt Loc: 7Silver-W  
DOB: 03/16/1988  
MRN: 01060003  
Admit: 11/14/2008  
Chart Type N/A  
Chart Request ID: 6374678

Room: 7010 Bed: 01  
Age: 21 years Sex: M  
Acct #: 8001308728  
Discharge: 11/18/2008  
Print Date/Time: 2/3/10 1:52 PM  
Page: 14 of 93

Patient Name: **Howard, Matthew R**  
MRN: 01060003  
Acct#: 8001308728

Attending Physician: Ali J Naini, MD  
Ordering Physician: N/A  
Copies To: N/A

**Transcribed Documents**

**EHMC ED Admission**

11/14/2008 00:00:00

Auth (Verified)

EEDA

DATE: 11/14/2008

**CHIEF COMPLAINT:**

Fell down stairs.

**HISTORY OF PRESENT ILLNESS:**

The patient is a 20-year-old male who reportedly had several beers this evening. He was going up some stairs when he fell and hit his head. His significant other went out found him unconscious and he then started moaning and making noises. She called 911. On the paramedics arrival, he was waking up somewhat. Did have a smell of alcohol on his breath, was confused. He was placed in C-spine back for precaution and transported to our facility for evaluation. At the time of arrival he complains of a severe headache and nauseous and did vomit almost immediately on arrival.

**PAST MEDICAL HISTORY:**

None per the patient and his significant other.

**ALLERGIES:**

NONE.

**SOCIAL HISTORY:**

Lives in Redmond. Is single but is here with his significant other.

**HABITS:**

He does drink alcohol socially. He does smoke tobacco. Has used drugs in the past, none recently.

**REVIEW OF SYSTEMS:**

Really unobtainable as he is too confused.

**FAMILY HISTORY:**

Legend: A = Abnormal C = Critical I = Interp Data @ = Corrected L = Low H = High # = RefLab fm = Footnote

  
**EVERGREEN**  
HOSPITAL MEDICAL CENTER  
12040 NE 128th Street • Kirkland, WA 98034  
425 - 899 - 1000

Patient Name: **Howard, Matthew R**  
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cct#: 8001308728

Attending Physician: Ali J Naini, MD  
Ordering Physician: N/A  
Copies To: N/A

### Transcribed Documents

**EHMC Consultation**

11/16/2008 00:00:00

Auth (Verified)

ECON

CONSULT: 11/16/2008 ADMITTED: 11/14/2008  
REFERRED BY: ALI NAINI, MD

REASON FOR REFERRAL:  
Left wrist and left knee injury.

**HISTORY OF PRESENT ILLNESS:**

The patient is a 20-year-old who at about 1 in the morning on Friday evening, November 14, 2008, was intoxicated, missed some steps out in front of his house and fell. Had a severe head injury. Was seen in the emergency room with an epidural hematoma. Was taken urgently to the operating room that night and once he was conscious and aware, complained of left wrist and left knee discomfort. X-rays of those show a nondisplaced left scaphoid fracture and a nondisplaced large avulsion fracture of the proximal plateau, consistent with ACL avulsion type injury.

**PAST MEDICAL HISTORY:**

The patient states that at age 11 or 12 he had a triplane fracture of his left ankle, treated nonoperatively. At age 5, he had histiocytosis X treated operatively in his right hip with I and D and bone grafting. He was followed until age 11, with no evidence of disease elsewhere. He has had no history of prior problems with his left wrist or his left knee. He is right hand dominant. He is currently a stay-at-home dad. Lives with his girlfriend. He has no ongoing medical problems.

**SOCIAL HISTORY:**

He drinks and smokes about 1/2 pack per day. I talked to him about the importance of quitting smoking associated with fracture healing.

**PHYSICAL EXAMINATION:**

HEENT: He has his right side of his head shaved and a large incision consistent with evacuation of his hematoma.

Legend: A = Abnormal C = Critical I = Interp Data @ = Corrected L = Low H = High # = Ref Lab fm = Footnote



12040 NE 128th Street • Kirkland, WA 98034  
425 - 899 - 1000

Patient Name: **Howard, Matthew R**

Pt Loc: 7Silver-W

DOB: 03/16/1988

MRN: 01060003

Admit: 11/14/2008

Chart Type N/A

Chart Request ID: 6374678

Room: 7010 Bed: 01

Age: 21 years Sex: M

Acct #: 8001308728

Discharge: 11/18/2008

Print Date/Time: 2/3/10 1:52 PM

Page: 11 of 93

Patient Name: **Howard, Matthew R**  
MRN: 01060003  
Acct#: 8001308728

Attending Physician: Ali J Naini, MD  
Ordering Physician: N/A  
Copies To: N/A

**Transcribed Documents**

**EHMC Operative Report**

11/14/2008 00:00:00

Auth (Verified)

EOP

DATE OF SERVICE: 11/14/2008

PREOPERATIVE DIAGNOSIS:  
ACUTE RIGHT TEMPORAL EPIDURAL HEMATOMA.

PROCEDURE(S):  
EMERGENCY RIGHT FRONTOTEMPORAL CRANIOTOMY FOR EVACUATION OF ACUTE EPIDURAL HEMATOMA.

SURGEON:  
ALI NAINI, MD.

ASSISTANT:  
NONE.

ANESTHESIA:  
GENERAL ENDOTRACHEAL.

COMPLICATIONS:  
None.

INDICATIONS:  
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. On admission he was agitated and confused and was found on cranial CT imaging to have an approximately 2-cm right temporal epidural hematoma. Because of the patient's worsening neurological condition, he was rapidly taken to the operating room for emergency surgery.

FINDINGS:  
As suggested by the preoperative CT, there was in fact a large

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**EVERGREEN**  
HOSPITAL MEDICAL CENTER  
12040 NE 128th Street • Kirkland, WA 98034  
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Page: 6 of 93

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 AUG -5 PM 1:04

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

JULIA S. SINEX, as Personal Representative )  
of The Estate of Matthew Richard Howard, )  
and on behalf of DYLAN DAVID HOWARD, ) NO. 66916-8-I  
the surviving son of Matthew Richard Howard, )  
Appellants, ) DECLARATION OF  
SERVICE  
vs. )  
WILLIAM L. BICE and JANE DOE BICE, )  
husband and wife and the marital community )  
comprised thereof, and LANDMASTER )  
CORPORATION, d/b/a the Bathtub Doctor, a )  
Washington corporation )  
Respondents. )

I, Caroline Ketchley, hereby declare under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to this case.
2. On August 5, 2011, I caused to be delivered to the attorney for the Appellants, a copy of Respondent Bice's Response Brief and this declaration of service, and caused those same documents to be filed with the Clerk of the above captioned court.

The addresses to which these documents were provided to Appellants' attorneys and Respondent Landmaster Corporation's attorney were:

James A. Doros, WSBA #16267  
The Law Office of James A. Doros  
3502 Fremont Avenue North  
Seattle, WA 98103

legal messenger (ABC Messenger Service)

email

Kevin Coluccio, WSBA #16245  
Stritmatter Kessler Whelan Coluccio  
200 2nd Ave W  
Seattle, WA 98119-4204

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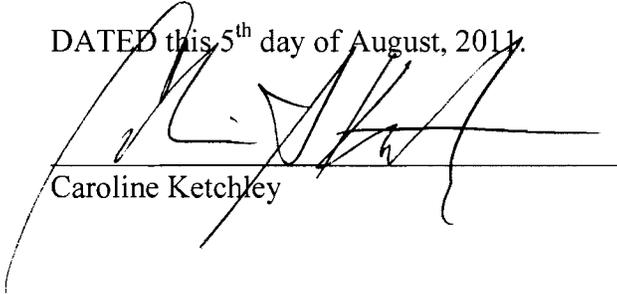
email

Keith A. Bolton, WSBA #12588  
Bolton & Carey  
7016 - 35th Avenue N.E.  
Seattle, WA 98115-5917

legal messenger (ABC Messenger Service)

email

DATED this 5<sup>th</sup> day of August, 2011.

  
\_\_\_\_\_  
Caroline Ketchley