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COURT OF APPEALS  
DIVISION II

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No. 37994-5-II

STATE OF WASHINGTON  
WASHINGTON COURT OF APPEALS, DIVISION 2  
DEPUTY

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CYNTHIA PHELPS and STEVEN PHELPS,  
Appellants-Plaintiffs

v.

SOUTHWEST WASHINGTON MEDICAL CENTER and  
SOUTHWEST WASHINGTON MANAGEMENT GROUP, INC.,  
Respondents-Defendants

And

FAMILY PHYSICIANS GROUP, PS  
Defendant

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REPLY BRIEF

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## REPLY TO RESPONDENT'S STATEMENT OF THE CASE

- A. Medical Center does not dispute any of the material facts recited in the plaintiffs' opening brief, and does not establish the absence of a genuine issue of material fact.**

Although Respondent Medical Center<sup>1</sup> does not dispute the accuracy of the plaintiffs' statement of facts, Medical Center's brief nonetheless contains a lengthy discussion of the facts. But that discussion is, at best, unhelpful.

First, Medical Center states that one of its goals is to "clarify the inferences" that may be drawn from the facts.<sup>2</sup> By that, Medical Center means that some facts are susceptible to more than one inference. For example, Medical Center argues that it is possible to infer that applying de-icer at the clinic was merely a preventative measure rather than a response to the presence of ice. And Medical Center argues that it is possible to infer that conditions in the parking lot were different near Cindy Phelps's car than they were in the section of the parking lot where Cheryl Gauker slipped when getting out of her car. But Medical Center's arguments about competing inferences is unavailing because at summary judgment *all* reasonable inferences must be drawn in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d

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<sup>1</sup> Only Respondent Southwest Washington Medical Center filed an answering brief; Respondent Southwest Washington Management Group did not.

<sup>2</sup> Medical Center's answering brief at 4.

886 (2008). Therefore, it is both unhelpful and irrelevant whether the facts might permit inferences favorable to Medical Center. What inferences to draw from the facts is the stuff of closing argument to the jury. At this stage, the only inquiry is whether viewing the facts, including all reasonable inferences, in the light most favorable to the plaintiffs, there are genuine issues of material fact.

Second, most of Medical Center's factual discussion is devoted to challenging factual contentions that the plaintiffs have never asserted. For example, Medical Center argues that Steven Phelps's testimony that he saw a water puddle near Cindy Phelps's car "does not establish that the water puddle . . . was frozen at the time of the incident and was the spot where his wife fell."<sup>3</sup> That is true, but the point is irrelevant. The plaintiffs do not argue that Steven Phelps's testimony "establishes" either that the puddle was frozen or that it was the site of the fall. Instead, Steven Phelps's testimony is relevant because it *does* establish that there was a puddle of water in Cindy Phelps's path on the morning of the incident. In combination with other undisputed evidence, Steven Phelps's testimony permits the reasonable inference that the puddle was frozen and caused Cindy Phelps's fall.

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<sup>3</sup> Medical Center's answering brief at 6.

Similarly, Medical Center argues that Deborah Lyons's testimony does not "establish" that there was ice in the parking lot at the time of the incident. Again, that is true and irrelevant. The plaintiffs have never argued that Deborah Lyons's testimony "establishes" that there was ice in the parking lot. Instead, it establishes that there was a puddle of water in the path that Cindy Phelps took to reach the clinic. That evidence, in combination with evidence that temperatures were below freezing on the morning of the incident, permit (and perhaps compel) the inference that the puddle was frozen when Cindy Phelps encountered it.

Finally, Medical Center devotes almost three pages to debating expert witness Wayne Slagle's opinion that there was sufficient precipitation in Vancouver to result in a water puddle in the parking lot on the morning of the incident. Medical Center's interest in that testimony is perplexing because the plaintiffs' brief does not even discuss it.

The record contains eyewitness testimony from Steven Phelps and Deborah Lyons that there was a water puddle near the rear of Cindy Phelps's car. And the record contains evidence that there was no precipitation between the time of the incident in the morning and the afternoon when the puddle was observed by Steven Phelps and Deborah Lyons. Given these facts, even Medical Center concedes that the evidence "rais[es] an inference that the

puddle had been present at 8:00 a.m.”<sup>4</sup> Since the evidence supports the inference that there was a puddle in the parking lot near Cindy Phelps’s car at the time of the incident, it is unimportant whether one believes Wayne Slagle’s explanation for how the water got there.

### REPLY TO RESPONDENT’S ARGUMENT

- A. The superior court erred by granting summary judgment against the plaintiffs’ claims because the plaintiffs presented evidence from which a trier of fact could reasonably conclude that Cindy Phelps’s injuries were caused by slipping on ice.**

Medical Center’s overarching theory is that summary judgment was appropriate because the evidence supports two equally plausible explanations for Cindy Phelps’s fall, and there is no evidentiary basis for a jury to reasonably find that one explanation is more probable than the other. Medical Center’s argument in support of that theory begins with several factual assertions.

First, after noting the presence of a curb near Cindy Phelps’s car, Medical Center proposes that she could have “stumbled or tripped on the curb or in the landscaped dirt area.”<sup>5</sup> According to Medical Center, this evidence provides an “alternative explanation for how Ms. Phelps could have fallen[.]”<sup>6</sup> But the existence of the

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<sup>4</sup> Medical Center’s answering brief at 15.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Medical Center's "alternative explanation" does not justify summary judgment. It is common in the law to have more than one plausible explanation for an event. Indeed, alternative theories are so common that CR 8(e)(2) expressly permits a party to allege "as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 919, 48 P.3d 334 (2002) (CR 8(e)(2) authorizes inconsistent alternative theories).

The existence of alternative explanations for an event justifies summary judgment only in the rare event that the evidence is so scant that there is no reasonable basis for the trier of fact to decide that one alternative is more probable than the other. In this case, the evidence does not stand such equipoise: "It is sufficient if [the] evidence affords room for men of reasonable minds to conclude that there is a greater probability that the thing in question, such as the occurrence of a fire, happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable." *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947) (quoting *Home Ins. Co. v. Northern Pac. R. Co.*, 18 Wn.2d 798, 802, 140 P.2d 507 (1943)).

Medical Center's theory is that Cindy Phelps tripped on the curb next to her car. Even if that theory is *plausible*, it cannot be

said that the evidence provides no basis for the trier of fact to find that one theory is more probable than the other. Indeed, the evidence casts significant doubt on the probability of Medical Center's theory that Cindy Phelps tripped on the curb.

The only evidence supporting Medical Center's theory is the presence of the curb near Cindy Phelps's car. The rest of the evidence undercuts the theory. There is no evidence that she stepped on the curb. Instead, she testified that she took at least one step then began falling, seeing the ground (not the curb) coming toward her. She did not testify that she stepped on or against the curb. And there would have been no reason for her to do so. Her path to the clinic did not require her to step up to the curb. And, as Medical Center concedes, there was plenty of room for her to walk beside her car without contacting the curb: "This left a space of two to three feet on the driver's side of Ms. Phelps' car to walk towards the rear of the vehicle."<sup>7</sup>

Therefore, Medical Center's theory comes down to asking the jury to find that Cindy Phelps tripped on a curb that she has no recollection of stepping on, did not need to step on, and had plenty of room to avoid. On the other hand, the plaintiffs' theory is that Cindy Phelps slipped and fell on a patch of ice. That theory is supported by evidence that there was a frozen puddle directly in

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<sup>7</sup> Medical Center's answering brief at 15.

Cindy Phelps's path to the clinic. Thus, the evidence is not in equipoise. Instead, a jury could reasonably find that the plaintiffs' theory more probably than not was what occurred. Because there is a reasonable basis for the jury to find in favor of the plaintiffs' theory of causation, summary judgment was improper.

Next, Medical Center discusses three cases, beginning with *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 75 (1999). The plaintiffs already discussed that case in their opening brief and explained how it is inapposite under the current facts. Medical Center then addresses *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947), in which the decedent fell to his death down an elevator shaft. *Gardner* is an example of a case where the evidence was so scant that there was no basis for the jury to decide that one alternative explanation for the accident was more probable than the other. As the court said, "As to what actually happened in this case, we have absolutely no evidence. There was no testimony as to where the elevator was found after the fall; no testimony as to what, if any, elevator doors were found to be open." *Id.* at 805. There also was no evidence of from what floor the decedent fell. *Id.* at 806. Thus, in *Gardner* there were only speculative theories for what caused the fall, but no evidentiary basis for a jury to decide that one theory was more probable than another.

Because this case arises from a summary judgment, the evidence and all reasonable inferences must be viewed in the light

most favorable to the plaintiffs. And here, unlike in *Gardner*, there is evidence from which a jury could reasonably conclude that the plaintiffs' theory is more probably what happened, compared with Medical Center's implausible theory.

Finally, Medical Center relies on *Burnett v. Essex Ins. Co.*, 773 So.2d 786 (La. Ct. App. 3<sup>rd</sup> Cir. 2000), a Louisiana intermediate appellate court decision. But *Burnett* provides no support for Medical Center's position.

In *Burnett* the plaintiffs alleged they suffered food poisoning from eating food at the defendant restaurant. After a *bench trial*, the court rendered judgment for the defendant. In *Burnett*, the court held a trial at which it heard causation evidence from all parties, then decided in favor of the defendant. And that factual finding was affirmed on appeal. Because *Burnett* did not arise from a summary judgment and did not involve a decision that there was insufficient evidence to submit the question of causation to the trier of fact, it provides no support for Medical Center's argument that summary judgment was proper here. Instead, *Burnett* supports the plaintiffs' argument that causation is an issue of fact to be resolved at trial after a full presentation of the evidence.

**B. Medical Center fails to provide any persuasive justification for excluding Wayne Slagle's testimony.**

Medical Center's discussion of the exclusion of Wayne Slagle's testimony is primarily notable for neither addressing the

substance nor the basis of Slagle's testimony. Medical Center offers an abstract discussion of the facts and holdings of cases from Washington and other jurisdictions. But that discussion is unhelpful since Medical Center makes no attempt to apply those cases to the specifics of Slagle's testimony.

The cases cited by Medical Center stand for the proposition that expert testimony must be based on an adequate evidentiary foundation rather than speculation and conjecture. *See, e.g., Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (stating the rule). The plaintiffs have no quarrel with that rule of law. But stating the rule merely begs the question: was Slagle's expert opinion based on an adequate evidentiary foundation? The plaintiffs' opening brief showed that it was, explaining that Slagle (like most forensic experts) relied on multiple reliable sources, including several witness statements, weather records, photographs, and personal observations. Significantly, Medical Center has declined to engage the plaintiffs on that issue by responding directly and meaningfully to the plaintiffs' discussion of the basis for Slagle's testimony. Instead, Medical Center has merely offered conclusory characterizations rather than a careful analysis of the basis for Slagle's testimony, suggesting that Medical Center recognizes that a close examination of Slagle's testimony would not advance its cause.

Furthermore, Medical Center's case authority is factually distinguishable because in each instance there was an obvious flaw in the basis for the expert's proffered opinion. For example, in *Miller*, the expert's opinion was based on nothing more than believing one witness over another without conducting any independent investigation to provide a basis for concluding that the witness's statement was more or less probably true. Here, as outline above, that is not true of Slagle's testimony. And in *Cummiskey v. Charndris, S.A.*, 719 F. Supp. 1183 (S.D.N.Y. 1989), *aff'd*, 895 F.2d 107 (2d Cir. 1990), the expert purported to offer opinions about the composition of certain floor tiles, and the adequacy of defendant's supervision practices, when the expert had no knowledge of either.

It is easy to see why those courts declined to consider the proffered expert testimony. By contrast, it is difficult to see why here the superior court refused to consider the well-documented, thoroughly researched, fully supported opinions of Wayne Slagle, and Medical Center has not even attempted to defend that decision.

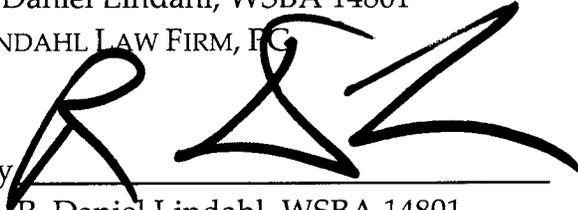
**CONCLUSION**

The judgment should be reversed and the case remanded for trial.

Dated: January 23, 2009.

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By

  
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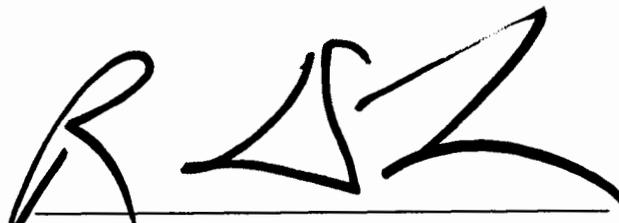
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**CERTIFICATE OF SERVICE**

I certify that on January 23, 2009, I mailed a copy of the foregoing Reply Brief to the persons listed below, at the addresses indicated, postage prepaid.

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