

No. 37994-5

WASHINGTON COURT OF APPEALS, DIVISION 2

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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, P.S.,

Defendants.

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RESPONDENT SOUTHWEST WASHINGTON  
MEDICAL CENTER'S BRIEF

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## I. INTRODUCTION

This appeal concerns the issues of the nature, quantum, and quality of evidence which is needed to establish the required element of “causation” in a premises liability personal injury case sounding in negligence.

Appellants Cindy and Stephen Phelps sued Respondents Southwest Washington Medical Center (“Medical Center”) and Southwest Washington Management Group (“Management Group”) for injuries and damages sustained by appellants arising from an alleged slip and fall occurring in a clinic parking lot on the morning of November 28, 2005.

Cynthia Phelps has no memory of the weather conditions or how, whether or where she slipped in the parking lot other than to say that she fell after taking one step from her car. There were no witnesses to the alleged slip and fall and no witnesses to the contemporaneous conditions of the parking lot at the location where Ms. Phelps’ car was parked. The evidence presented by appellant on causation negligence was simply too speculative to allow the plaintiff to survive summary judgment. The trial court properly granted summary judgment for respondents.

In the trial court’s April 11, 2008 ruling granting respondents’ Motion for Summary Judgment, the Honorable Roger A. Bennett explained the circumstances which justified his ruling: (1) No witnesses

testified to the existence of ice anywhere in the parking lot (despite Cheryl Gauker's testimony that she slipped on something when she parked her vehicle that morning at some other location in the parking lot; (2) no witness, including Ms. Phelps, could testify to observing Ms. Phelps slipping on ice, anywhere; (3) the statements that Cynthia Phelps attributed to Medical Center employee Darren Cook were inadmissible as there was no proper foundation laid that Mr. Cook was a "speaking agent" for the Medical Center on the topic of roads and/or parking lot conditions (for the purposes of the statements constituting an "admission").<sup>1</sup>

Separately, the trial court excluded the expert opinion of Wayne Slagle, Ph.D. under an Evidence Rules 702 and 703 analysis. His opinion was based upon a fact not proven—that Ms. Phelps slipped on ice. CP 332. Additionally, the Court concluded, "Nowhere in the record does Mr. Slagle state that experts in the witness's field customarily rely on unsubstantiated speculation, supposition, or hearsay, unsupported by any evidence in the record." CP 332.

Thus, the trial court's ruling rested on two fundamental bases: (1) the testimony and other evidence presented by plaintiff from sources and witnesses, excluding the expert opinion of Wayne Slagle, was

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<sup>1</sup> This latter point regarding the absence of speaking agent status is not challenged by appellant on appeal.

insufficient to establish causation in fact and defeat the motion for summary judgment and (2) the expert opinion of Wayne Slagle, P.E. was inadmissible under ER 702/703 and cumulative of the other evidence, which was insufficient evidence to establish causation.

The trial court noted that Ms. Phelps alternatively could have “fallen, tripped, stumbled or slipped.” CP 331. It correctly concluded that the evidence in the record showed that “while it is possible plaintiff Cynthia Phelps slipped on ice, it is not improbable that she fell for some other reason.” CP 333-334. The other reason could have been a curb and landscaped area right next to where Ms. Phelps parked her car. Under Washington law, these circumstances (*i.e.*, “it could have happened for one of several reasons”) justified the trial court’s granting of the Medical Center and Management Group’s Motion for Summary Judgment. This April 11, 2008 ruling should be affirmed on appeal.

## II. ISSUES ON APPEAL

A. The trial court did not err in granting summary judgment to the Medical Center and Management Group based on the speculative “fact witness” evidence presented by appellants on causation in fact (which did not include the expert opinions of Wayne Slagle, Ph.D.).

B. The trial court did not err by striking/refusing to consider the speculation-based expert witness opinions of Wayne Slagle, Ph.D.

(which were used by appellants in an attempt to overcome the speculation problems with appellants' other "causation" evidence).

### **III. STATEMENT OF THE CASE**

Respondent Medical Center does not dispute the relevant facts set forth in appellants' "statement of the case" for the most part. However, respondent Medical Center wishes to place the summarized testimony in context and clarify the inferences that appellants would like to draw from the evidence.

#### **A. The Application of De-Icer on Sidewalks and Entryways on the Morning of November 28, 2005 as a Precautionary Measure Did Not Establish the Presence of Ice in the Clinic Parking Lot.**

Appellants quote from the testimony of Mark Magistrale on pages 4 and 5 of their Brief. Mr. Magistrale was concerned enough about the weather to contact maintenance personnel at the Clinic "to assure that plowing and cleaning and de-icing and that sort of thing was occurring." This does not establish by reasonable inference that there was ice present in the parking lot where Cindy Phelps allegedly fell. It was a purely preventative measure.

#### **B. Clinic Employee Cheryl Gauker's Testimony Does Not Establish There Was Ice Near Ms. Phelps' Car.**

Cheryl Gauker testified that she slipped when exiting her car on the morning of the incident. Her exact testimony was as follows:

Q: What was the weather conditions [sic] like on November 28, 2005...

A: It was sort of an overcast day, cold. I think I had to scrape my windows before I left home. I just know it was cold.

CP 148 (Gauker deposition, page 14, line 23, page 15, line 10).

Q: When you got out of your car, do you remember noticing the condition of the parking lot at all?

A: I noticed when I got out of the car that I slipped and sat right back down in my van.

Q: When you say slipped and sat right back down, you mean, your feet slipped out from under you?

A: Yes, sir.

Q: But you were fortunately standing right next to your car so your bottom dropped back into the seat that you had just gotten out of?

A: Correct.

CP 148 (Gauker deposition, page 16, lines 5-15).

Q: All right. That's fine. So you got out of your car, slipped and fell back into it. Did you then get out again or did you do anything differently? Did you move the car? What happened next?

A: No. I decided to be extra careful here and I held onto my car and just sort of scooted along and held onto my car.

Q: Until you got over to the sidewalk here?

A: Yep. And I decided the sidewalk was - - looked a little slick. So I scooted along the sidewalk and walked in the ground cover until I could get to the door.

This evidence does not establish that the conditions that Cheryl Gauker believed existed next to her car and on the sidewalks were the same conditions that existed next to Cynthia Phelps' car.

**C. The Evidence Provided by Steven Phelps Regarding Conditions Later in the Day on November 28, 2005 Do Not Establish That His Wife Slipped and Fell on Ice in the Depression Located Near Her Car in the Parking Lot.**

Steven Phelps' deposition does not establish that the water puddle he said he saw somewhere near his wife's car was frozen at the time of the incident and was the spot where his wife fell.

Mr. Phelps' testimony on the conditions of the morning of the incident was as follows:

Q: Did you notice any freezing fog when you left the house?

A: I noticed the conditions were, I would not say hazardous, but I would say there was freezing fog. I-5 is such a heavily traveled freeway that there wasn't any major ice on that freeway, but on side roads from our house to the freeway, I notice that there were some icy spots.

Q: How about when you got to Tigard, when you got to work?

A: Again, it is such a heavily traveled road, there was no major ice, but in our parking lot there was a little bit.

Q: Is your parking lot paved?

A: Yes.

Q: And when we are talking ice, was this step on it and break it kind of ice or just enough to make the asphalt slippery?

A: Just enough to make the asphalt slippery.

Q: Not a hard freeze?

A: Correct - - or not a great amount of ice.

CP at 396 (S. Phelps' deposition, page 14, lines 5-25.)

As for the conditions in the clinic parking lot on the afternoon of the incident, Mr. Phelps' relevant testimony for his assumption of the location of the alleged accident was as follows:

Q: ... Was it your assumption when you took this picture that Cindy was walking to the door shown on the third page of Exhibit 4?

A. Correct.

Q. But she didn't tell you that?

A. No.

Q. Did anyone tell you that that's what they thought Cindy was doing that day?

A. No.

Q. Did anybody – has anybody described the actual route that Cindy took that day?

A. No.

Q. Has anybody shown you where Cindy fell?

A. No.

Q. Can you identify in this parking area that is area B--

- A. Uh-huh.
- Q. --On Exhibit 3, where Cindy fell?
- A. Where I think she fell?
- Q. Fair enough, where you think she fell?
- A. It would have been that spot right there next to that little island.
- Q. That spot? So on this Exhibit 3, there is a little white spot.
- A. Yeah, it is a tiny - - it is a parking space.
- Q. Okay. So it is your belief that she fell alongside her car as opposed to out in the parking lot?
- A. My belief is that she fell at the end of the parking - - of the stall of the parking spot.
- Q. Where there is a little puddle?
- A. Correct.

CP 398 (S. Phelps' deposition, page 24, line 3 to page 25, line 8.) This testimony is pure speculation, which is inadmissible to prove causation under Evidence Rule 602.

**D. The Witness Statement of Deborah Lyons Similarly Does Not Establish With Admissible Evidence What Cynthia Phelps Allegedly Slipped On Was Ice and Exactly Where She Slipped.**

Ms. Lyons' sworn statement also does not establish that Ms. Phelps slipped on ice or where that ice was supposedly located in the parking lot. It states:

We wondered on the way to FPG if we would be able to get the car or whether the parking lot would still be icy. Fortunately, it was no longer icy by 3:00 in the afternoon.

CP 224.

This assumption that there was ice in the lot near Cindy Phelps' car before 3:00 p.m. is not based on any admissible evidence. It is pure speculation and not admissible under ER 602 (lack of personal knowledge).

Ms. Lyons went on to make other assumptions and speculations in her declaration about the location of the alleged ice:

When we spotted Cindy's car, I stopped. Both Steve and I could see the back of Cindy's car. Both of us also could see that there was a depression in the pavement near the back of the car where the water had pooled up.

CP 224.

This testimony again is an assumption (i.e., speculation) that water had pooled in this spot prior to the alleged slip and then had iced over. There is no first-hand personal knowledge testimony of how or when the water got there or if and when it froze, if it did at all. The testimony violates ER 602, making it inadmissible.

Ms. Lyons went on in her declaration to identify when she first speculated as to the cause of the alleged accident and the location of the alleged slip:

There was no ice on the spot, but there was clearly a low spot and a pool of water. Both of us immediately (and I think independently) concluded that Cindy must have slipped on ice that had formed on that low spot where the pool was. We both basically said this to each other, almost simultaneously.

CP 224.

The fact that Ms. Lyons and Mr. Phelps engaged in joint simultaneous speculation as to (1) the “low spot”/pool of water being the place where the accident had happened, (2) ice had been in that spot that morning, and (3) that the water in the low spot must have been from the ice that had melted from that morning does not change the speculation into admissible evidence under ER 602.

Finally, Ms. Lyons’ statement that there was no other reason for Ms. Phelps to fall begs the question of her ability (or willingness) to perceive a condition that may or may not have existed insofar as Ms. Phelps may not have even slipped at all:

There was nothing else that I could see that Cindy may have tripped or slipped. It was pretty obvious to both Steve and I that there must have been ice on that water pool and that must have been where Cindy had fallen.

CP 225.

The photographs attached to the appellants’ brief show a curb around a landscaped area next to a parked car (presumably Ms. Phelps’

car). Based on Ms. Smith's inability to remember details of the incident afterward, it is just as likely that Ms. Phelps could have tripped or stumbled on that curb and fallen or tripped or stumbled on something in the landscaped area. This is why the court found the evidence of causation too speculative and insufficient to overcome summary judgment of the negligence claim.

**E. Wayne Slagle's Expert Opinion Was Based on Inadmissible Testimonial Evidence and Weather Information From Battleground, Washington and Portland, Oregon; It Was Not Supported By Weather Information For the Vancouver, Washington Area.**

Expert Wayne Slagle admitted in his deposition that he relied upon (1) what other people have told him regarding the existence of water at 3:00 p.m. in the afternoon on November 28, 2005, (2) weather reports showing it was cold enough to freeze and (3) statements by others that there were icy conditions in the general area to opine there was frozen water at 7:00 a.m. in the morning at the depression in the paved parking lot located near the rear of the parking stall where Ms. Phelps allegedly parked. CP 177. However, Mr. Slagle admitted, "I really don't know how [Ms. Phelps] slipped." CP 179. Neither did Ms. Phelps. She had no idea where she may have fallen. The depression at the rear of the car has not been validly connected by anyone to her injury.

Mr. Slagle had the opinions that: (1) 0.06 inches of precipitation was reported 32 hours before Ms. Phelps' accident did not evaporate in temperatures well above freezing; (2) that approximately 20 hours later, these traces of precipitation "combined" with unreported "mist" which was allegedly present for 12 hours before Ms. Phelps' accident and (3) formed a puddle of standing, frozen water at the rear of Ms. Phelps' car. CP 83 and 209.

It is undisputed from the record that there was no precipitation on November 28, 2005. It is also undisputed that only 0.06 (600ths of an inch) of precipitation fell in the Vancouver area between 12:40 a.m. and 1:53 a.m. on the morning of November 27, 2005, a full 32 hours before Ms. Phelps allegedly slipped. There was absolutely no evidence that these traces of precipitation "accumulated" as reported by Mr. Slagle. His opinion was pure conjecture and speculation.

Mr. Slagle's claim that a "mist" was "reported" for a 12-hour period prior to the accident was not supported by any of the weather records in evidence. Neither WSU nor Pearson Field reported this fog/mist even though they typically do. CP 207; 286-290; 292-296. This establishes that there was no adequate factual basis to support his claim that a mist was present for 12 hours on the morning of November 28, 2005. Mr. Slagle's 12-hour mist opinion was not supported by any

witness testimony in the case. While witnesses testified it was cold in the morning of November 28, 2005, no one testified that there was a mist or fog that morning. Indeed, Mr. Phelps allegedly called Ms. Phelps to tell her to watch out for slippery roads; he did not mention a mist had allegedly been present for 12 hours. CP 396.

There was no admissible evidence that 0.06 inches of precipitation reported between 12:00 a.m. and 2:00 a.m. on November 27 “combined” with the alleged 12-hour mist, 32 hours later to create a frozen puddle of water near the rear of Ms. Phelps’ car. CP 83 and 84. Mr. Slagle did not provide any scientific analysis or evidence showing how these alleged particles of water floated around for half a day and “combined” to make a 14-inch-wide sheet of frozen standing water at the rear of Mr. Phelps’ car.

Finally, Mr. Slagle’s opinion was that “extreme high humidity” prevented 0.06 of precipitation from evaporating. CP 209. That opinion was without any foundation or factual basis. The average humidity from November 28, 2005 was 77% with a high of 100%. CP 301. Most days of November even had averages above 77%, many recording highs of 100%. CP 300 and 301. If, as Slagle had opined, there is no reasonable chance for 0.06 inches of precipitation to evaporate because of this high humidity, then none of the 5.32 inches of rain that fell in the Vancouver area in November 2005 would have had a chance to evaporate. If that was true,

then by the end of November 2005, Vancouver would have resembled a skating rink with ice 5.32 inches thick.

#### **IV. SUMMARY OF ARGUMENT**

Appellants sets forth two assignments of error: (1) “the trial court erred by refusing to consider expert witness Wayne Slagle’s testimony that more probably than not, Cindy Phelps slipped and fell on an ice patch near the rear of her car” and (2) the trial court erred by granting summary judgment to the Medical Center and Management Group.

Respondent Medical Center believes that the issues in the appeal of this case should be cast in an order that is opposite of that used by appellants: (1) the trial court did not err in granting summary judgment because the speculative evidence (outside of Slagle’s opinions) could not establish causation in fact as a matter of law and (2) Wayne Slagle’s opinion testimony was cumulative, relied on the inadmissible and speculative causation evidence offered by the other fact witnesses, and the trial court did not abuse its “wide” discretion in excluding his opinions.

## V. ARGUMENT

### A. **First Issue: The Trial Court Did Not Err in Granting Summary Judgment to the Medical Center and Management Group Based on the Speculative Causation Evidence Presented By Plaintiff (Which Did Not Include the Expert Opinions of Wayne Slagle).**

#### 1. **The Evidence Presented By Plaintiffs (Outside the Expert Opinions of Wayne Slagle) Did Not Create a Genuine Issue of Fact As To Whether Cindy Phelps Slipped on Ice in the Parking Lot.**

The trial court correctly noted that it was undisputed that a curb and landscape dirt area was located to the immediate left of Ms. Phelps' car where she apparently parked in the morning of November 28, 2005. CP 331. 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.

More importantly, the curb and the landscaped area presented an alternative explanation for how Ms. Phelps could have fallen—she stumbled or tripped on the curb or in the landscaped dirt area. The trial court recognized this when it noted in its ruling that plaintiff could have “fallen, tripped, stumbled or slipped.” CP 331.

The court noted that it was also undisputed that seven hours after the alleged time of the incident, a puddle of water was seen at the rear of Ms. Phelps' car, between the rear of the car and the curb. No precipitation had occurred between 8:00 a.m. and 3:00 p.m., raising an inference that the puddle had been present at 8:00 a.m. The temperature in the other

areas of the county have been recorded at and prior to 8:00 a.m. as below 32 degrees. Thus, an inference could be drawn that the puddle near Ms. Phelps' vehicle was frozen over at the time she walked past, or stepped over, or stepped on it. However, nothing places Ms. Phelps at the rear of the car even if there was ice, let alone water.

The court below acknowledged that witness Cheryl Gauker also testified that she slipped on something when she parked her vehicle that morning at some other location in the parking lot. There was no evidence from Ms. Gauker that she slipped on ice in the parking lot. Even if she did, that cannot be used to extrapolate to Ms. Phelps' injury.

The other facts which the appellants could not dispute from the evidence were: (1) no witness testified to the existence of ice anywhere in the parking lot; (2) no witness, including Ms. Phelps, can testify to observing Ms. Phelps slipping anywhere. The trial court correctly noted: "The best that can be said from the totality of plaintiff's evidence, is that, unfortunately, it is possible that plaintiff Cynthia Phelps slipped on ice. The provable facts are consistent (that is, not inconsistent) with the ice-slip hypotheses; however, the evidence is likewise not inconsistent with other possibilities which plaintiff cannot exclude." CP 333.

This evidentiary situation falls squarely within established Washington case law regarding proof of causation in negligence. In

Marshall v. Bally's Pac West, Inc., 94 Wash. App. 372, 972 P.2d 475

(1999), the court held that the plaintiff failed to establish the proximate cause element of her negligence claims to survive summary judgment. The plaintiff in that case had no memory of how the alleged accident and her injury occurred. She had been exercising on a treadmill when it allegedly stopped abruptly in the middle of her exercise program. Plaintiff re-programmed the treadmill and pushed the start button after it stopped. The treadmill allegedly restarted at 6.2 mph rather than the usual 2.5 mph.

The plaintiff contended that the sudden, unexpected start at a higher speed threw her from the treadmill causing her injuries and her head struck a Plexiglas wall located behind the treadmill. Plaintiff testified at her deposition to the following: (1) She did not recall how "abruptly" the treadmill reached full speed; (2) she did not recall being thrown from the treadmill; (3) she did not recall striking the glass wall located behind the machine and (4) the last thing she recalled was resetting the machine after it stopped. On further questioning, plaintiff testified she had no memory of any of these events other than the resetting of the treadmill after it had stopped.

It is in this context, similar to the facts of this case, that the Marshall court held that plaintiff had failed to present sufficient evidence of causation to survive summary judgment on her negligence claim:

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 the 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 non-moving party's case which renders all other facts immaterial.)

Marshall, 94 Wn. App. at 379-380.

In a footnote, the Marshall court addressed the notion that equally-plausible explanations existing for the cause of an accident prevented the plaintiff from recovering in negligence. This is due to the evidentiary problems of speculation and conjecture. It stated:

Life Fitness correctly notes that it is equally plausible that Marshall incurred her injuries after tripping and falling or after fainting. As “there is nothing more tangible to proceed upon than two or more conjectural theories,” the trial court did not err in granting summary judgment. Gardner, 27 Wn.2d at 809, 180 P.2d 564 (citation omitted).

Marshall, 94 Wn. App. at 380, fn. 2, 972 P.2d 475 (1999).

The two conjectural theories for the cause of the fall in this case are: (1) slipping on ice or (2) stumbling/tripping on the curb or in the landscaped area near the curb or over her own feet. This scenario calls for the granting of summary judgment on causation in fact.

In Gardner v. Seymour, 27 Wn.2d 802, 180 P.2d 564 (1947), the widow of a store manager who was found at the bottom of an elevator

shaft at his workplace sued the owners of the store for wrongful death. In that case, the decedent had left one part of the store to retrieve some stock replacements. He used a hallway that had stairs going up and down and which contained an entrance to a freight elevator. Six minutes after leaving to get the stock, the decedent was found at the bottom of the elevator shaft with critical injuries. No one from the store saw the decedent in the intervening time, but he did tell a fellow employee that he fell down the shaft.

In Gardner, there were at least two equally reasonable explanations of the decedent's fall. The first hypothesis was that the elevator might have been stopped on the second floor at some time before the decedent's fall. A person on one of the upper floors may have opened the doors to the elevator on the fifth floor and brought the elevator to that door by using the cables. This would have resulted in leaving the doors open on the second floor. Then, the decedent, seeing the open doors on the second floor and assuming that the elevator was there, may have walked into the elevator shaft.

The second hypothesis was that the decedent may have opened the doors on the second floor with the intention of operating the cables in such a way to bring the elevator down to him. The decedent would have done this knowing that the elevator was above him and because he did not want

to walk up to it. The second hypothesis was, that while attempting to do this, the decedent may have fallen down the shaft. Considering these two hypotheses, the Supreme Court held that plaintiff “has failed to establish that appellant’s negligence was the proximate cause of [her decedent’s] death. Id. at 805-806.

The Supreme Court reversed the lower court judgment in favor of the decedent’s widow and dismissed the action. In so doing, it addressed the issue of speculative evidence of proximate cause in cases of negligence. The Supreme Court noted the “respondent cannot substitute the doctrine of *res ipsa loquitur* for proof of proximate cause in this case. Much as we sympathize with the respondent, the proof of proximate cause cannot be left to conjecture or speculation”. Gardner, 27 Wn.2d at 812.

The Supreme Court noted:

We have frequently said that, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which the 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.

Id. at 809. Again, the two conjectural theories in the instant case for the cause of the fall are: (1) slipping on ice; and (2) tripping/stumbling on the curb or in the landscaped area near the curb or misplacing her feet. A jury should not be allowed to hear this type of case based on the evidence.

While not controlling authority, the facts and holding in Burnett v. Essex Ins. Co., 773 So.2d 786 (La. Ct. App. 3<sup>rd</sup> Cir. 2000) further illustrate the propriety of the court taking a negligence case from the jury when the evidence of causation in a negligence case is equivocal.

In that case, both of the plaintiffs had pre-existing gastric disorders and sued the defendant restaurant for an alleged food poisoning-type infection causing severe gastric system complaints after they dined at the restaurant. There was no issue of exclusion of the opinions of plaintiffs' expert (treating physician) in the case on causation of the symptoms, but the doctor did not take cultures and could not specify the etiology of the infection (gastroenteritis) he diagnosed. Id. at 787.

The trial court granted judgment in the favor of defendants, with the following explanation:

When these two presented themselves December 23 to Dr. Ghanta, had they not given him a history of having eaten at Betty's, it would have been just another episode of abdominal pain, diarrhea, et cetera.

Absent the history given to Dr. Ghanta both plaintiffs' symptoms could have been caused by failure on their part to follow proper diet considering their health conditions. Considering their chronic conditions of abdominal distress associated with diarrhea, et cetera, to go into a restaurant where most of the food served is fried would seem to the Court to be asking for trouble. Their problem could have been caused by water or food contamination elsewhere. We don't know what the etiology of this problem is, whether viral or bacterial, and we don't know what the

incubation period would have been for the various infections from which they could have suffered.

Burnett v. Essex Ins. Co., 773 So.2d 786, 788-789 (La. Ct. App. 3rd Cir. 2000).

The Court of Appeals affirmed the trial court's grant of judgment, while noting:

Dr. Ghanta testified that if the Plaintiffs' history were correct, then he would relate their symptoms to the food consumed at the restaurant. However, Dr. Ghanta could not identify the source of the infections, and he could not rule out as other possible causes the local drinking water or from elsewhere in the community. Although a plaintiff need not scientifically identify the infection-producing organism to recover in a food poisoning case, he must still prove causation by a preponderance of the evidence. *See Arbourgh*, 740 So.2d 186. When the lack of more specific evidence of causation is considered in light of the Burnetts' medical histories, we find no error in the trial court's conclusion that they did not meet this burden. The evidence simply does not preponderate in their favor, given their propensity to gastric disorders and Dr. Ghanta's reliance solely on their accounts to formulate his opinion of causation.

Burnett v. Essex Ins. Co., 773 So.2d at 790.

The trial court in this case was equally correct when it granted summary judgment to dismiss the appellant's claims against the Medical Center.

**B. Second Issue: The Trial Court Did Not Err By Striking/Refusing to Consider the Speculation-Based Expert Witness Opinions of Wayne Slagle (Which Were Used by Appellants in an Attempt to Overcome the Speculation Problems with Plaintiff's Other Causation Evidence).**

**1. Standard of Review; Abuse of Discretion.**

The appellant's assignment of error regarding the trial court's exclusion of the expert Wayne Slagle's testimony correctly identifies the standard of review for this issue - - abuse of discretion. However, it underplays the amount of discretion given to the trial court in this evidentiary context.

As noted in Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (2001), "the trial court has wide discretion in ruling on the admissibility of expert testimony. [Footnote omitted.] [An appeals court] will not disturb the trial court's ruling ' [i]f the reasons for omitting or excluding the opinion evidence are both fairly debatable...' [footnote omitted]." Id. at 147 (emphasis added).

The trial court's ruling on the inadmissibility of Wayne Slagle's opinions was as follows:

I have reviewed the report of Wayne M. Slagle, plaintiff's expert witness, who states that in his opinion, plaintiff slipped on a puddle of ice near the rear of her car. To get there, he opines that sufficient precipitation occurred to cause water to collect and freeze in a low spot in said location. Having been told that plaintiff's slipped on ice, Mr. Slagle concludes she probably slipped on the puddle of ice near her vehicle.

Mr. Slagle's opinion in that regard is inadmissible, as it is based on a fact not proven, that plaintiff slipped on ice. Although ER 703 permits an opinion to be based on facts or data not admissible or in evidence, the facts or data must be of a kind generally relied upon by experts in the field. Nowhere in the record does Mr. Slagle state that experts in the witness's field customarily rely on unsubstantiated speculation, supposition, or hearsay, unsupported by any evidence in the record. CP 332.

The trial court properly applied the standard for admissibility of expert opinions when they are based upon conjecture or speculation provided by alleged fact witnesses. Far from being "fairly debatable," the trial court's reasons for the exclusion of the opinions of Mr. Slagle properly followed the standards of evidence and negligence law.

In Crowe v. Prinzing, 77 Wn.2d 895, 468 P.2d 450 (1970), the Supreme Court affirmed the granting of a directed verdict to the defendants in an automobile accident case. On appeal the plaintiffs contended that the exclusion of the opinions of their expert regarding the defendant's speed was improper. The Supreme Court disagreed and affirmed the exclusion of the evidence because there was no abuse of discretion:

Here, the expert witness, Mr. Smith, stated on voir dire:

A. \* \* \* If you want to tell me exactly how many feet of skid marks there was, then I can answer your question better but whenever there is a smudge or skid mark, you have got a locked up wheel.

Q. There isn't any evidence as to exactly what those skid marks are.

A. Well, I can't help you then.

The rule is that when an expert witness cannot properly express an opinion on the facts, it would be error to allow the testimony. O'Donoghue v. Riggs, 73 Wn.2d 814, 440 P.2d 823 (1968). In the instant case, the trial court believed that the expert witness' testimony was too speculative, and it was not allowed. Having examined the record, we do not believe that there was an abuse of discretion by the trial court to justify an overturning of its ruling and refusing to admit the testimony of the expert witness.

Crowe, 77 Wn.2d 895, 898, 468 P.2d 450 (1970). The expert basing his opinion on a road mark he did not even know for a fact was a skid mark is akin to Mr. Slagle basing his opinions on the assumptions of lay witnesses that there was ice and a slip on ice or that there was some sort of frozen precipitation resulting from a mist.

Likewise, in Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (2001) the trial court excluded the testimony of the plaintiff's expert accident reconstructionist and granted summary judgment. The opinions at issue were by a reconstructionist regarding where on a roadway the plaintiff's son was struck.

The negligence case against the City of Federal Way was based on the theory that the City failed "to adequately or properly perform design, engineering, and maintenance duties instrumental to keeping the roads, streets, sidewalks, and lighting in a reasonably safe condition for ordinary

travel by persons using them.” Id. at 143. There were conflicting accounts as to where the plaintiff’s son was standing when he was struck by a car driven by 87-year-old Ralph Likins.

The City contended that the boy was skateboarding in the middle of the road when he was struck and submitted eyewitness and expert declarations supporting its view. The plaintiffs offered the declaration of a friend of her son’s who was standing next to her son when he was hit. That person testified that both he and the plaintiff’s son were outside the fog line, off the traveled portion of the road and were not on their skateboards when Mr. Likins’ car struck the plaintiff’s son. The plaintiff’s expert, Kenneth Cottingham, also provided a declaration that, in his opinion, the accident happened the way that Wesley Richards said it did.

The Court of Appeals in Likins addressed the sufficiency of the evidence outside of the expert opinions of Kenneth Cottingham to prove liability of the City and negligence. It stated:

In this case, [plaintiff] contends that the accident occurred when Likins vehicle crossed over the fog line and onto the shoulder of the road, striking [her son]. [The plaintiff] claims that if the City had taken additional precautions, such as installing raised pavement markings on the fog line, lowering the speed limit, posting additional road signs, Likins “would have been likely to be more alerted to possible presence of pedestrians, enabling him to avoid a collision.” But like the driver in Johannsen, Likins passed away before he could give his own sworn account of how the accident occurred. There is no direct or circumstantial

showing that Likins was, in fact, confused or misled by the condition of the roadway. Like the plaintiffs in Johannsen and Kristjanson, the most [the plaintiff] can show is that the accident *might* not have happened had the City installed additional safeguards. [The plaintiff's] contentions "can only be characterized as a speculation or conjecture." [Footnote omitted.] Accordingly, a jury could not reasonably infer that had the City implemented the additional precautions Cottingham suggested, Likins would not have crossed the fog line and hit [the plaintiff's son]. We conclude summary judgment was proper. Here, because [the plaintiff] failed to satisfy her burden of producing evidence showing that the City's negligence proximately caused [her son's] injuries.

Miller v. Likins, 109 Wn. App. 147, 34 P.3d 835 (2001).

In our case, like in the Miller v. Likins case, the appellants have a gap in their evidence. This is due to Ms. Phelps' inability to remember nor anyone else to testify to exactly what happened. In Miller v. Likins, the driver who struck the plaintiff's son had died and was not available to provide testimony supporting plaintiff's theory. Plaintiffs herein, realizing that they have a gap in their evidence, have put forth the declaration of expert Wayne Slagle to fill that gap. The attempt to fill a gap in required causation evidence with the opinions of an expert was rejected by the trial court in this case as it was in Miller v. Likins.

In Miller v. Likins, the trial court addressed the speculative nature of the basis of expert Cottingham's opinions:

The City argues that Cottingham's opinion about where on the roadway Crumbach was struck is speculative and lacks

an adequate factual basis. We agree. Cottingham admits that he did not perform a quantitative analysis to support his version of the facts of the accident. At his deposition, Cottingham testified that he had no way of determining where the point of impact in this accident occurred.

....

When asked if there was any basis, other than Richards' declaration for forming his opinion that [the plaintiff's son] was hit on the shoulder of the road, Cottingham stated that the physical damage to the vehicle [f]its being hit on the shoulder, but also fits being hit in the lane of traffic."

Considering this testimony, the trial judge reasonably concluded that Cottingham's opinion as to where [the plaintiff's son] was located when he was struck was based solely on Richards' declaration, and thus lacked an adequate factual basis. It is unclear how, relying only on Richards' statements, Cottingham could have formed an expert opinion on a more probable than not basis" that [the plaintiff's son] was "off the vehicle travel portion of the roadway" when he was struck. Therefore, we conclude the trial court was within its discretion in excluding the testimony. [Footnote omitted.]

Miller v. Likins, 109 Wn. App. at 148-150.

Federal courts have similarly rejected attempts of plaintiffs to prove a required element of a negligence case based on speculation and expert opinions premised on speculation.

In Cummiskey v. Chandris, S.A., 719 F.Supp. 1183, 1185 (S.D.N.Y. 1989), aff'd, 895 F.2d 107 (2nd Cir. 1990), the plaintiff claimed she slipped and fell on a tile floor aboard a passenger vessel. Although plaintiff saw nothing on the floor before her fall, her companion

noticed that the tile floor and adjacent rugs were wet. Id., at 1185. In granting the shipowner's motion for summary judgment, the court held that the plaintiff failed to prove the ship had actual or constructive notice of the wetness. Id., at 1188. Importantly, the Cummiskey court rejected plaintiff's efforts to prove notice with inadmissible hearsay or irrelevant facts, including expert evidence:

Suspicion, conjecture, and speculation are not enough .... The reported fact issue must be actual rather than theoretical, real rather than imaginary. Plaintiff has thus failed to produce any expert evidence to demonstrate a genuine factual dispute with respect to defendant's constructive or actual notice of the wetness. (Emphasis added)

719 F.Supp. at 1188.

In Cummiskey, the plaintiff fell on a wet spot and plaintiff's expert identified four possible causes, including unsuitable tile material in a bar area, irregular surface of the tile material, negligent arrangement of lounge furniture and inadequate supervisory personnel to monitor activity in the bar area. Id. The expert relied on depositions, photographs of the lounge area, a general arrangement drawing of the vessel, and interrogatory responses. Id.

In viewing the value, weight and admissibility of the expert opinion, the Cummiskey court applied ER 703, which requires trial court inquiry into the basis on which an expert opinion is formed. Id. at 1188-

89. The court rejected the expert opinions because they were theoretical speculations. Id. at 1189. The court specifically ruled that ER 703 does not preclude the granting of summary judgment against a party who relies solely on an expert's opinion which has no other basis than theoretical speculation. Id., citing United States v. Various Slot Machines on Guam, 658 F.2d 697 (9th Cir. 1981) (expert must back up his opinion with specific facts, not mere assertions without factual basis).

In Cummiskey, the expert opinions were rejected because the expert could not explain how he came to his conclusions with respect to the composition of the tile. Id. at 1189. There was no evidence of the composition of the tile from the photographs or the general arrangement drawings. Id. The court commented that the discovery period should have allowed the plaintiff to resolve the question of the tile surface either by inspection, by other discovery routines, or by stipulation from defendants. Id. The court similarly rejected the expert's opinion concerning inadequate supervisory personnel in the bar area based on lack of personal knowledge. Id. at 1189-90. The Cummiskey expert had no first-hand knowledge of the ship's supervisory practices and it was unclear how he came to the conclusion that no supervision existed. Id. Because there was no evidence presented to support his opinions, the expert's opinions on causation were based on speculation and not fact. Id.

Because the expert testimony was unreliable and unfounded, it was insufficient to defeat defendant's motion for summary judgment. Id. at 1190. The court concluded:

Merely stating the opinion that the tiles were defective, the traffic monitored incorrectly or the furniture arrangement somehow improper with no supporting facts to sustain these conclusions does not create a factual dispute for the jury.

Id.

In the instant case, although the trial court did not expressly rule on the unreliability and thus the inadmissibility of the plaintiffs' expert opinions, that ground is certainly an alternate or at least supporting ground for this court's ultimate conclusion. The plaintiffs' expert, Wayne Slagle, lacked a personal knowledge foundation to support his conclusions and opinions, no less so than the Cummiskey expert.

In Fedorczyk v. Caribbean Cruise Lines, Ltd., 82 F.3d 69 (3<sup>rd</sup> Cir. 1996), the injured plaintiff passenger on a cruise ship was unable to prove that the alleged unsafe vessel bathtub condition in fact caused her slip and fall injury. 82 F.3d at 74. Despite expert opinion that there should have been additional anti-skid strip area in the bathtub, the court ruled that plaintiff had not met her burden of proof. Id. The court reasoned that the injured passenger could have fallen in the bathtub "for reasons other than Royal Caribbean's negligence." Id.

The Fedorczyk court ruled that the expert's conclusion that the failure to adequately strip the bathtub caused the passenger's accident was not legally admissible. Id. at 75. The court ruled that "an expert opinion is not admissible if the court concludes that an opinion based upon particular facts cannot be grounded upon those facts." Id., citing 1 McCormick on Evidence, § 13, at 56. Importantly, the court added that in order for an expert opinion to be admissible, the technique the expert employs in formulating an opinion must be reliable and if it is not, it is based on speculation or conjecture and must be stricken. Id. The court reasoned:

No evidence presented tends to prove Fedorczyk was standing either on or off the stripping at the time she fell. Without such evidence, the jury is left to speculate whether Royal Cruises' negligence was in fact the cause of her injury. A mere possibility of causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balance, it becomes the duty of the court to direct a verdict for the defendant.

Id., at 75, citing Restatement (Second) of Torts, § 433B (1965).

Finally, besides the problem that the speculative foundation of the "opinions" prevents them from being admissible, Mr. Slagle did not establish that experts in his field customarily rely upon unsubstantiated speculation, supposition, or hearsay, unsupported by any admissible

evidence, to support an opinion as to the location of an alleged slip and fall and the cause of the fall. See ER 703. This was an additional proper basis for the court to exclude the opinions of Mr. Slagle in deciding and granting the Medical Center's motion for summary judgment.

The trial court acted within its "wide discretion" in excluding the testimony of Wayne Slagle in deciding the motion for summary judgment by the Medical Center. This ruling was proper and should be affirmed.

## VI. CONCLUSION

There is no direct evidence that Ms. Phelps slipped to cause her fall. There is no direct evidence that Ms. Phelps slipped on ice. The inferences on which appellants make their causation case are no more than speculation. Based on the record and applicable law, the order of summary judgment (including the ruling excluding the opinions of Wayne Slagle) and final judgment entered after that order should be affirmed.

DATED this 30th day of December, 2008.

FORSBERG & UMLAUF, P.S.

By: William C. Gibson

John P. Hayes, WSBA #21009

William C. "Chris" Gibson, WSBA #26472

Attorneys for Respondent-Defendant

Southwest Washington Medical Center

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing  
RESPONDENT SOUTHWEST WASHINGTON MEDICAL CENTER'S  
BRIEF on the following individuals in the manner indicated:

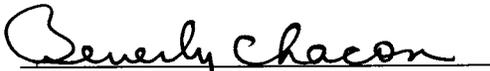
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COURT OF APPEALS  
DIVISION II  
08 DEC 31 PM 1:49  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

SIGNED this 30<sup>th</sup> day of December, 2008, at Seattle, Washington.

  
Beverly Chacon