

NO. 66916-8-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

JULIA S. SINEX, as Personal Representative
of the Estate of Matthew Richard Howard,
and on behalf of DYLAN DAVID HOWARD,
the surviving son of Matthew Richard Howard,

Appellant,

v.

WILLIAM L. BICE and SUSAN E. BICE, husband and wife
and the marital community comprised thereof, and, LANDMASTER
CORPORATION, d/b/a The Bathtub Doctor,
a Washington corporation,

Appellees.

Appeal from Superior Court of King County
The Honorable Susan J. Craighead
No. 09-2-46732-3

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I. INTRODUCTION

[T]he question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.

Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 935, 653 P.2d 280 (1982).

Plaintiff's evidence establishes that the stairway at issue was replaced 10 days before Mr. Howard was injured (CP 66, 68) and that the new stairs differed significantly from what had been there before. CP 176. Julia Sinex heard a loud thumping sound like someone falling down the stairs just moments after Mr. Howard left their apartment. CP 176. Plaintiff's evidence also establishes that Julia went outside immediately after hearing the thumping sound and found Mr. Howard lying on the ground at the bottom of the stairs with a pool of blood near his head. CP 176.

Despite this evidence, Defendants repeatedly claim that Plaintiff must rely on speculation to show that Mr. Howard fell down the stairs. But, ironically, it is the Defendants who posit all sorts of speculative theories regarding what happened to Mr. Howard. They speculate that Mr. Howard may have been assaulted, even though Julia did not see anyone in the area when she found Mr. Howard lying unconscious on the ground. CP 176. They speculate that Mr. Howard may have fallen while trying to light a cigarette, but there is no evidence of any cigarettes or lighters being found on, under or near the stairs. They also speculate that Mr. Howard may have tripped over his shoelace, but there is no evidence that his

shoelaces were untied. They even go so far as to speculate that Mr. Howard was intoxicated at the time he fell, based on a negligible blood alcohol level of .013 a little over one hour after Julia found his unconscious body at the bottom of the stairs. CP 100; 105; 103. They make this claim even though Mr. Howard's treating doctor corrected his report to indicate that Mr. Howard was not intoxicated (CP 207, 217), and Julia Sinex testified that Mr. Howard was acting normally and did not appear to be affected by alcohol or drugs of any kind at the time he left the apartment to go down the stairs. CP 175-176.

None of Defendants' speculative theories are supported by any credible evidence. The only reasonable conclusion that can be drawn from the actual evidence in this case is that Mr. Howard fell down the stairs due to the defective condition of the stairway.

The cause in fact prong of proximate cause involves a determination of some physical connection between an act and an injury and is generally left to the jury. *See Schooley v. Pinch's Deli-Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998); *Rucshner v. ADT, Sec. Systems, Inc.*, 149 Wn. App. 665, 686, 204 P.3d 271 (2009). A logical, causal connection between an act and the consequence of that act satisfies the cause-in-fact prong of proximate cause. *See Hartley v. State*, 103 Wn.2d 768, 778-779, 698 P.2d 77 (1985); *Rucshner, supra*, at 686. As pointed out in Appellant Sinex's Opening Brief, proximate cause can be proved by inferences arising from circumstantial evidence. *Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978).

The evidence in this case establishes that the subject stairway deviated substantially from applicable code requirements and safety standards. Two human factors experts stated that these deviations increased the probability of people falling when using the stairs. CP 147-150, 158, 181-182. Despite Defendants' claims to the contrary, this evidence, in conjunction with the reasonable inferences from Julia Sinex's testimony and the lack of evidence to support the scenarios suggested by Defendants, creates a strong inference that the defective condition of the stairway was a proximate cause of Mr. Howard's falling down the stairs and being injured.

Based on this evidence, the trial court erred in granting the Defendants' summary judgment motions. The trial court should be reversed, and this case should be remanded for trial.

II. ARGUMENT

A. **The inference that Mr. Howard's injuries were caused by a fall down Defendants Bices' defective stairway is rooted in fact.**

Defendants Bice state that "[f]or an inference to be reasonable it must be rooted in fact." *See Respondents Bices' Brief* at 13. The inference that Mr. Howard fell down the stairs due to defects in the stairs *is* rooted in fact. This inference is based on Julia Sinex's testimony in her declaration:

Matthew stepped outside our apartment and within just a few seconds, I heard a loud thumping noise, as though someone was falling down the stairs. I immediately went outside and saw Matthew at the bottom of the stairs, lying on the ground with a pool of blood near his head.

....

Just a few days prior to Matthew's fall, new stairs had been built from our apartment to the ground level. The new stairs were of odd shape and size. The new stairs were much different than what had been there before. They seemed to be steeper and the steps did not seem to be as wide or uniform as the ones that had been replaced, especially at the top of the stairs.

CP 176.

As stated in *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 106 P.2d 314 (1940),¹ “if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.” *Prentice Packing & Storage Co.*, 5 Wn.2d at 163. *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 78 P.3d 177 (2003), illustrates this rule of law.

Conrad involved an elderly woman who suffered a femur fracture while in a nursing home. The fracture compounded severely, requiring amputation of her lower leg. A jury found the nursing home liable, but exactly how and why her leg fractured was vigorously contested at trial.

There was no direct evidence of the cause of the decedent's femur fracture. As in this case, the defendant argued that the circumstantial evidence presented only alternate possibilities and that the jury's finding of causation was based on mere speculation. Based on expert medical testimony, the plaintiff argued that the decedent's leg fracture was not the result of osteoporosis and could only have occurred by a rotational

¹ *Prentice Packing & Storage Co.* is cited in Respondents Bices' Brief at pp.14-15.

mechanism or twisting force, more probably than not the result of someone catching the decedent's leg in the bed rails or dropping her on the floor.

A major issue on appeal was whether the circumstantial evidence was sufficient to support liability against the nursing home for the decedent's broken leg. The Court of Appeals noted that a plaintiff does not need to establish causation by direct and positive evidence. A plaintiff need only show "a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable." *Conrad*, 119 Wn. App. at 281.

The nursing home argued that there was no evidence that the decedent was moved or dropped by anyone from the nursing home just prior to her injury. The nursing home pointed out that the decedent's husband spent the evening with her and wheeled her back to her room himself. The injury was then discovered within five minutes by a nursing assistant who was alone with the decedent at the time, and the decedent was still seated in her wheelchair. A nurse at the nursing home testified that the decedent's husband admitted that he had recently repositioned the decedent's legs and asked if he could have caused the fracture. The nursing home also suggested that the fracture may have been caused by the decedent's foot falling off the wheelchair footrest and dragging on the ground. *Conrad*, 119 Wn. App. at 283-284.

Although there was no direct evidence as to how the decedent's femur fractured, the court held that the circumstantial evidence was

sufficient for a jury to conclude that negligence on the part of the nursing home caused the fracture. *Conrad*, 119 Wn. App. at 285-286. The plaintiff's expert witnesses testified that catching the decedent's leg in the bed rail or the bed sheets or dropping her during a transfer were the only situations that would cause her leg to twist and fracture, and that any of those scenarios would constitute a breach of the standard of care by the nursing home. *Conrad*, 119 Wn. App. at 282-283. The court found that the plaintiff had presented sufficient evidence to reasonably exclude every other hypothesis other than the decedent's injury being caused by the nursing home, and that the jury had adequate circumstantial evidence to reasonably infer that the fracture was caused by the nursing home's negligence. *Conrad*, 119 Wn. App. at 285.

Here, as in *Conrad*, there is a logical sequence of cause and effect. There were significant defects in the stairs that increased the risk of someone falling. CP 147-150; 158; 181-182. According to Julia Sinex, after Defendant Landmaster replaced the stairs, the stairs were different from what had been there before. CP 176. It was dark when Mr. Howard fell down the stairs, except for an outside light, which Dr. Daniel Johnson states did not provide adequate illumination of the stairway. CP 156-157. Before Mr. Howard went outside, Ms. Sinex said that he was acting normal. CP 175. Moments after Mr. Howard left the apartment, Ms. Sinex heard a thump like someone falling and then went out and found him at the bottom of the stairs. CP 176.

Further, the evidence reasonably excludes the alternative hypotheses suggested by Defendants:

- **Mr. Howard was assaulted** – There is no evidence, either direct or circumstantial, to support this theory, other than a statement in a medical record, which is hearsay. The statement is not attributed to anyone. It is speculation by a medical provider. On the other hand, the evidence establishes that, when Julia Sinex went outside immediately after hearing a thumping sound, “[t]here was no one around or near the area.” CP 176. Julia heard nothing other than a thump like someone falling. *Ibid.* The sound was seconds after Mr. Howard left the apartment. *Ibid.*
- **Mr. Howard was intoxicated, missed some steps and fell** -- There is no evidence that Mr. Howard was intoxicated. Although he had consumed some beer the evening before his fall, there is no evidence that Mr. Howard was impaired at the time of his fall. Julia Sinex stated in her declaration that Mr. Howard “was acting in a normal fashion and did not appear to be affected by any alcohol or drugs of any kind” when he left her apartment. CP 175. Mr. Howard’s treating surgeon stated that his blood alcohol level of .013 at 3:15 a.m. “is not a level consistent with any intoxication.” CP 207; CP 105.² Defendants likewise speculate that Mr. Howard could have had drugs in his system but admit that no drug test was performed.
- **Mr. Howard was lighting a cigarette and not paying attention to where he was stepping** -- Although he went outside to smoke, there is no evidence that Mr. Howard was lighting a cigarette as he went down the stairs. There is no evidence of any cigarettes or lighter being found on, under, or near the stairs.

² Defendants Bice incorrectly state that the blood sample for the blood alcohol test was collected after 4:00 a.m. *Respondents Bices’ Brief* at p.3. It was collected at 3:15 a.m. CP 105.

- **Mr. Howard fell because he was tired** -- There is no evidence that Mr. Howard was tired when he left the apartment. As stated above, Julia said that Mr. Howard was acting in a normal fashion before he left the apartment. CP 175.
- **Mr. Howard did not fall on the stairs at all** – Defendants claim that there was no fresh chip in any of the wooden stairs, no blood stains, no scuff on a tread. But if Mr. Howard did not hit his head until he reached the ground, one would not expect to find blood stains on the stairs. Nor would one necessarily expect chips in the wood because these were heavy wooden stairs that had just been constructed. CP 165-166.

More importantly, Julia Sinex heard a loud thumping noise within a few seconds of Mr. Howard leaving the apartment. CP 176. It would take more than a few seconds to descend the stairs. The evidence establishes that: (1) Mr. Howard left the apartment and had to go down the stairs to be found on the ground; (2) moments after he left the apartment, Julia Sinex heard a thumping sound; (3) the stairs were defective, and those defects increased the risk of a fall; and (4) the stairs had recently been replaced and differed significantly from the stairs that were there before, especially at the top. CP 176. That is adequate circumstantial evidence to infer that Mr. Howard fell on the stairs. All other theories regarding what may have happened to Mr. Howard lack evidence to support them. The only actual evidence indicates that Mr. Howard fell down the stairs.

- **Mr. Howard tripped on a shoelace** -- There is no evidence that Mr. Howard was even wearing shoes with laces or if so, that they were found untied or loose or that they were long enough for him to have tripped on.
- **Mr. Howard could have fallen before reaching the stairs** -- There is no evidence that Mr. Howard fell before he reached the stairs. Indeed, if he had fallen on the landing, how would he have fallen all the way down the stairs? This scenario is extremely implausible.

- **Mr. Howard could have dropped a cigarette or a lighter or an iPod and fallen while reaching for it** -- There is no evidence of any object being found on, under, or near the stairs.
- **Mr. Howard could have tripped on a stair that was code compliant** -- At best, this is a factual question for the jury. It is much more likely that he fell due to the numerous defects in the stairway, which, according to expert testimony, increased the probability of a fall. In addition, almost every stair violated applicable safety standards. CP 181-182.

In summary judgment proceedings, courts are required to take all reasonable inferences in the light most favorable to the nonmoving party. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). As discussed above, the evidence in this case establishes a logical sequence of cause and effect. Contrary to Defendants' claim, the speculative scenarios suggested by Defendants are not "equally plausible" as Plaintiff's explanation – that Mr. Howard fell down the stairs due to the defective conditions of the stairway. The evidence simply does not support Defendants' explanations. But Ms. Sinex's testimony and the analysis of the dangerous conditions of the stairway by Dr. Johnson and Dr. Gill establish a greater probability that Mr. Howard fell down the stairs as a result of the defective conditions of the stairway rather than any other explanation. Viewing the evidence and the reasonable inferences therefrom in a light most favorable to the Plaintiff, genuine issues of material fact exist that should have precluded the trial court from granting summary judgment in this case.

B. Factual issues exist as to whether or not Defendant Landmaster built the subject stairs in an unsafe manner.

Defendant Landmaster claims that it merely replaced “rotting wood to its existing configuration in like manner” when it constructed the stairs. *See Brief of Respondent Landmaster* at 1. Significantly, Landmaster does not claim that the work it did on the stairs met applicable code requirements or safety standards. In addition, Julia Sinex’s testimony rebuts Landmaster’s claim that it did not alter the configuration of the stairs. Julia states that, after Landmaster worked on the stairs, the stairs were much different:

Just a few days prior to Matthew's fall, new stairs had been built from our apartment to the ground level. The new stairs were of odd shape and size. The new stairs were much different than what had been there before. They seemed to be steeper and the steps did not seem to be as wide or uniform as the ones that had been replaced, especially at the top of the stairs.

CP 176.

Ms. Sinex’s testimony regarding the odd shape and size of the stairs is supported by the measurements by human factors expert Dr. Daniel Johnson just ten days after Matthew’s fall. CP 146; CP 147-159. Viewing this evidence in a light most favorable to the nonmoving party, Appellant Sinex, factual issues exist as to whether or not Defendant Landmaster constructed the stairs in a negligent manner.

C. *Little v. Countrywood Homes* and *Moore v. Hagge* are distinguishable from this case.

Defendants discuss *Little v. Countrywood Homes Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006), at length. In *Little*, the plaintiff was injured while installing gutters on a house. The plaintiff and his brother

were working for a subcontractor hired by the defendant, a general contractor for a housing development. The plaintiff's brother was organizing equipment and packing it into their truck when he heard the plaintiff call him. When the plaintiff's brother went to investigate, he found the plaintiff on the ground. The plaintiff's ladder was also on the ground, and the plaintiff did not know what had happened.

The plaintiff filed suit against the defendant general contractor, alleging that he was injured as a result of the defendant's negligence. The defendant then moved for summary judgment, arguing that the plaintiff could not prove breach of a duty and/or proximate cause because neither the plaintiff, nor anyone else, knew how the plaintiff was injured. The trial court granted the defendant's motion, and the plaintiff appealed.

The appellate court affirmed the trial court. In doing so, the court stated that "[t]he claimant must establish that the harm he suffered would not have occurred but for an act or omission of the defendant." *Little*, 132 Wn. App. at 780. The court further stated that, to meet this burden, the plaintiff "needed to present proof sufficient to allow a reasonable person to conclude that the harm, more probably than not, happened in such a way that the moving party should be held liable." *Id.* at 781.

The court affirmed the trial court on the basis that the plaintiff did not produce evidence showing how he was injured:

Little contends he established, more probably than not, that Countrywood's negligence was "a 'substantial contributing cause'" of his accident and resulting injuries. We disagree. One may speculate that the ladder was not properly secured at the top, or that the ground was unstable. But even assuming that those

conditions constituted breaches of a duty that Countrywood owed Little, he did not provide evidence showing more probably than not that one of those breaches caused his injuries. No one, including Little, knows how he was injured.

Ibid.

In this case, Plaintiff does not have to speculate about whether the stairs were dangerous or whether the lighting was bad or the railings defective. All of that is established here, unlike the position of the ladder before the plaintiff in *Little* fell – a fact that could not be known, without witness testimony, after the ladder fell to the ground. Here the stairs were in the same condition after the fall as before the fall and were available for experts to evaluate.

In *Little*, there was no evidence to explain how the accident occurred. Here, Julia Sinex's testimony explains how the accident occurred – she heard a thumping noise like someone falling moments after Mr. Howard left the apartment, and there is evidence of defects at the top of the stairs. CP 147, 153, 158, 176.

Here, the evidence establishes more probably than not that Matthew Howard's injuries were caused by the defective stairs. The evidence shows that Matthew left Julia's apartment to go down the defective stairway to smoke. CP 175-176. Within a few seconds after he left the apartment, Julia heard thumping sounds like someone falling down the stairs. CP 176. Dr. Johnson's measurements show that the stairs were substandard, in violation of applicable code requirements, and unsafe. CP 150, 152-153, 157. In fact, almost every stair violated applicable safety standards. CP 181-182.

Unlike *Little*, Plaintiff has produced sufficient evidence to allow a reasonable person to conclude that the harm, more probably than not, happened in such a way that Defendants should be held liable. This evidence should have precluded summary judgment as a matter of law under CR 56(c).

Defendants Bice also rely on *Moore v. Hagge*, 158 Wn. App. 137, 241 P.3d 787 (2010). In *Moore*, a pedestrian plaintiff sustained injuries when he and a vehicle operated by the defendant driver collided on South 240th Street in the City of Des Moines. The plaintiff brought claims against the driver and against the city for its failure to provide a safe roadway. The trial court dismissed the plaintiff's claim against the city on summary judgment, and the plaintiff appealed. Because he had no memory of the collision, and no one saw him immediately before the collision, the plaintiff relied on his own testimony about his normal walking habits and expert testimony about roadway conditions in the accident vicinity to show that the city's failure to provide a safe roadway caused the accident.

The Court of Appeals upheld the trial court. In its opinion, the court noted that the investigating officer reported that "the pavement was dry, that the reflectorized lane markings, center buttons, and fog lines were clearly visible, and that the adjacent grass shoulder, open ditch, and gravel footpath were visible." *Moore*, 158 Wn. App. at 142. The court also noted that the city's engineering expert opined that "there was no unusual danger in S. 240th Street, in the vicinity where [the plaintiff's] accident

occurred” and that there was ample sight distance for pedestrians to see oncoming vehicles in either direction. *Id.* at 143. Based on this and other evidence, the court affirmed summary judgment in favor of the city.

Contrary to the evidence in *Moore*, the evidence in this case shows that the Defendants failed to provide a reasonably safe stairway. The undisputed evidence in this case establishes that the stairway at issue deviated substantially from applicable code requirements and safety standards. Human factors experts Dr. Daniel Johnson and Dr. Rick Gill both concluded that the defective condition of the stairs presented a dangerous condition for people using the stairs. CP 147-153, 157-158, 181-182. Julia Sinex stated that she heard a loud thumping noise like someone falling down stairs seconds after Mr. Howard left the apartment to go down the stairs. The circumstantial evidence, when viewed in a light most favorable to the Plaintiff as the nonmoving party, creates a strong inference that Mr. Howard fell down the stairs as a result of the defective and inherently dangerous condition of the stairs.

D. The statements in medical records relied upon by Defendants are inadmissible hearsay.

Defendants argue that Plaintiff should not be allowed to challenge the admissibility of the medical records relied upon by Defendants because Plaintiff did not move to strike them in the trial court. Defendants cite RAP 2.5, which states that an appellate court *may* refuse to review any claim of error which was not raised in the trial court. By its own terms, the rule is permissive and does not automatically preclude the

consideration of an issue like this at the appellate level. *See, e.g., In re the Welfare of BRSH and MRE*, 141 Wn. App. 39, 45, 169 P.3d 40 (2007). It is well within the discretion of this Court to consider whether the statements in medical records relied upon by Defendants are inadmissible hearsay. *See, e.g., In re the Welfare of BRSH and MRE*, 141 Wn. App. at 46 (“RAP 2.5(a) is expressly a discretionary rule . . .”).

The rationale underlying RAP 2.5(a) is that trial courts should have an opportunity to avoid or correct error, thus avoiding unnecessary appeals. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (“The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.”). This rationale applies to failures to object during a *trial*, not summary judgment proceedings. If the Court reverses the trial court and remands this case for trial, the admissibility of the statements in the medical records will have to be decided by the trial court, and a second appeal on that issue could be avoided by this Court addressing that issue now. The rationale behind RAP 2.5(a) – avoiding unnecessary appeals – favors this Court addressing the admissibility of the statements in the medical records at this time.

Appellant Sinex’s Opening Brief discusses why the statements in the medical records relied upon by Defendants are inadmissible hearsay. Those arguments will not be repeated here.

None of the medical records cited by Defendants attribute any statement about how the incident happened to Mr. Howard. They all indicate that Mr. Howard was agitated and unable to provide information about the incident.

None of the statements in the medical records cited by Defendants are admissible under ER 803(4) as statements for the purpose of medical diagnosis or treatment, because most of the statements are not even attributed to Mr. Howard or Ms. Sinex. While the statements that *are* attributed to Ms. Sinex are consistent with Plaintiff's theory of liability, they do not fall within ER 803(4)'s exception to the hearsay rule because they are not "reasonably pertinent to diagnosis or treatment" of Mr. Howard's injuries, which ER 803(4) requires for a hearsay statement to be admissible under ER 803(4). The circumstances of how Mr. Howard fell and hit his head have no bearing on the diagnosis of his condition (which was primarily based on imaging studies) or the treatment of his condition.

Defendants cite no case law applying ER 803(4) in the manner that they are asking this Court to apply the rule. In fact, the only case cited by Defendants, *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001), undermines Defendants' position. *Woods* involved the admissibility of medical providers' *trial testimony* – not medical records -- about statements that a patient made to them. ER 803(4) only allows for the admissibility of *testimony* by medical providers about statements made to them that are reasonably pertinent to diagnosis or treatment. ER 803(4) does not allow for the admissibility of statements in medical *records*. See

Tegland, 5C Washington Practice: Evidence, § 803.19 at p.67 (2007) (ER 803(4) is not the appropriate vehicle for introducing a patient's medical records).

Whether the statements about how the incident occurred that are attributed to Ms. Sinex in some of Mr. Howard's medical records are admissible under ER 803(a)(2) as excited utterances is a discretionary judgment. Clearly, only statements actually attributed to Ms. Sinex and only statements made in the immediate aftermath of the incident would possibly qualify as excited utterances. These criteria exclude Appendices A3, A4, and A5 to Respondents Bices' Response Brief from admissibility because the statements Defendants cite in those records are not attributed to Ms. Sinex (or to Mr. Howard). In addition, the record in A4 was two days after the incident. This leaves the records in A1 and A2 potentially being admissible under ER 803(a)(2). But the statements attributed to Ms. Sinex in those records are completely consistent with her declaration and Plaintiff's theory of liability, as discussed below.

Defendants also assert, without citing any authority, that the medical records are admissible "to prove that not once did Sinex or Howard tell any emergency health care provider that Howard fell because of any condition of the stairs." *Respondents Bices' Response Brief* at p.2. Plaintiff is aware of no legal authority that would support medical records being admissible to show the **absence** of statements contained therein. Such a rule of evidence would make no sense, because medical providers are not court reporters. They do not accurately transcribe everything a

patient or a patient's family member tells them. They paraphrase bits and pieces of what people tell them, sometimes quoting what a person says, sometimes misquoting what a person says, sometimes summarizing what the person said, and sometimes putting what the person said into the medical provider's own words. Medical providers simply do not record everything that they are told, and medical records therefore are not admissible to prove that a patient or patient's family member did not tell a medical provider something because it was not recorded in the medical records.

Finally, the medical records attached to Bices' Response Brief as Appendices A3, A4, and A5 do not attribute any statements about the incident to Julia Sinex and therefore cannot possibly qualify as statements of a party opponent under ER 801(d)(2). The statements attributed to Ms. Sinex in the record attached as A1 are difficult to read and include abbreviations. The statements would only be admissible through testimony from the paramedic who wrote the report as to what Ms. Sinex actually said. Likewise, the record attached as A2 does not purport to quote Ms. Sinex but rather summarizes information that the doctor obtained from her. Again, the doctor would have to testify as to what Ms. Sinex actually said for alleged statements by Ms. Sinex to be admissible under ER 801(d)(2).

E. Even if the statements in the medical records relied upon by Defendants were admissible, at best they would raise factual questions for a jury to decide.

Most of the statements in the medical records cited by Defendants are consistent with Mr. Howard falling down the stairs and hitting his head on the ground. The paramedic report (Appendix A1 to Bices' Response Brief) states that Ms. Sinex told the paramedics that she believed Mr. Howard "fell down outside stairs." CP 103. She told the paramedics that she heard a "loud crash" and then found Mr. Howard on the ground. She further told the paramedics that Mr. Howard had been "acting normally" before the incident. All of this is consistent with Ms. Sinex's declaration and is consistent with Mr. Howard falling down the stairs due to the defective conditions of the stairway.

The medical record from the emergency room cited by Defendants (Appendix A2 to Bices' Response Brief) is likewise consistent with Ms. Sinex's declaration and Plaintiff's theory of liability. The record states that Ms. Sinex told an unidentified medical provider that Mr. Howard was "completely lucid" before the incident. After Mr. Howard "stepped out for a minute," Ms. Sinex reported hearing a "loud thump." She then went outside and found him unconscious, having been "struck on the head." All of this is consistent with Ms. Sinex's declaration and Mr. Howard falling down the defective stairs and striking his head on the ground.

The third medical record cited by Defendants (Appendix A3 to Bices' Response Brief) is also consistent with Ms. Sinex's declaration and Plaintiff's theory of liability. First, it should be noted that the record does

not indicate that any of the information about the incident came from Ms. Sinex or Mr. Howard. The information could have been taken from other medical records that attributed statements to Ms. Sinex, could have been obtained verbally from other personnel at the hospital, or could include speculation by the person who wrote the report. In any event, the record states that Mr. Howard “was going up some stairs when he fell and hit his head.”³ Although the record states that Mr. Howard was going “up” rather than down the stairs, errors like this are common in medical records, which are often done under time pressures with many distractions. It does not make sense that Mr. Howard would have fallen backwards and ended up at the bottom of the stairs if he fell going up the stairs. The record further states that Mr. Howard’s “significant other went out and found him unconscious.” Again, this is consistent with Plaintiff’s explanation of what happened.

The fourth medical record cited by Defendants (Appendix A4 to Bices’ Response Brief) is also consistent with Plaintiff’s theory of liability. First, it should be noted that, like Appendix A3, it does not indicate that any of the information about the incident came from Ms. Sinex or Mr. Howard. The source of the information in the record is unknown. In any event, the record states that Mr. Howard “missed some

³ Defendants Bice mischaracterize the record, stating that it “recounts Howard’s report that he fell while running up the stairs.” First, the record does not indicate that Mr. Howard was the source of the statement in the record. Second, the record does not say that Mr. Howard was “running” on the stairs. It simply says that he was “going up some stairs when he fell.” See Appendix A3 to Respondents Bices’ Response Brief.

steps out in front of his house and fell” and had a severe head injury. This is consistent with Plaintiff’s theory of liability – that the defective condition of the stairs, which varied substantially in height and depth, caused Mr. Howard to miss a step and fall down the stairs.

Although this record also states that Mr. Howard “was intoxicated,” his doctor later corrected this error:

I have reviewed the record on Matthew . . . regarding my assessment that he was intoxicated the night of his admission and I apologize. I did definitely misinterpret his laboratory values. I thought he had a blood alcohol level of 130 and it was 13 which is not a level consistent with any intoxication, in fact minimal blood alcohol at all. So I have amended the records to reflect the fact that his blood alcohol on admission does not reflect any compromise associated with the use of alcohol and apologize for the confusion.

CP 207; *see also* CP 213, 217. The fact that the doctor made a mistake about Mr. Howard being intoxicated illustrates the likelihood that other statements in the medical records are also in error.

In addition, the medical records indicate that Ms. Sinex stated that Mr. Howard was acting normally and completely lucid, and her declaration states that he was “acting in a normal fashion and did not appear to be affected by any alcohol or drugs of any kind.” CP 175. Although the records suggest that Mr. Howard consumed some beer the evening of the incident, the only evidence is (a) Ms. Sinex’s testimony that he was acting normal and (b) the blood alcohol evidence, which indicates that whatever beer Mr. Howard consumed that evening must have been consumed long enough before the incident that almost all of the alcohol had left his system.

The only medical record cited by Defendants that is inconsistent with Plaintiff's theory of liability is a record stating that Mr. Howard was assaulted (Appendix A5 to Bices' Response Brief). But there is no indication in the record as to the source of this statement. It is not attributed to Ms. Sinex. It is not attributed to Mr. Howard. It may have been speculation by the medical provider who dictated the note. In any event, there is no evidence to support Defendants' theory that Mr. Howard was assaulted other than this inadmissible statement in a medical record. At best, the statements in the medical records cited by Defendants – even assuming that they are admissible – simply create questions of fact for a jury to decide.

III. CONCLUSION

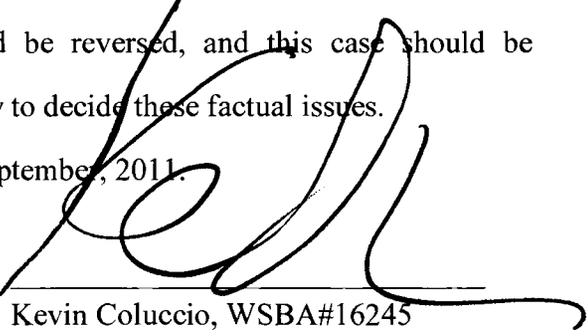
The circumstantial evidence in this case clearly supports a reasonable inference that Matthew Howard fell down the recently constructed defective stairway seconds after he left the apartment to go down the stairs. The stairway violated safety standards with regard to the variation in the height and depth of the stairs, the lighting, and the width of the handrail. These conditions are known to cause falls on stairs.

The only reasonable inference supported by the evidence is that Mr. Howard fell due to the safety hazards present on the newly constructed stairway. All other explanation for Mr. Howard's fall can reasonably be excluded because they lack any evidence to support them.

Because there are genuine issues of material fact as to whether or not the Defendants' negligence caused Mr. Howard to fall down the

stairway, the trial court should be reversed, and this case should be remanded for trial to allow a jury to decide these factual issues.

Dated this 21st day of September, 2011.



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