
NO. 66916-8-1

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

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,

Respondents.

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BRIEF OF RESPONDENT LANDMASTER CORPORATION

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IV. STATEMENT OF THE CASE

This is a wrongful death action brought by the Estate of Matthew Howard alleging that on November 14, 2008, Mr. Howard fell down a staircase at a duplex owned by Defendants Bice and was injured.¹ Defendant Landmaster Corporation moved for Summary Judgment based upon plaintiff's failure to prove proximate cause. In particular, there was no admissible evidence to support Plaintiff's allegation that Mr. Howard fell down the stairs and was injured due to an unsafe condition on the stairs.

The evidence showed Defendants Bice, owners of the duplex in question, entered into a written contract with Defendant Landmaster to rebuild the deck, repair some plumbing, and haul off some garbage. See written contract attached to Affidavit of Keith A. Bolton as Exhibit C. CP 63-64. As the work progressed, Landmaster agreed to do some additional work requested by Defendants Bice, including replacing the exterior stairs. See list of additional work, attached to the Affidavit of Keith A. Bolton as Exhibit D. CP 66. With respect to the stairs, Landmaster simply replaced the rotting wood to its existing configuration in like manner. See declaration of Ben Palmer, CP 87-88.; declaration of

¹ The First Amended Complaint alleges Mr. Howard died five months later from medical complications and treatment for the injuries he sustained in the fall. CP 22-28. Mr. Howard's medical records show he was discharged from Evergreen Hospital on November 18, 2008, neurologically stable. The autopsy report shows Mr. Howard died of a drug overdose on April 2, 2009. See autopsy report attached to Affidavit of Keith A. Bolton as Exhibit F. CP 85-86

William Bice, CP 118. It is undisputed the stairs were used safely for years, both before and after Mr. Howard's accident, without any complaints that the stairs were unsafe. See declaration of William Bice, CP 118.

On November 14, 2008, Matthew Howard sustained a head injury. No one knows how Mr. Howard sustained his injury. There were no witnesses to his accident. Mr. Howard's medical records contain various statements about how his accident occurred. One record provided:

"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."

See Evergreen Hospital Operative Report, dated November 14, 2008, attached to Affidavit of Keith A. Bolton as Exhibit G. CP 77-79. Another medical record provided:

"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."

See Evergreen Hospital Consult, dated November 16, 2008, attached to Affidavit of Keith A. Bolton as Exhibit H. CP 80--83.²

² On appeal, plaintiff objects to the medical record indicating Mr. Howard was assaulted, and to the records indicating he was intoxicated. However, plaintiff did not object and move to strike the medical records at the summary judgment hearing. Consequently, plaintiff may not raise the objection for the first time on appeal. RAP 2.5(a); *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 182 P.3d 985

Mr. Howard had no recollection of the accident. In fact, his medical records from the Wenatchee Valley Clinic indicated the following regarding his accident:

"He reports 36 hours of loss of consciousness. He does not have a memory of that event."

See Wenatchee Valley Clinic Consult, dated March 19, 2009, attached to Affidavit of Keith A. Bolton as Exhibit I. CP 85-86.

In short, there was no admissible evidence as to what caused Mr. Howard's accident. It is undisputed there were no witnesses to the accident, and Mr. Howard had no memory of it. There was no evidence that Mr. Howard's accident was caused by an unsafe condition on the stairs. Since there was no evidence that any conduct on the part of Defendant Landmaster proximately caused Mr. Howard's accident, the trial court properly granted Landmaster's summary judgment motion.³

V. ARGUMENT

A. Standard of Review.

An Appellate court reviewing a grant of summary judgment engages in the same inquiry as the trial court. *Little v. Countrywood Homes* 132 Wn. App. 777, 779, 133 P.3d 944 (2006). Summary judgment should be granted when, after viewing the

(2008).

³ The court granted Landmaster's summary judgment motion on March 16, 2011. CP 271-274. The Court also entered an Order granting Landmaster Corporation's Motion to Strike Testimony of Plaintiff's witnesses. CP 279-282.

pleadings, depositions, admissions and affidavits and all reasonable inferences that may be drawn there from in the light most favorable to the non-moving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment. *Olympic Fish Products v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980). When a motion for summary judgment is supported by evidentiary matter, the adverse party may not rest on mere allegations in the pleadings but must set forth specific admissible facts showing there is a genuine issue for trial. *LePlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975).

A defendant in a civil action is entitled to summary judgment when the defendant shows there is an absence of evidence supporting an element essential to plaintiff's claim. *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272 896 P.2d 750 (1995). The defendant may support a motion for summary judgment by merely challenging the sufficiency of plaintiff's evidence as to any material issue. *Young v. Key Pharmaceuticals* 112 Wn.2d 216, 770 P.2d 182 (1989).

B. The trial court properly granted Landmaster's summary judgment motion because there was no admissible evidence that any conduct on Landmaster's part proximately caused Plaintiff's accident.

One of the essential elements Plaintiff must prove in a negligence action is proximate cause. *LePlante v. State, supra*. In *LePlante, supra*, the Supreme Court reiterated this well-known law:

The tort complained of in the case at hand is negligence, which consists of (1) the existence of a duty owed to the complaining party, (2) a breach thereof, and (3) a resulting injury. *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 412 P.2d 109 (1966); *Christensen v. Weyerhaeuser Timber Co.*, 16 Wn.2d 424, 133 P.2d 797 (1943). For legal responsibility to attach to the negligent conduct, the claimed breach of duty must be a proximate cause of the resulting injury.

LePlante v. State, supra at 159. It is also well-settled that a case will not be allowed to proceed to trial for a jury to speculate regarding proximate cause. *Marshall v. Bally's PacWest, Inc.*, 94 Wn.App. 372, 972 P.2d 475 (1999).

Proximate cause was the element of Plaintiff's claim that was at issue in Landmaster's summary judgment motion. Plaintiff cannot avoid summary judgment by simply raising disputed facts regarding the safety of the stairs. Plaintiff must also set forth admissible facts to show an unreasonably dangerous condition of

the stairs proximately caused Mr. Howard's injuries. *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). Plaintiff failed to do that. The evidence Plaintiff submitted related only to the issue of whether the stairs had any deficiencies. It did not relate to the issue of whether those alleged deficiencies proximately caused Mr. Howard's injuries.

Johanson v. King County, 7 Wn.2d 111, 109 P.2d 307 (1941), *Little v. Countrywood Homes, supra*, *Miller v. Likins*, 109 Wn.App. 140, 34 P.3d 835 (2001), and *Marshall v. Bally's PacWest, Inc., supra*, all involved cases where proximate cause was not proved as a matter of law, even though plaintiffs produced evidence of negligence. The issue in those cases was not whether Plaintiff had submitted evidence of duty and breach of duty. The issue was not whether evidence was circumstantial or direct. All the cases were dismissed because plaintiffs failed to set forth admissible facts to show that defendants' negligence proximately caused their injuries.

For example, in *Marshall v. Bally's PacWest, Inc., supra*, the court held:

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 can not show that her injuries were caused by any defect in the machine.

Marshall v. Bally's PacWest, Inc., supra at 380-381. Similarly, even assuming the stairs had defects, Plaintiff has offered no admissible evidence that Mr. Howard actually fell, or, if he fell, how he fell, where he fell, or what caused his fall. It follows that Plaintiff cannot show Mr. Howard's injuries were caused by any defect in the stairs.

Marshall, supra, is directly on point and required dismissal of Landmaster. In *Marshall, supra*, plaintiff claimed a malfunctioning treadmill started at a fast pace and threw her off the treadmill, causing her to sustain a head injury. However, plaintiff confirmed at her deposition that she had no memory of the accident. The trial court granted defendant's summary judgment motion. The Court of Appeals affirmed, and held:

Without any memory of the accident, Marshall simply offers a theory as to how she sustained her injuries. But a verdict cannot be founded on mere theory or speculation.

[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 recover, a jury will not be permitted to conjecture how the accident occurred. *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947) (citations omitted).

In short, Marshall provides no evidence that she was thrown from the machine, what caused her to be thrown from the

machine, or how she was injured. Given this failure to produce evidence explaining how the accident occurred, proximate cause cannot be established. Because Marshall did not produce evidence of proximate cause, she failed to produce evidence sufficient to withstand summary judgment. See *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992) (a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial)

Marshall v. Bally's PacWest, Inc., *supra* at 379-80.

Similarly, Plaintiff submitted no admissible evidence regarding what caused Mr. Howard's accident. There was no evidence Mr. Howard fell down the steps and hit his head due to an unreasonably dangerous condition of the stairs. There was no physical evidence at the scene to indicate that any unreasonably dangerous condition of the stairs, handrail, or lighting proximately caused Mr. Howard's accident, as opposed to any of the other theories reflected in the medical records. For example, for all we know, Mr. Howard was assaulted as the medical records state. For all we know Mr. Howard was lighting his cigarette and not paying attention to where he was stepping, and fell. It is equally likely Mr. Howard miss-stepped due to a combination of fatigue and the beer he had been drinking, as reflected in the ambulance records. Mr. Howard could have mis-stepped because of not paying attention for any number of other reasons. There is not even any admissible

evidence that Mr. Howard ever fell on the stairs at all, since he was simply found lying on the landing. As in *Marshall v. Bally's PacWest, Inc., supra*, Plaintiff Sinex failed to produce evidence of proximate cause, and failed to produce evidence sufficient to withstand summary judgment. *Marshall v. Bally's PacWest, Inc., supra* at 380.

Little v. Countrywood Homes, supra, is also directly on point and required dismissal of Defendant Landmaster. In *Little, supra*, plaintiff Little, a subcontractor at a construction site, was found on the ground injured and disoriented. His ladder was also on the ground. Little had no memory of his accident, and no one witnessed the accident. Evidence at the summary judgment hearing showed defendant Countrywood Homes, the general contractor, had violated Washington administrative code regulations providing that ladders should be used only on stable and level surfaces, and should be secured at both the top and bottom. Despite evidence of that breach of duty, the court granted defendant summary judgment motion because plaintiff had failed to show evidence that the breach of duty proximately caused plaintiff's accident. The court held:

But even if we assume that the evidence before the trial court, when viewed in the light most favorable to Little, is sufficient to support an inference that Countrywood breached a duty it owed him, he has not presented evidence

sufficient to prove that Countrywood's breach was what caused his injuries. To meet his burden, Little needed to present proof sufficient to allow a reasonable person to conclude that the harm more probably than not happened in such a way that the moving party should be held liable. *Gardner v. Seymour*, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947). The party who has the burden of production need not provide proof to an absolute certainty, but reasonable inferences cannot be based upon conjecture. *Id.* at 808.

The mere fact that Little sustained an injury does not entitle him to put Countrywood to the expense of trial. *Marshall*, 94 Wn. App. at 377 (an accident does not necessarily lead to an inference of negligence). He needed to submit evidence allowing a reasonable person to infer, without speculating, that Countrywood's negligence more probably than not caused the accident. *Id.* at 378...One may speculate that the ladder was not properly secured at the top or that the ground was unstable. But even assuming that those conditions constituted breaches of a duty that Countrywood owed Little, he did not provide evidence showing more probably than not that one of those breaches caused his injuries. No one, including Little, knows how he was injured...Little, however, 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...Without evidence to

explain how his accident occurred, Little could not establish proximate cause and could not withstand summary judgment. The decision of the trial court is affirmed.

Little, supra, at 781-84.

In the same way, plaintiff in the case at bar needed to provide more than evidence that Mr. Howard used stairs that did not in all respects conform to code. Plaintiff needed to establish proof that Landmaster's negligence proximately caused Mr. Howard's injuries. Plaintiff did not do that. Consequently, the law required judgment in favor of Landmaster. *Little, supra*.

Similarly, In *Johanson v. King County, supra*, there was evidence the county was negligent in failing to remove old road lane stripping which could mislead drivers into thinking the road was a two-lane, rather than a four-lane road. However, the court held plaintiff failed to prove that defect proximately caused the accident:

Appellants say, in effect, that Rian *might have been* and probably was deceived and misled by the yellow line. Appellants cannot recover herein because of what they claim might have happened, or because the driver of the Rian car might have been misled by the location of the yellow line, or because there was no evidence upon which the jury could have found that Rian was not deceived. The burden is upon appellants to establish, by direct or circumstantial evidence, that the

location of the yellow line did, in fact, deceive and mislead the driver of the Rian car, to his injury.

The jury may not enter into the realm of conjecture or speculation, in determining whether or not the location of the yellow line was a proximate cause of the collision. See *Chilberg v. Colock*, 80 Wash. 392, 141 Pac. 888, *wherein we stated*:

"The rule in cases of this character, is as stated in *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881, quoting from *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457, as follows:

"But there must be some evidence, either direct or circumstantial, that there was negligence on the one side, an injury resulting in damages on the other, and that the injury and damages followed the negligence, and were produced thereby . . . it is not proving his case by circumstantial evidence for the respondent to show that there were causes, for which the appellant would be liable, which could have produced the injury, without showing that it could not have been produced in any other

manner, or in any manner
for which the appellant
would not be liable."

Johanson v. King County, supra at 122-123. Similarly, there were no admissible facts in the case at bar, direct or circumstantial, to show that any condition on the stairs proximately caused Mr. Howard's injuries. Ms. Sinex was inside and did not see what happened to Mr. Howard. She simply heard a thump and then found Mr. Howard lying on the ground. She has no way to tell whether he fell, or was assaulted as indicated in the medical records. Even if he fell, she has no way to tell where he fell or why he fell. For all she knows, he fell because he was lighting a cigarette and not paying attention to where he was walking. She does not know whether he fell from the top landing, in which case the claimed deficiencies in rise and run of the stairs could not possibly have caused his injuries. Neither does the speculation of Dr. Johnson or Dr. Gill provide admissible facts to demonstrate proximate cause.⁴ It is not enough to simply state facts regarding negligence. All of the authorities cited by Landmaster contained facts showing negligence. Yet, all those cases were dismissed for

⁴ Large portions of the Declarations of Daniel Johnson and Richard Gill contained not only speculation but also legal opinions, and were therefore inadmissible. *McBride v. Walla Walla County*, 95 Wn.App. 33, 975 P.2d 1029 (1999); *Guile v. Ballard Community Hospital*, 70 Wn.App. 18, 851 P.2d 689 (1993); *Charleton v. Day Island Marina, Inc.*, 46 Wn.App. 784, 732 P.2d 1008 (1987) *Hyatt v. Sellen Construction Company, Inc.*, 40 Wn.App. 893, 700 P.2d 1164 (1985). CP 225-233; 263-66.

failure to prove proximate cause. Similarly, the court properly dismissed Plaintiff's claims for failure to set forth evidence of proximate cause.

C. The cases cited by Plaintiff are clearly distinguishable and not controlling in the case at bar.

Plaintiff relied upon *Schneider v. Yakima County*, 65 Wn.2d 352, 397 P.2d 411 (1964), and *Raybell v. State*, 6 Wn.App. 795, 496 P.2d 559 (1972). Both cases are clearly distinguishable. Unlike the case at bar, the *Raybell* case did not involve speculation regarding how the accident occurred. In *Raybell*, plaintiff claimed an improper guardrail caused the car accident. In *Raybell*, there were admissible facts showing:

1. A temporary guardrail was put up with a six foot gap between the old guardrail and the new temporary rail;
2. the temporary guardrail encroached on the roadway and made it even narrower than the original nine foot lane width;
3. physical evidence showed plaintiff's car went off the road between the old guardrail and the temporary rail and the left front fender of plaintiff's car hit the temporary guardrail;
4. Plaintiff's car left the roadway at a point where the roadway perceptively narrowed and at a point where frequent rock slides tumbled off the cliff and across the highway;

5. The temporary guardrail was not secured into the ground or any other surface and would not hold even a slow moving car;
6. a proper guardrail would have deflected plaintiff's car back onto the highway even if plaintiff's car had been traveling as high as 48 miles per hour;
7. the speed limit on the road was 35 miles per hour and there was no evidence plaintiff exceeded that speed.

Unlike the case at bar, *Raybell* did not involve speculation regarding how the accident occurred, but substantial admissible facts that the alleged negligence proximately caused plaintiff's accident. In *Raybell* there was physical evidence to show plaintiff's car ran into the defective guardrail and went off the cliff because of the defective guardrail. In contrast, there was no physical evidence to show Mr. Howard's injuries were proximately caused by any unreasonably dangerous condition of the stairway.

In *Schneider, supra*, plaintiff also claimed negligence in the design of the road and in not warning motorists of the road dangers. There were admissible facts showing:

1. The road in question made a significant turn, and the turn in the road was at a lower elevation from both the portion of the road that approached the turn and the portion of the road that continued on after the turn, so that the

- roadway looked straight as one approached the turn;
2. there was no warning about the significant turn in the road, despite state standards requiring the warning;
 3. the posted speed limit was 60 miles per hour in the area, but evidence at trial showed negotiating the turn was not safe at speeds over 35 miles per hour.
 4. an occupant of the car testified that the car's occupants thought the road was straight and so proceeded at a speed of 55-60 miles per hour into the turn.

In contrast, there are no admissible facts in the case at bar regarding how Mr. Howard's injuries occurred, or what proximately caused those injuries. Defendant Landmaster was entitled to judgment as a matter of law. *Johanson v. King County, supra*; *Miller v. Likins, supra*; *Little v. Countrywood Homes, supra*; *Marshall v. Bally's PacWest, supra*.

Finally, Plaintiff relies upon two out-of-state cases, *Majerus v. Guelow*, 113 NW 2d 450, 262 Minn. 1 (1962), and *Hall v. Winfrey* 27 Conn.Ap. 154, 604 Atlantic 2d 1334 (1992). Those cases are not authoritative in Washington because they do not follow Washington law. The cases Plaintiff cited follow the substantial factor test of proximate cause, which is not the law in Washington. See, *Blasick v. City of Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954). Compare *Little v. Countrywood Homes, supra* at

780. In addition, in contrast to the out-of-state cases cited by Plaintiff, in Washington legal causation presents a question of law. *Little, supra* at 780. In short, the out of state cases cited by Plaintiff are not controlling in the case at bar.

VI. CONCLUSION

Plaintiff failed to produce admissible evidence that Mr. Howard's accident was proximately caused by any unsafe condition on the stairs, or any conduct on the part of Landmaster. Landmaster respectfully requests the Court affirm the trial court's summary judgment order.

Respectfully submitted this 8th day of August, 2011.

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COURT OF APPEALS, DIVISION I,
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JULIA S. SINEX, as Personal Representative of the Estate of
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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,

Respondents.

DECLARATION OF SERVICE

The undersigned, Terri L. Jackson, hereby declares that on
August 8, 2011, she caused to be filed with the State of
Washington, Court of Appeals, Division I, *Brief of Respondent
Landmaster Corporation*, together with this *Declaration of Service*,
and on August 8, served copies of the same by way of ABC
Legal Messengers/Hand-Delivery, addressed to the following:

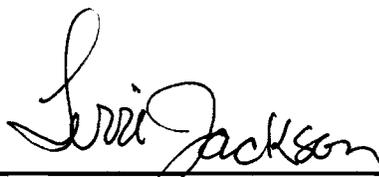
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