

ORIGINAL

NO. 36389-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JEFFREY STEPHENS,

v.

WILLIAM HOLLANDSWORTH, ET AL.

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson
Pierce County Superior Court Cause No. 04-2-14764-1

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BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

1. Plaintiff's Liability Allegations:

This responsive argument is specific to the actions, conduct, and lack of culpability in this matter of the Defendants William Hollandsworth and Jane Doe Hollandsworth d/b/a Four C Utility Construction, Inc., a Washington Corporation and Qwest Communications (hereinafter collectively referred to as "Defendants"). Plaintiff brought state law tort claims against Defendants for negligence in Pierce County Superior Court, alleging that they negligently caused a small indentation on plaintiff's property, which was "open and unsecured creating a hazardous condition on Plaintiff's property." CP 79. Defendants adamantly denied these allegations. CP 10-12; 30 – 36.

2. Plaintiff's Errors Regarding Dates:

At the outset Defendants note that Plaintiff has repeatedly erred throughout his Opening Brief with regard to the date on which plaintiff has claimed his alleged injury occurred, as well as the date as to when Defendants allegedly buried a telecommunications cable on his property. While plaintiff claims at various places in his opening brief that his injury occurred on December 27, 2004, (Appellant's Brief, pg. 1, 5) he has always claimed previously that it occurred in 2001. (CP 3–5;77–82;146). In both the original complaint and amended complaint for damages

plaintiff alleged the injury occurred on December 26, 2001. (CP 3-5; 77 – 82). However, in his declaration in support of his response to Defendant’s summary judgment motion, plaintiff stated that the date of the accident was December 27, 2001. (CP 243). When asked in his deposition about the discrepancies in the alleged date of occurrence, plaintiff testified that it was the result of “confusion.” (CP 146). Similarly, throughout his opening brief plaintiff at times alleges that the cable was buried on his property by Defendants on December 26, 2004 (CP 1, 2), and at other times he claims it was on December 27, 2004 (Appellant’s Brief, page 5, 9), and even December 27, 2001 (Appellant’s Brief, page 3).

3. Procedural History:

Plaintiff’s amended complaint for damages alleges that Defendants buried a telecommunications cable on his property and in doing so caused a small hole on December 26, 2001, and that his injury occurred “on or about December 27, 2001.” (CP 78-79). On April 6, 2007, Plaintiff’s claim for negligence against defendants was dismissed in its entirety via Defendants’ Motion For Summary Judgment by Pierce County Superior Trial Court Judge Bryan Tollefson. Plaintiff filed a Motion for Reconsideration of the court’s granting of Defendants’ Motion for Summary Judgment and that motion was heard before the trial court on May 4, 2007. On May 10, 2007, Judge Tollefson denied the plaintiff’s

Motion for Reconsideration and affirmed his grant of Defendants' Motion for Summary Judgment. Appeal from these two rulings is before this court.

4. Factual Background:

The plaintiff's claim in this matter involves an alleged small hole or indentation that the plaintiff alleges Defendants created on the plaintiff's property when Defendants buried a telecommunications cable on the plaintiff's property in December of 2001. In his amended complaint Plaintiff claims that on or about December 27, 2001, he "stepped into the hazard created by Defendants and fell and sustained serious physical injuries."¹ (CP 79). The plaintiff's own description of the alleged "hazard" he claims was created by Defendants on his property was a small indentation or hole, described in his own deposition as being "**1 ½ to 2 inches deep by 2 to 3 inches wide**" (CP 144, 148). The ground at issue was composed of **dirt, rock and gravel**. CP 150-151). Plaintiff also testified that the area was possibly "wet and muddy." CP 149.

¹ In his opening brief, plaintiff notes many misstatements and inaccuracies with regard to the proffered evidence by plaintiff's trial counsel, Robert Hayes, during the hearing on Defendants' motion for summary judgment. These alleged errors, misstatement of facts and inaccuracies as proffered to the trial court by attorney Hayes included many aspects of the plaintiff's claims, as set forth in plaintiff's Opening Brief, at pages 2 – 5. In ultimately denying the plaintiff's Motion for Reconsideration of the trial court's dismissal of the plaintiff's claims on summary judgment, the trial court did not rely upon any of those prior misstatements and errors on the part of plaintiff's counsel. (RP 68-69).

On the date of his injury, Plaintiff claims that he went out of his house to check his mailbox. (CP 243). As he was coming back from the mailbox he noticed that the front of his boat trailer to the side of the house had been pushed to the East toward the fence.” (CP 243). Fearing that his old work van parked in that same area had been broken into he headed over towards that part of his property. *Id.* As he looked into the van window, the front part of his right foot was “grabbed” or “snagged” as it stuck into a hole the size of a pop can. Plaintiff testified that “I did not step into a hole. My foot was wedged into a hole as the front of my foot slid into it while I was stepping.” (CP 243). Plaintiff concluded that the small indentation must have been caused by Defendants after they installed a telecommunications cable on his property. When asked why he made this conclusion, the plaintiff initially testified that it was because the small hole was in the middle of the linear area where the cable had been buried. (CP 149,150). Plaintiff then changed his testimony to say that the alleged small hole/indentation was actually at the end of that alleged linear area where the cable had been buried. *Id.* By way of an additional inconsistent, shifting account, in his deposition the plaintiff testified that with respect to the area where the alleged hole/indentation was located **“the whole area was up several inches above the normal ground”** (CP 150) and that it was a **three-inch “mound.”** CP 151.

Plaintiff then testified that **“the grass covered everything up and there was no hump to let me know something was wrong.”** CP 145. Still further, in his first sworn declaration submitted “In Support of Response to Motion for Summary Judgment”, plaintiff stated that with regard to the location of the alleged hole, **“the area had no visible indications of a disturbance in the ground such as a mound or previous digging of the ground.”** CP 244. This sworn testimony is all in direct conflict, inviting a jury to impermissibly speculate as to whether the alleged indentation was in an area “up several inches above the normal ground” (i.e. visible) or just the opposite, “in an area that had no visible indications of a disturbance such as a mound or previous digging, etc,” (i.e. not visible). Still further, a jury would have to speculate as to where the alleged hole/indentation was truly located, i.e. whether it was near the “end” of a linear area where the cable was allegedly buried, in the “middle” of that linear area or neither. In short, the plaintiff offered only shifting and conflicting accounts as to the nature and location of the complained of condition that he variously and inconsistently claims caused his alleged injuries. To further demonstrate and underscore the nature of the plaintiff’s speculation with regard to when and how this small hole/indentation was created, Plaintiff testified in his deposition as follows:

Q. Prior to December 27th of 2001 when this happened, when was the last time that you looked at this particular area of ground?

A. I – I couldn't say. **It could have been several weeks.**

Q. All right.

A. Because during the time for seeing all that, all my activities were like down in Olympia, and **being wintertime, I came home; it was dark.**

Q. Okay.

A. **And there was no reason to go over there because nothing is growing in the winter.**

Q. Now, you went (sic, "weren't") home when they did the work; correct?

A. Correct.

Q. So you didn't see any part of them actually performing the work; correct?

A. Correct.

Q. **And in fact you're not even sure when it was done?**

A. The exact date?

Q. Right.

A. **I do not know.** CP 145.

Q. **So we don't know as we sit here the time span that occurred between them doing the work on your properties and this incident happening?**

A. **Correct. Because I never went out in that area, and when I came home at night it was always dark.** CP150.

Plaintiff finally testified that he merely “assumed” that the small indentation was caused by the Defendants’ work. In that regard he testified:

Q. Okay. Is it fair to say, though, that you’re assuming that that hole was caused by the work that was done?

A. Yes. CP 150.

Still further, despite testifying that the dogs from down the street and the next-door neighbor’s dog “all come over” to his property (CP 149), when asked how he could be so sure that the small indentation into which he stepped had not been caused by a dog (given that it could have been “several weeks” since plaintiff had even been in the area where he claims the indentation/hole was located), plaintiff acknowledged that this was a “good question” and then attempted to explain why he did not believe a dog had created it. (CP 150). Plaintiff then acknowledged that he was “assuming” that the Defendants had caused the alleged hole because of where it was allegedly located in relation to where the cable had been buried. (CP 150).

As was argued by defendants to the trial court below, the above testimony—given under oath by the plaintiff—as to where, when and how the small indentation/hole was created, would require a jury to speculate and conjecture as to each of these questions. As will be set forth herein,

the trial court's ruling in granting defendants' Motion for Summary Judgment and finding that plaintiff's claims of negligence against Defendants failed as a matter of law was legally sound and should be affirmed.

B. LAW AND ARGUMENT

1. Standard on Summary Judgment

As the trial court recognized, CR 56 (e) cautions that, "...when a Motion for Summary Judgment is made and supported as provided in this rule ... the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Rental Owners v. Thurston County*, 85 Wn. App. 171, 177 931 P. 2d 208 (1997); *DOE v. Dept. Of Transportation*, 85 Wn. App. 143, 147, 909 P. 2d 1303 (1997). Plaintiff made no such showing in the present case.

In *Suarez v. Newquist*, 70 Wn.App. 827, 832, 855 P. 2d 1200 (1993), the court warned adverse parties that given the caveats in CR 56 (e) "speculation, argumentation, assertions, opinions and conclusory statements will not defeat the motion [for summary judgment]. Where the court can determine that reasonable minds could reach but one conclusion, summary judgment is indicated." See *Dale v. Black*, 81 Wn. App. 599, 601, 915 P. 2d 1116 (1996).

Where the state of the record permits a determination as a matter of law, summary judgment is indicated, even in cases involving negligence claims and causation factors normally determined by a jury. *LaPlante v. State*, 85 Wn. 2d 154, 531 P. 2d 299 (1975), *Mejia v. Erwin*, 45 Wn. App. 700, 705, 726 P. 2d 1032 (1986) and *Braegelman v. County of Snohomish*, 53 Wn. App. 381, 383, 766 P. 2d 1137 (1989).

2. The Trial Court's Dismissal of Plaintiff's Negligence Claim Based on His Failure to Raise a Material Issue of Fact Beyond Speculation Of An Alleged Breach of Duty by Defendants Was Legally Sound.

In his Opening Brief, Plaintiff states that the trial court erred when it granted Defendants' Motion for Summary Judgment, with plaintiff claiming that "there was no question but that the defendants made the hole that caused plaintiff's injury" and that "the uncontroverted evidence that the hole that caused plaintiff's injury was in the middle of the trench line that was dug on December 27, 2004 (sic), affirms that the hole was made at that time." (Appellant's Opening Brief, page 9). Plaintiff's statements are wholly unsupported by any evidence on the record below. First, plaintiff cites to no part of the record below in support of his claim that there is "no question but that the defendants made the hole that caused plaintiff's injury." (AB, pg.9)

In order to prove actionable negligence, a plaintiff must establish the existence of a duty, a breach thereof, a resulting injury, and proximate

causation between the breach and the resulting injury. *Schooley v. Pinch's Deli Market*, 134 Wn. 2d 468 (1998); *Pedroza v. Bryant*, 101 Wn. 2d 226, 228, 677 P. 2d 166 (1984). During the hearing on Defendants' Motion for Summary Judgment to the trial court, the Plaintiff could not demonstrate beyond speculation any "breach of duty" on the part of the Defendants or that any such breach of duty was the proximate cause of his alleged injuries. To the contrary, Defendants have cited numerous references to the record below that belie plaintiff's claim in that regard. For example, as noted, supra, the plaintiff testified under oath in his own deposition that he just "assumed" that Defendants caused the alleged hole (CP 150) and that prior to allegedly stepping into the small hole at issue he had not been near that area to see it in as much as "several weeks." (CP 145).

In *Kalinowski v. YWCA*, 17 Wn. 2d 380, 391, 135 P. 2d 852 (1943), the Washington State Supreme Court stated that it is not the law that every accident establishes a cause of action warranting recovery by the injured party. Similarly, in *Brant v. Market Basket Stores, Inc.*, 72 Wn. 2d 446, 443 P. 2d 863 (1967), the court noted that it is well established in the decisional law of the State of Washington that something more than a slip and fall is required to establish the existence of a dangerous condition. *Hooser v. Loyal Order of Moose, Inc.*, 69 Wn. 2d 1, 416 P. 2d 462 (1966); *Hanson v.*

Lincoln Federal Savings and Loan Association, 45 Wn. 2d 577, 277 P. 2d 344 (1954). See also, *Pement v. F.W. Woolworth Corp.*, 53 Wn. 2d 768, 337 P. 2d 30 (1959). Thus, while the plaintiff in this case alleges that his foot “caught” or “snagged” in a small area on the ground that was approximately 2 inches wide and 1 ½ to 2 inches deep; was on a part of his property that he had not seen for “several weeks”; had occurred on ground that was comprised of “dirt, rock and gravel”, (CP 151); where plaintiff has given inconsistent testimony as to the supposed location of the alleged hole and whether there was any visible indication that Defendants had done work in that area; where plaintiff has testified that he “assumes” the hole was caused by Defendants; where plaintiff testified that he does not know when Defendants buried the cable on his property; and where plaintiff has provided inconsistent testimony as to when this incident occurred, the plaintiff cannot sustain his burden of demonstrating a breach of duty on the part of defendants and that such an alleged breach was the proximate cause of his alleged injury. The mere fact that a telecommunications cable had been installed on plaintiff’s property at some point prior to his alleged incident is insufficient as a matter of law to survive Defendants’ Motion for Summary Judgment, as confirmed by the trial court.

The majority of Plaintiff’s Opening Brief focuses on the plaintiff’s initial declaration in opposition to Defendants’ Motion for Summary

Judgment, which declaration the plaintiff argues contained misstatements of facts, and which declaration was amended and then submitted in conjunction with his Motion for Reconsideration to the trial court after Defendants' Motion for Summary Judgment was granted. (See AB, pgs. 3 - 6). Defendants emphasize that the trial court's affirming its dismissal of plaintiff's claims after denying Plaintiff's Motion for Reconsideration **was not contingent on the now disputed portion of plaintiff's first declaration that he completed**, signed and produced to the court and all parties in opposition to Defendants' Motion for Summary Judgment. The trial court found that Defendants were entitled to summary judgment of dismissal of plaintiff's claims without regard to the disputed portion of Plaintiff's declaration as his amended declaration did not change the fatal flaws in Plaintiff's claims against Defendants in this case. In denying plaintiff's Motion for Reconsideration, the trial court ruled that the plaintiff simply could not establish beyond speculation that the alleged small indentation on his property was caused by Defendants having previously buried a telephone cable on his property as opposed to any other cause.

Because of plaintiff's failure in this regard, his claims of negligence are legally deficient and were properly dismissed by the trial court on Defendants' Motion for Summary Judgment. It is axiomatic under Washington law that:

“a non-moving party attempting to preclude a summary judgment may not rely on speculation or argumentative assertions that unresolved factual matters remain, or in having its affidavits considered at their face value, for upon the submission by the moving party of adequate affidavits the non-moving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.”

Peterick v. State, 22 Wn. App. 163, 589 P. 2d 250 (1977); *American Linen Supply Co. v Nursing Home Bldg. Corp.*, 15 Wn. App. 757, 551 P. 2d 1038 (1976); *Ashwell-Twist Co. v. Burke*, 13 Wn. App. 641, 536 P. 2d 686 (1975); *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 529 P. 2d 466 (1974); *Blakely v. Housing Auth.*, 8 Wn. App. 204, 505 P. 2d 151 (1973).

In a negligence case, the plaintiff has the burden of producing, among other things, evidence sufficient to support a finding of causation. *Whitchurch v. McBride*, 63 Wn. App. 272, 818 P. 2d 622 (1991), citing *Maltman v. Sauer*, 84 Wn.2d 975, 980, 530 P. 2d 254 (1975).

Causation has two elements, cause in fact and legal (proximate) cause. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P. 2d 77 (1985). A cause in fact is one without which the accident would not have happened. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 476, 656 P. 2d 483 (1983). In a negligence case, then, the plaintiff has the burden of producing evidence sufficient to support a finding that the defendant's negligent conduct was a cause in fact which is the same as saying that the plaintiff has the burden of producing evidence sufficient to support a finding that **the**

accident would not have occurred but for the negligent conduct of the defendant.

Whitechurch, supra, at 275. In the present case, plaintiff cannot establish causation beyond pure speculation, that is, plaintiff cannot show that “but for” defendants having installed a telephone cable on plaintiff’s property prior to his alleged injury, the alleged 2” X 1 ½ to 2” indentation in his property would not have existed. In short, plaintiff has acknowledged under oath that he is “assuming” that the small indentation was caused by Defendants because it was located in the area where the telephone line had been buried by Defendants. It is equally likely that the indentation in the ground where plaintiff allegedly caught his foot either (1) already existed prior to the work done by Defendants as the ground in question is comprised of dirt, rock and gravel and is uneven by nature; or (2) another person or other people walked in that area either before or after Defendants installed the cable; (3) wild and/or domestic animals were in the area and somehow made the small hole/indentation; (4) a rock or something else being dislodged from the ground given the plaintiff’s testimony that area is made up of “dirt, rock and gravel” and probably muddy. There are simply countless ways in which a small indentation as described by the plaintiff could have been caused on a portion of his property that he had not even seen for “several weeks” prior to his alleged

incident. To “assume” that such small indentation was caused by Defendants is simply insufficient to sustain his claims of negligence.

In denying plaintiff’s Motion for Reconsideration, the trial court relied on the Washington Supreme Court case of *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947), which unequivocally illustrates the need for a plaintiff to show causation that is beyond conjecture and speculation. In *Gardner*, the decedent was found at the bottom of the elevator shaft in the building where he worked. After he had fallen but before he died, he told a fellow employee that he fell down the elevator shaft. The subject elevator was such that if it was operated properly, the only elevator door that was open would be the door on the level where the elevator car was standing. However, it was possible for the elevator doors to be manipulated by someone such that the elevator would be brought down several floors but the doors where it had previously stopped were left open, thus potentially allowing someone to fall into the elevator shaft. There was no testimony as to on which floor the elevator was found after the decedent’s fall or what, if any, elevator doors were found to be open on the various floors of the building.

In *Gardner*, the plaintiff (the decedent’s widow) established that (1) the decedent fell down the elevator shaft and died; and (2) that there was evidence from which a jury could have found that defendants had failed to

provide a safe place for the decedent to work and that they were in violation of certain statutory duties in that regard given that the elevator “could be” manipulated in a manner to allow someone to fall down the elevator shaft. However, the Washington Supreme Court found that the plaintiff had failed to establish that the defendant’s negligence was a proximate cause of the decedent’s death because there were at least two equally reasonable explanations for the decedent’s fall; one of which would have been caused by the defendant’s negligence, the other of which would not have been caused by defendant’s negligence. The court stated that the test to be applied in this circumstance is whether the jury could determine that defendants were liable as a reasonable inference from the evidence or whether the verdict would rest on conjecture. In that regard, the court noted that:

“[t]he rule is well established that **the existence of a fact or facts cannot rest in guess, speculation, or conjecture**....In applying the circumstantial evidence submitted to prove a fact, the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference.” See *Gardner*, supra, at 808 (emphasis added).

In *Gardner*, the court emphasized that it is the plaintiff’s burden of proof to show not only that the defendant was negligent but also that his negligence in that respect was the proximate or efficient cause of the accident. *Gardner*, supra, at 809. In discussing that there were other

unexplained theories of how the decedent's accident occurred, the *Gardner* court quoted from *Paddock v. Tone*, 25 Wn.2d 940, 949, 172 P.2d 481, 486, (1946) as follows:

Nor can a plaintiff meet his burden of proving negligence merely by showing that he himself was free from contributory negligence, and that statement applies equally to his burden in the matter of proximate cause. In the present case, for example, the plaintiff was presumed to have been exercising due care and the jury so found but, so far as the evidence goes, he might, without any negligence on his part, have slipped or stumbled forward in front of the defendant's car or he might have been pushed or jostled by his companion, and the defendant would not have been liable for the accident. *Gardner*, supra, at 809.

As concluded by the trial court in this matter, the same is true in the present case. Plaintiff failed to eliminate other potential explanations for the alleged "indentation" in the ground over which he claims to have stumbled and sustained injury. As stated in *Gardner*, supra:

A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon 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. It is not sufficient that they be consistent merely with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well settled rule. It seems to us that we may reasonably draw other conclusions as to the cause of this injury from the facts in evidence than those contended for by the plaintiff. 'Verdicts must have evidence to support them, and must not be founded

on mere theory or supposition.’ (citation omitted). A jury will not be permitted merely to conjecture how the accident occurred.” (emphasis added). *Gardner*, supra, at 810.

As is clear from the above authority, plaintiff’s negligence claims in the present case are legally unsupported and his theory of causation would impermissibly allow a jury to speculate as to the cause of his alleged accident. This speculation on the part of a jury is not allowed in Washington. **“If there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.”** *Gardner*, supra, at 809. In the present case plaintiff has not and cannot—pursuant to his own admission in his deposition—determine beyond conjecture when the small indentation was created or how it was created.

Gardner, supra, relied on by the trial court in denying plaintiff’s Motion for Reconsideration in this case is still good law in Washington as noted in *Kuch v. United States*, 2007 U.S. Dist. LEXIS 72700, wherein the United States District Court for the Eastern District of Washington stated:

Under Washington law, “no legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, and without further

showing that it could not reasonably have happened in any other way.” *Kuch*, supra, at 11, citing *Gardner*, supra.

The State of Washington Supreme Court has also found that “a recovery cannot be had where the plaintiff’s evidence is equally consistent with the absence as with the existence of negligence.” See *Wilson v. Northern Pacific Railway*, 44 Wn.2d 122; 265 P.2d 815 (1954). In its ruling on the plaintiff’s Motion for Reconsideration, the trial court made it clear that he did not even consider the plaintiff’s allegedly erroneous declaration, which plaintiff amended in support of his Motion for Summary Judgment. The trial court, in making its ruling on the reconsideration, specifically stated he wanted to “put that issue aside.” (RP 35:18-25; 36:1 – 12) and requested that plaintiff’s counsel provide him with any evidence or facts “that show somehow that any of the defendants are responsible for this hole.” RP 36. The trial court, being indulgent, instructed plaintiff’s counsel, “Just take as much time as you need. What are the facts?” RP 36:4-5. Plaintiff then proceeded with the same conjecture and speculation that he had done throughout the case, as has been described herein.

In providing the parties with his ruling on plaintiff’s Motion for Reconsideration, the trial court ruled that the plaintiff’s “stumbling block” in this case was the case of *Gardner*, supra, wherein the Supreme Court established the rule that “if there is nothing more tangible to proceed upon

than two or more conjectural theories under one or more of which a defendant would be liable and under one or more which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.” RP 67: 9 – 25. In setting forth and applying that standard, the trial court concluded that the plaintiff had simply not been able to meet that standard, even with the court having specifically noted that it had not relied in any way upon the plaintiff’s allegedly erroneous declaration, which he had submitted in opposition to defendants’ Motion for Summary Judgment, and then having submitting an amended declaration on his Motion for Reconsideration. RP 68: 10 – 25. As stated by the trial court, “[t]he plaintiff cannot show by the required level of proof that there is a greater probability that the accident happened in such a fashion as is caused by the defendants’ negligence.” RP 68: 21 – 25.

3. The Trial Court Was Correct in Denying Plaintiff’s Motion for Reconsideration

After the trial court granted Defendants’ Motion for Summary Judgment, Plaintiff filed a Motion for Reconsideration per CR 59. Plaintiff based his Motion for Reconsideration on alleged misstatement of facts in his own declaration that he had submitted with his Response to Motion for Summary Judgment. As plaintiff explained in his opening appellate brief, the plaintiff’s original declaration provided that he had notice and knowledge of the alleged

hole prior to his alleged injury whereas his “amended” declaration that he submitted with his Motion for Reconsideration was to the effect that plaintiff did not have specific knowledge of the subject indentation/hole prior to his alleged accident. However, despite significant focus on these two declarations by the plaintiff in his opening appellant’s brief, the Plaintiff fails to appreciate that **the trial court did not rely on the inconsistency in them in denying plaintiff’s Motion for Reconsideration.** It is abundantly clear from the verbatim transcript on plaintiff’s Motion for Reconsideration, that the trial court indeed considered the plaintiff’s amended declaration on his Motion for Reconsideration but found that plaintiff’s claims still failed as a matter of law given his continued reliance on speculation and conjecture as to breach of duty and causation. (RP 68 -69).

While plaintiff states at the conclusion of his response memorandum that “Defendants have proven nothing” and “Defendant has submitted no testimony or affidavits...” plaintiff does not appear to understand that it is **not** Defendant’s duty to prove anything in this case. To the contrary, it is plaintiff’s obligation to prove to this court that there is a material issue of fact—beyond speculation, conjecture, argumentative assertions—that Defendants breached a duty to plaintiff in this case. The burden of proving negligence rests upon the plaintiff and the defendant is not required to assume the burden of proving that he was not negligent. *Lee & Eastes, Inc.*

v. Continental Carriers, Ltd., 44 Wn.2d 38; 265 P.2d 257 (1953). In this case, the plaintiff's argument seems to be that if Defendants at some point installed the telecommunications cable on plaintiff's property prior to his injury, then this somehow constitutes "circumstantial evidence" in support of his claim that Defendants must have been the cause of the small indentation that was allegedly present on ground that plaintiff hadn't seen in weeks prior to his alleged incident, and in an area of the property that was made of rocks, gravel and dirt. **"Where circumstantial evidence leads only to speculation, a verdict cannot be based on inferences drawn from the evidence."** See *Coleman v. Ernst Home Center*, 70 Wn. App. 213; 853 P.2d 473 (1993).

Finally, any argument that the plaintiff's deposition was taken under "duress" when he was acting pro se is an attempt by the plaintiff—who never raised the subject until defendants made their Motion for Summary Judgment—to exclude damaging testimony to the effect that plaintiff simply "assumes" Defendants caused his injury. It is undisputed that at **no time** did plaintiff ever advise counsel or the court that he was not prepared to proceed with his deposition or that he was attempting to retain counsel prior to being deposed. To the contrary, plaintiff proceeded, pro se, to take his own depositions of defendants' representatives **after his own deposition was taken**. A litigant appearing pro se is bound by the same rules of procedure

and substantive law as his or her attorney would have been had the litigant chosen to be represented by counsel. See *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993); *Batten v. Abrams*, 28 Wash. App. 737, 739, n. 1, 626 P.2d 984, review denied, 95 Wash. 2d 1033 (1981). Further, pro se litigants must comply with all procedural rules to the same extent as attorneys. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997); *City of Bonney Lake v. Delaney*, 22 Wn. App. 193, 196, 588 P.2d 120 (1978). A civil litigant is guaranteed counsel only in those proceedings where the litigant's physical liberty is threatened or where a fundamental liberty interest is at stake. See *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995); *Miranda v. Sims*, 98 Wn. App. 898, 902, 991 P.2d 681, review denied, 141 Wn.2d 1003, 10 P.3d 404 (2000). Plaintiff simply has shown no merit in his claim that his deposition taken in conjunction with this case should not have been used.

C. CONCLUSION

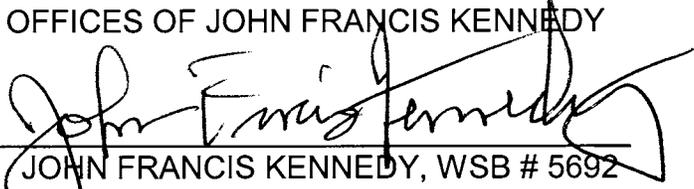
The trial court's dismissal of the plaintiff's claims against Defendants in this case was legally sound and appropriate based upon the Plaintiff's failure to articulate beyond conjecture both an alleged breach of duty and causation with regard to his alleged accident. As noted throughout, these elements are fundamental to his claims of negligence against Defendants. To allow plaintiff's claims to be heard by

a jury would be to impermissibly allow a verdict which is based upon conjecture and speculation.

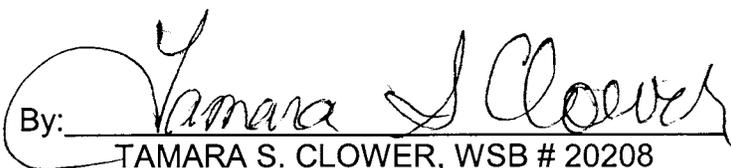
Defendants respectfully request that the Court affirm the trial court's dismissal of the plaintiff's claims, in their entirety, against Defendants for the reasons outlined above.

DATED this 7th day of April, 2008.

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CERTIFICATE OF SERVICE

I certify that on the 7th day of April, 2008, I caused the original and one copy of the Brief of Respondent to be hand delivered for filing with the Clerk of the Court of Appeals, Division II, State of Washington and further also caused a copy of the Brief of Respondent to be hand delivered to Barbara Corey, attorney for appellant: This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Signed at Gig Harbor, Washington, on the date below

Date: April 7, 2008.

By: Marge Gissberg
Marge Gissberg

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STATE OF WASHINGTON
BY [Signature]
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