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Phillips v. Erhart Appellant's Reply Brief Dckt. 36801

No. 36801

In the Supreme Court of Idaho

JAMES M. PHILLIPS and GALE PHILLIPS,
individually and as a marital community,

Plaintiffs-Respondents,

v.

MILT E. ERHART and MARY C. ERHART,

Defendants-Appellants.

Appeal From The District Court Of The Fourth Judicial District For Ada County.
District Court No. CV PI 0707453
Richard D. Greenwood, District Judge Presiding.

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. Erhart Is Entitled To Judgment Or A New Trial Because Of Plaintiffs' Failure To Prove Proximate Cause.

Plaintiffs ignore a crucial element of the standard of review governing the denial of a motion for directed verdict. To support a verdict, evidence must be "competent." *Johannsen v. Utterbeck*, 146 Idaho 423, 428, 196 P.3d 341, 347 (2008). Evidence is competent only if offered by a witness whose testimony is based on facts within the witness' personal knowledge or on otherwise verifiable information. *Nevarez v. State*, 145 Idaho 878, 881, 187 P.3d 1253, 1256 (2008). Plaintiffs have no competent evidence sufficient to establish a *prima facie* case as to cause-in-fact.

There were no eyewitnesses to the accident. At trial, Phillips had no memory of how the accident occurred. Phillips testified:

> Q. Okay. And do you remember anything about the last trip [down the stairs]?
>
> A. I just know that I was just killing sometime waiting for that ride. And I had like one more box left in the office that I was going to run out to the trash can, some final few things, and then basically spend the next few minutes waiting for my ride.
>
> Q. Okay. Did you head out towards the trash can? And how did you go?
>
> A. I went out my door and out the exterior door and went down the stairwell like I have -- had a hundred times, done it a lot. So I just took the trash, heading out to the trash.
>
> Q. What's the next thing you remember?
>
> A. I remember the smell of concrete, broken concrete, like when you're jackhammering it with a jackhammer. I used to break out roads when we were putting in new pipe, and I remember the smell of broken concrete. (Tr. Vol. I, p. 287, L. 16 to p. 288, L. 10).

Phillips did not testify that a step moved. He did not testify that he touched or reached for a handrail. Phillips' testimony did not supply any evidence as to cause-in-fact.

Plaintiffs offered evidence that hours after the accident, Angela Sisco and Phillips' father took photographs showing that the third step (lower level, descending) was misaligned (Tr. Vol. I, p. 513, L. 17-24; p. 652, L. 15, to p. 653, L. 19). The evidence was insufficient. Plaintiffs failed to establish two facts: (1) the step was properly aligned before the accident, and (2) the step did not move after the accident but before the photographs were taken. The failure to prove both facts was important. Plaintiffs' theory is that the stair moved when Phillips stepped on it. But Phillips and Sisco had been using the staircase to take trash to the dumpster that morning (Tr. Vol. I, p. 287, L. 12-15; p. 509, L. 4-9). The steps were also available to other tenants and

their invitees. So prior to the accident the steps may have been in the position shown in the photographs. A jury could only speculate. Moreover, the steps were not barricaded following the accident. Any movement might have occurred after the accident. In fact, the evidence from plaintiffs' own witness Kenneth Doolittle supports the conclusion that it did. Doolittle was at the scene when Phillips was still there (Tr. Vol. I, p. 147, L. 13-24). At that time, Doolittle checked for problems with the steps (Tr. Vol. I, p. 148, L.8-15; p.156, L.11-17). He testified:

> Q. Did you notice any problems?
>
> A. ***No, I didn't. In fact, that was the first thing I thought of was, well, maybe he slipped because of the stair, that stair that -- none of the stairs were out of alignment that I could notice. And I did look for that very reason***, because I thought, well, maybe it's because of this issue that I had previously brought up to Mr. Erhart.
>
> * * *
>
> Q. Okay. But you physically went up and down the steps that day and observed no problems other than what you've told us about?
>
> A. Correct.
>
> Q. ***And the steps were not out of alignment on that day?***
>
> A. ***Correct*** (Tr. Vol. I, p. 148, L. 7-15; p. 152, L. 11-17; emphasis supplied).

Given Doolittle's testimony, the misalignment claimed by plaintiffs must have occurred after the accident.

Plaintiffs argue that a written statement given by Gale Phillips and contained in a doctor's medical record provides evidence of causation (Pl. 14-15, 32). Plaintiffs claim that defendants

failed to object to the record (Pl. 32). But they ignore that during the hearing on motions in limine, defendants objected to Gale Phillips' statement underlying the record (Tr. Vol. I, p. 2, L. 17 to p. 3, L. 17; R. Vol. II, p. 223, L. 3-4; p. 226, L. 19 to p. 224, L. 15). The court reserved its ruling (Tr. Vol. I, p. 3, L. 14-17). Rather than first requesting a sidebar to obtain the court's ruling, plaintiffs' attorney read the hearsay to the jury through his questions to Gale Phillips (Tr. Vol. I, p. 889, L. 12-25). Contrary to plaintiffs' brief, defendants objected and the Court sustained the objection:

> [Defense counsel] MR. CANTRILL: I'm making an objection, obviously. And we've gone through this so many times, I can't believe counsel had the effrontery to do this. That's a speaking objection. I'll ask it be removed. I do make an objection. It calls for inadmissible hearsay.
>
> THE COURT: And I'm going to sustain the objection (Tr. Vol. I, p. 890, L. 1-10).

So defendants are not seeking reconsideration of an evidentiary ruling. The court ruled in defendants' favor. *Coombs v. Curnow*, 148 Idaho 129, 219 P.3d 453, 461 (2009), is inapplicable.

Immediately after the court sustained defendants' objection, Gale Phillips testified that she "believe[d]" the statement to be accurate based on everything she knew (Tr. Vol. I, p. 890, L. 16 to p. 891, L. 3). Because the court had just sustained defendants' objection, her belief about the inadmissible hearsay was immaterial. Gale Phillips was incompetent to testify on the subject. In *State v. Gutierrez*, 143 Idaho 289, 292-90, 143 P.3d 1158, 1161-62 (2006), this Court stated:

> Idaho courts have not yet squarely addressed the standard necessary to prove the sufficiency of a witness' personal knowledge required for his or her testimony to be admissible as to a particular question. *See* I.R.E. 602. However, Rule 602 analysis of the United States Ninth Circuit Court of Appeals is instructive in this matter. Generally, testimony meets the requirements of Rule 602, and should be admitted by the court, if the jury or other trier of fact could reasonably find that the witness perceived the event. *See United States v. Owens-El*, 889 F.2d 913, 915 (9th Cir. 1989). The role of the court in assessing the offer of proof, then, is not to determine if the witness actually perceived the event, but whether the trier of fact could reasonably believe the witness perceived it. *Id.* This Court also notes that an objection to personal knowledge should be sustained if the testimony is based upon conjecture, hearsay, or any source of information other than that which the witness did actually perceive. *See* State *v. Hall*, 111 Idaho 827, 832, 727 P.2d 1255, 1260 (Ct. App. 1986; *see also* JOHN W. STRONG, McCORMICK ON EVIDENCE §10 (5th ed. 1999).

Here, Gale Phillips had no personal knowledge about the accident. Her alleged "knowledge" was apparently based on information from her father-in-law and/or others, and that made her recorded statement double hearsay (Tr. Vol. I, p. 890, L. 16 to p. 891, L. 3). In fact, Gale Phillips did not even state that she gained the information from her husband (*Id.*).

Plaintiffs also claim that Gale Phillips' written statement effectively became evidence due to defendants' failure to object to plaintiffs' closing argument (Pl. 32, citing Tr. Vol. I, p. 1006, L. 8-13). But closing argument is not evidence, and so it fails to provide an evidentiary basis for a verdict. By relying on improper closing argument about excluded evidence, plaintiffs are seeking a $1.36 million reward for disregarding a court ruling.

Although it denied defendants' post-trial motion, the trial court reaffirmed its exclusion of the hearsay evidence:

> ***The Court agrees with Defendant that Mrs. Phillips' comments, as recorded in the medical records, are not pertinent.*** The motion in limine intended to preclude her statement regarding Mr. Phillips' utterance from being entered into evidence. Voluminous records medical records were entered into evidence. The particular entry that Plaintiff refers to was not brought to the Court's attention. Had it not been mentioned in Plaintiff's brief, the Court would not be aware of it now. Further, the statement was not mentioned in closing. The medical records and other documents were stipulated into evidence in bulk. The documents were largely ignored from that point of trial on, other than portions the medical witnesses referred. ***In any event, Mrs. Phillips was not a witness to the fall and her "knowledge" could only be speculation based on this record.*** [R. Vol. III, p. 572, L. 20 to p. 573, L. 8 (emphasis supplied)].

The hearsay evidence was not competent.

Plaintiffs also claim that Phillips' alleged statement to Dr. Nancy Greenwald provided the needed evidence of cause-in-fact (Pl. 13-14, 31-32). Greenwald's testimony was based on her medical record containing James Phillips' alleged statement, so it was inadmissible hearsay (Pl. Ex. 30 at 1; Tr. Vol. I, p. 321, L. 18 to p. 324, L. 2). Phillips' statement was not given under oath, nor was Greenwald's medical record written under oath. Significantly, plaintiffs claim that the testimony was admissible under a hearsay exception "for purposes of medical diagnosis or treatment" in describing "the source" of symptoms or pain [Pl. 31-32, citing I.R.E. 803(4) and *State v. Hoover*, 138 Idaho 414, 418, 421, 64 P.3d 340, 344, 347 (Ct. App. 2003)]. Admitting the evidence for that purpose is understandable. Greenwald treated Phillips for a brain injury and was allowed to explain why. But Greenwald's testimony was inadmissible as proof of the matters asserted.

Regardless of defendants' failure to object, the evidence did not support the verdict. It was similar to the inadmissible hearsay evidence that plaintiffs tried to offer through Gale Phillips (R. Vol. III, p. 572, L. 20 to p. 573, L. 8). Besides, evidence must be probative to be supportive. *Dehlbom v. Industrial Special Indemnity Fund*, 129 Idaho 583, 541, 928 P.2d 42, 45 (1996) (evidence admitted without objection must be " 'sufficiently probative' " to support verdict). Greenwald did not witness the accident, and she testified that Phillips "didn't remember anything" about his actual fall (Tr. Vol. I, p. 323, L. 22-24). At time of trial Phillips had no memory of the accident (Tr. Vol. I, p. 287, L. 16 to p. 288, L. 10). So defendants could not verify Greenwald's medical record or Phillips' alleged statement at trial. Greenwald's testimony was not probative.

Greenwald's testimony raised more questions than answers. According to her medical records:

> On 03/20/06 he was in the Meridian office. He was descending a cement staircase and remembers the first two-three steps. He felt like the "rug was pulled out from under him" and he fell forward tumbling to the ground. His next recollection is a woman holding his hand telling him that everything was going to be okay (Pl. Ex. 30 at 1).

If he remembered two or three stairs, did he slip on the fourth — a non-defective step? Just because he remembers a step does not reasonably infer that he slipped on it. It is equally likely that he slipped on a non-defective step and lost his memory of it in the fall.

Greenwald's quote about the "rug being pulled out" might have captured Phillips' words, but it did not provide evidence of cause-in-fact. Did a step actually move? Did Phillips' heel or

toe catch the prior step? Did he slip on a stone, leaf, twig, wrapper, or on a piece of trash that he or Sisco had been discarding? Did he trip over his own feet? Given his size, Phillips' feet were likely very large. Did he overstep a stair and lose balance? He was carrying a 12-inch tall box, so he may have been unable to see where he was stepping.

Greenwald's testimony also raises questions as to whether the handrails were involved. The missing handrail extender was to be on the right-side of the landing (descending). The partially detached handrail was on the left-side of the lower level. Did Phillips move from one side of the stairwell to the other? If so, did he shift the box in his hands or drop the box in order to grab for a rail? Were both hands on the box? At the time of the accident, did he reach for the missing handrail extender on the landing? If he remembered contacting the third step on the lower level, was he already too far from the missing extender on the landing? Conversely, if the missing extender was involved, had Phillips reached the third step? And does that mean that the accident started on the right side, leaving the detached left-side handrail uninvolved?

Though questions abound, the jury could not answer them because plaintiff failed to supply the necessary evidence. The jury could only guess. That is the problem with plaintiffs' case on causation. It rests on speculation.

Plaintiffs' cases are distinguishable. In *Murphy v. Union Pacific R.R.*, 138 Idaho 88, 57 P.3d 799 (2002), plaintiff twisted his ankle while walking on an uneven surface in a railroad yard. He could not pinpoint the spot of his accident. He stated in his deposition that there were "a lot of stumbling hazards." 138 Idaho at 89, 57 P.3d at 800. Moreover, he stated in an affidavit:

> . . . ***I believe it is more probably true that I stepped in one of the uneven areas of the ties and large ballast and stumbling hazards which caused me to fall.*** I readily acknowledge that it was possible that I may have stepped on the insulator and had that cause my fall. However, that is only a possibility, not a probability. I do not believe that the insulator was the probable cause of my tripping and falling. ***I believe that the probable cause which caused me to fall was the rough, uneven, and unmaintained areas where the switch was located.*** I have tried to explain to the Railroad on numerous occasions that there are numerous stumbling hazards. *Id.* at 90, 57 P.3d at 801 (emphasis supplied).

The evidence was sufficient to withstand defendants' motion for summary judgment. Here, this case was well beyond the summary judgment stage. And plaintiffs did not offer admissible evidence as to the cause-in-fact of Phillips' fall.

Stephens v. Stearns, 106 Idaho 249, 278 P.2d 41 (1984), is distinguishable. Plaintiff was injured when she grabbed for a missing handrail. 106 Idaho at 253, 678 P.2d at 45. There is no evidence here that Phillips grabbed for a handrail. In *Marcher v. Butler*, 113 Idaho 867, 749 P.2d 486 (1988), plaintiff fell while walking down the narrow side of steps that were angled because of a turn in a staircase. Plaintiff had placed her hand on the wall to balance herself because there were no handrails. 113 Idaho at 867-68, 749 P.2d at 486-87. Here, the steps themselves did not make turns so as to create angles. Moreover, there is no evidence that Phillips tried to use a handrail.

Blados v. Blados, 151 Conn. 391, 198 A.2d 213 (1964) is also distinguishable. Decedent was found dead at the base of a hazardous staircase. No one witnessed the accident. In reversing a directed verdict for defendant, the court stated: "There is no rule of law which forbids the

resting of an inference on facts whose determination is the result of other inferences." *Id.* at 395, 198 A.2d at 215. Idaho applies a different, and better, rule of law:

> This court has held that inference cannot be based upon inference, nor presumption on presumption. *Swetland v. New World Life Ins. Co.*, 35 Idaho 109, 206 P. 190; *Johnson v. Richards*, 50 Idaho 150, 294 P. 507; *Common School Dist. No. 27 v. Twin Falls Nat. Bank*, 50 Idaho 668, 299 P. 662; *Wells v. Robinson Construction Co.*, 52 Idaho 562, 16 P.2d 1059; cf. anno. 95 A.L.R., subdiv. III, pp. 181-192.

Splinter v. City of Nampa, 74 Idaho 1, 11, 256 P.2d 215, 221 (1953). The Idaho rule prevents the speculation on which *Blados* was decided. Facts must control.

Also distinguishable is *Sullivan v. Hamacher*, 339 Mass. 190, 158 N.E.2d 301 (1959). A 65-year old woman died in a fall down an unlit staircase in a tenement house. A single light fixture lit the hallways, but the light had been burned out for about three months. There were no windows in the hallways, making them dark during the day and pitch black at night. Tenants had repeatedly complained about the situation. On the evening of the accident, decedent had complained to another tenant about the darkness. The facts in *Sullivan* are far different than those here.

Plaintiffs have not tried to distinguish the Idaho cases in defendants' opening brief (Br. 25-26). Plaintiffs cannot adequately distinguish *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69 (3d Cir. 1996). Assuming that Phillips stepped on a defective step, plaintiffs did not offer evidence that Phillips fell ***because*** of it. Phillips could have been injured in many other ways, all equally possible. ". . . [W]here the proven facts are equally consistent with the

absence, as with the existence, of negligence on the part of defendant, the plaintiff has not carried the burden of proof and cannot recover." *Splinter*, 74 Idaho at 11, 256 P.2d at 221.

Because an accident does not give rise to a presumption or inference of negligence, a plaintiff must prove negligence and proximate causation. *Matheson v. Idaho Hardware & Plumbing Co.*, 75 Idaho 171, 179-80, 270 P.2d 841, 847 (1954). Here, a 6'5", 340-50 lbs. man carrying a 12" box in one or both hands fell down a staircase. The box may have obstructed his vision. The accident was unwitnessed, and Phillips was unable to testify under oath about what happened. The accident easily could have happened without any negligence. Plaintiffs failed to establish a *prima facie* case that defendants' alleged negligence actually caused the accident. Defendants are entitled to judgment.

At very least, defendants are entitled to a new trial. Defendants were not required to move for a new trial as to proximate cause (Pl. 29 n.6). The issue became part of the appeal through defendants' opening brief. I.R.C.P. 50(b). The verdict was not supported by substantial competent evidence, and it is against the clear weight of the evidence. *Cramer v. Slater*, 146 Idaho 868, 878, 204 P.3d 508, 519 (2009).

II. Plaintiffs Failed To Prove Willful Or Reckless Misconduct.

The award of damages in personal injury actions is largely governed by statute. An award of compensatory economic and capped non-economic damages only requires proof of conduct falling below the standard of ordinary care, *e.g.*, inadvertence, carelessness, unskillfulness, incompetence. I.C. §6-1603(1) and (2); *see also Wilson v. Bacon*, 78 Idaho 389, 390, 304 P.2d 908, 909 (1956). By contrast, to recover uncapped non-economic damages, a

plaintiff must prove "willful or reckless misconduct." I.C. §6-1603(4)(a). That is not synonymous with negligence or gross negligence. *S. Griffin Construction, Inc. v. City of Lewiston*, 135 Idaho 181, 189, 16 P.3d 278, 286 (2000). Statutory terms must be given their plain, usual, and ordinary meanings. *Boudreau v. City of Wendell*, 147 Idaho 609, 213 P.3d 394 (2009). The Legislature is presumed to enact statutes knowing the relevant judicial decisions and intending to follow them. *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009). "Willful" misconduct requires more than an intent to act. A driver may intentionally exceed the speed limit or enter an intersection mistakenly believing it safe. His errors in judgment, even his carelessness, may constitute nothing worse than negligence. For purpose of §6-1603, a willful actor must have actual or constructive knowledge that his conduct will create an unreasonable risk and high probability of actual harm, yet consciously do it anyway. *O'Guin v. Bingham County*, 139 Idaho 9, 14, 72 P.3d 849, 854 (2003) citing IDJI 2.25.

The meaning of the word "reckless" is also different from mere negligence. It requires an "intentional disregard" for safety or a "conscious indifference to consequences." *Hayslip v. George*, 92 Idaho 349, 352, 442 P.2d 759, 762 (1968). It implies "a consciousness of danger and a willingness to assume the risk, or an indifference to consequences." *Hunter v. Horton*, 80 Idaho 475, 479, 333 P.2d 459, 462 (1958). If the reckless actor does not actually know of a serious risk to others, he must know of facts that would disclose that risk to any reasonable person. *Wilson v. Bacon*, 78 Idaho 389, 390, 304 P.2d 908, 909 (1956). To be "reckless," an actor must engage in conduct consciously disregarding or indifferent to whether it creates an

unreasonable risk of harm highly probable to occur. In short, a reckless actor consciously refuses to care whether he will hurt someone.

Plaintiffs misapply these standards. They repeatedly use the words "chose" and "choice" to wrongly create an impression of willful or reckless misconduct (Pl. 9-13, 16-18, 25-26, 37). They over-emphasize the "should have known" standard, which by itself is only indicative of negligence (Pl. 36, 37, 38, 40). Missing from their case is evidence that Erhart consciously disregarded or was consciously indifferent to what he knew or should have known was an unreasonable danger with a high probability of actual harm.

Erhart's decisions to remove worn carpeting, follow recommendations of a contractor, and install new stairs are not evidence of negligence, much less willful or reckless misconduct. Likewise, Erhart's using a handyman, working on a weekend, and removing the old steps and handrails were all consistent with due care. Plaintiffs do not contend otherwise. Nor do they contend that Erhart incorrectly installed the first seven steps.

The problem occurred at the eighth and ninth steps (ascending), where Erhart did not make four-bolt connections. But even there, plaintiffs failed to prove the requisite willful or reckless mental state. Erhart did not act out of conscious disregard or indifference. He encountered an unexpected problem: a spread in the left-side stringer preventing a four-bolt connection (Tr. Vol. I, p. 68, L. 3-10; p. 90, L. 18-21). He did not believe that using washers would solve the problem (Tr. Vol. I, p. 68, L. 15 to p. 69, L. 10). His own solution may have been ineffective, even unskilled, but that is negligence at worst. Although Erhart agreed ***at trial*** that he could have used wooden shims, plaintiffs did not ask Erhart whether he rejected that

option ***at the worksite***. (Tr. Vol. I, p. 81, L. 23-25). Nor did plaintiffs ask whether he rejected that option consciously aware of or indifferent to a high probability of serious danger. On the contrary, Erhart believed that his fix was safe and solid because he repeatedly walked on the steps without moving them (Tr. Vol. I, p. 85, L. 13-21). "We did check it out. There was no movement in the steps" (Tr. Vol. I, p. 67, L. 10-12). In light of the tight and solid connection, Erhart concluded that a two-bolt connection would work (Tr. Vol. I, p. 67, L. 2 to p. 68, L. 2; p. 84, L. 16-20). Erhart may have been wrong, but he was not reckless.

Plaintiffs accuse Erhart of using two-bolt connections "because he wanted to get it done" and otherwise "would have had to come back another day" (Pl. 10). For plaintiffs, it is as if Erhart just wanted to go home. That was not Erhart's concern (Tr. Vol. I, p. 82, L. 13-16). Erhart was concerned about finishing the job because his tenants would return to the building on the following day (Tr. Vol. I, p. 82, L. 5-12). Erhart did not consult with the stair manufacturer or supplier at the time of installation because it was a Sunday (Tr. Vol. I, p. 84, L. 4-15). Plaintiffs argue that Erhart failed to explain why he did not call on Monday or thereafter (Pl. 37). But plaintiffs had the burden of proving a reckless mindset. Did Erhart not call because he was consciously callous or indifferent to tenant safety? Was he instead comfortable that his solution was effective and safe? Or did he just forget to call? By failing to establish Erhart's mental state, plaintiffs failed to meet their burden.

Plaintiffs claim that Erhart "chose not to attach the handrail" (Pl. 12, 37). Actually, the opposite is true — as proved by plaintiffs' own witness. Dan Phillips admitted that the guardrail was attached at the lower end (Tr. Vol. I, p. 653, L. 15-25). So Erhart did intend to attach the

rail. Erhart was surprised that the upper end was not attached (Tr. Vol. I, p. 98, L. 1 to p. 99, L. 9). He thought that he had attached both ends (Tr. Vol. I, p. 98, L. 9-15). Even if Erhart was negligent for failing to inspect the handrail, his conduct was nothing worse. Plaintiffs offered no evidence that prior to the accident Erhard knew about the problem but consciously disregarded it. Although the railing remained loose after the accident, Erhart explained: ". . . I felt, for legal reasons, we needed to leave everything alone" (Tr. Vol. I, p. 100, L. 15-20). Erhart did not ignore safety concerns; he felt powerless to address them. Besides, Erhart's post-accident decision is irrelevant to his pre-accident mindset.

Plaintiffs argue that "the handrail Erhart chose violated the UBC in a variety of ways" (Pl. 12-13, 39). But plaintiffs offered no evidence that Erhart knew it at the time of the installation. Plaintiffs only proved that Erhart was aware of the problem at the time of trial (Tr. Vol. I, p. 104, L. 1-4). That is not enough to establish and willful or reckless misconduct. And contrary to plaintiffs' suggestion, Erhart did not treat the building code as a mere guideline that can be ignored (Pl. 18). In stating that he would follow the building code "as much as you can," Erhart was speaking in terms of capability rather than intent (Tr. Vol. I, p. 108, L. 5-10). As for a permit, plaintiffs agree that the evidence was disputed as to the need for it (Pl. 18 n.5). They cite no law that would treat the failure to obtain a permit as evidence of willful or reckless conduct.

Plaintiffs claim that the handrail attached by Erhart was really not a handrail (Pl. 13). But plaintiffs' own exhibit disproves that argument (Pl. Ex. 7, attached to defendants' opening brief at A. 7-9). The Trex Decks literature on file with Erhart describes Erhart's selection as a "Trex

Designer Series ***Handrail***" (A.7; emphasis supplied; Tr. Vol. I, p. 112, L. 9-12). The literature also states that Trex "complies with all major model building codes and has been evaluated by the International Code Council evaluation service" (A.9). Erhart testified without contradiction that he selected a Trex Decks handrail based on a stairway contractor's recommendation (Tr. Vol. I, p. 103, L. 8-10; p. 104, L. 11-16). Plaintiffs cite no law requiring a consumer to research builder recommendations or manufacturer representations for accuracy and code compliance. They certainly have not shown that the failure to do so is evidence of willful or reckless misconduct.

Plaintiffs' evidence about tenant complaints did not establish a conscious disregard or indifference to safety. The trial court found no probative value in Kenneth Doolittle's complaint about a loose tread: "There is no evidence in the record as to which tread it was. Nor was Mr. Erhart questioned about Mr. Doolittle's warning" (R. Vol. III, p. 571, L. 18-20 n. 1). Plaintiffs' failure to question Erhart about the conversation is significant. Even if the same step was involved in the accident, plaintiffs needed to prove that Erhart consciously did not care bout Doolittle's warning. Had plaintiffs asked, Erhart might have testified that he checked the steps in response to Doolittle. Erhart might have planned to take action but became diverted by other matters. Neither is proof of recklessness. And, of course, Doolittle checked the steps shortly after the accident and observed that they were not misaligned (Tr. Vol. I, p. 148, L. 8-15; p. 152, L. 11-17).

As for Angela Sisco's complaints, they were not directed to Erhart but to a maintenance person (Tr. Vol. I, p. 530, L. 7-12). Plaintiffs offered no evidence that Sisco ever complained

about the condition of the stairs. She used the steps for 2-1/2 weeks prior to the accident without problem (Tr. Vol. I, p. 546, L. 1-7, 10-20).

The overwhelming evidence was that Erhart diligently maintained the steps following their installation. He walked the building weekly, and if doing work at the building he might have used the steps several times daily (Tr. Vol. I, p. 92, L. 23 to p. 93, L. 5; p. 136, L. 20 to p. 137, L. 1). Erhart regularly retightened bolts on the second step from the bottom because the step would wiggle slightly if purposely manipulated (Tr. Vol. I, p. 86, L. 4-8; p. 87, L. 10-23). Erhart purchased different bolts and believed that he had repaired the step well prior to the accident (Tr. Vol. I, p. 87, L. 23 to p. 88, L. 14). Doolittle testified that when he brought building issues to Erhart's attention, Erhart typically thanked him (Tr. Vol. I, p. 145, L. 6-10, 13-17). Doolittle also testified that Erhart did not purposely neglect problems (Tr. Vol. I, p. 145, L. 17-21). Plaintiffs' witness Wanda Jenks used the steps and handrails four or five times before the accident without problem (Tr. Vol. I, p. 701, L. 17 to p. 702, L. 13).

It is irrelevant that plaintiffs' expert Gill believed that "sooner or later" an accident would occur (Tr. Vol. I, p. 213, L. 1-3). Gill's belief did not establish Erhart's willful or reckless mental state. Likewise, neither does Gill's criticism that defendants should have implemented a safety risk program (Pl. 18, 39). A building owner can act diligently without a safety program and can act negligently with one. Plaintiffs offer no law supporting the notion that the failure to have a safety program is evidence of willful or reckless misconduct. Moreover, neither of plaintiffs' experts opined that Erhart acted with a reckless mental state or that the situation presented a high probability of actual harm. The stairs were in place for 2-1/2 years without

incident (Tr. Vol. I, p. 88, L. 10-13). During that period, tenants walked the staircase daily (*Id.* at p. 136, L. 5-16).

Plaintiffs claim that prior to trial the court "concluded" that Erhart's conduct "might even be characterized as 'an extreme deviation from reasonable standards of conduct' " (Pl. 38 n.8, quoting R. Vol. II, p. 219, L. 7-8). The court was merely ruling on plaintiffs' motion to add punitive damages, a motion the court denied (*Id.* at p. 219, L. 15-16). At the end of the case, the court was "not prepared to say [it] would reach the same conclusion as the jury [as to willful or reckless misconduct]" (R. Vol. III, p. 577, L. 8). Nothing should be drawn from the court's pre-trial statement.

Plaintiffs' cases are distinguishable. In *Latimer v. Latimer*, 66 Ill. App. 3d 685, 384 N.E.2d 107 (1978), plaintiff was injured when she tripped on a loose rug remnant placed next to a bathroom door. Defendant, who had himself tripped over the rug once or twice, testified that he and his wife "knew how to handle it." *Id.* at 687, 384 N.E.2d at 108. However, neither he nor his wife warned plaintiff about it. Here, Erhart had walked over the steps numerous times during installation and determined that they were tight and solid. Moreover, Erhart's regular maintenance of the staircase did not reveal a problem with movement in the suspect step. In *Goodman v. Clausen*, 1984 U.S. Dist. LEXIS 17067 (N.D. Ill. 1984) (unpublished), plaintiff's decedent, age 83, fell down an unguarded stairwell. The court denied summary judgment. Decedent was unfamiliar with the steps, and an issue of fact existed whether defendant should have realized it. Here, Phillips was very familiar with the steps but was carrying a box that may

have impeded his view of them. And unlike the defendant in *Goodman*, Erhart checked the steps during installation and regularly maintained them thereafter.

In the end, plaintiffs misapply the "knew or should have known" standard. In every negligence case, an actor knew or should have known of an unreasonable risk of harm. That is what makes conduct negligent — the actor should have known better. Absent evidence that an actor consciously disregarded or acted with indifference to an unreasonable risk highly probable to cause harm, the conduct is not willful or reckless.

When the Legislature enacted §6-1603, it did not relax the standards for willful or reckless misconduct. In order to effectuate the statutory intent, the courts must maintain the Legislature's distinction between negligence and willful or wanton misconduct. Even if plaintiffs proved negligence here, they did not prove willful or reckless misconduct. Defendants are entitled to judgment or a new trial.

III. The Loss Of Consortium Award To Gale Phillips Is Excessive.

Because plaintiffs did not prove willful or reckless misconduct, Gale Phillips' damages (all non-economic) are capped at $257,590.13. But even at that level, they are excessive.

There are no hard-and-fast rules governing the size of a loss of consortium award. This Court has not established a mathematical formula. But a survey of cases reveals that factfinders usually award much less to spouses than to injured persons. Even in *Browning v. Ringel*, 134 Idaho 6, 10, 995 P.2d 351, 355 (2000), which plaintiffs try to distinguish, the spouse's award was sixteen times lower than the injured husband's award. It likely would have been lower still if the husband had requested non-economic damages. *Browning* does not state that he did.

Gale Phillips was awarded about 220% of her husband's adjusted economic damages award (Pl. 6 n.3). Her jury award was about 99% of his non-economic award and over 68% of his total adjusted award. Plaintiffs suggest that "Gale's injuries are unique" (Pl. 43). But even with two special-needs children, plaintiffs cannot fairly claim that she has lost more than most wives (Pl. 43). They have no factual basis for comparison.

Gale Phillips' award was excessive because it included elements of damages not permitted under the legal standards. *Hei v. Holzer*, 145 Idaho 563, 569, 181 P.3d 489, 495 (2008) (abuse of discretion occurs where court acts outside legal standards applicable to claim). A jury may only award loss of consortium damages for "injury ***to the injured spouse***." *Zaleha v. Rosholt, Robertson & Tucker, Chtd.*, 131 Idaho 254, 256, 953 P.2d 1363, 1365 (1998) (emphasis supplied). Loss-of-consortium damages do not include an award for alleged injuries to the family unit. Plaintiffs cite no case extending a spouse's loss of consortium to the entire family. Moreover, the law does not recognize a claim for loss of parental consortium. *Green v. A. B. Hagglund and Soner*, 634 F. Supp. 790, 796-97 (D. Idaho 1986). So a spouse may not recover for the loss of the injured person's services to a child. Furthermore, a spouse may not recover for services performed by that spouse to the injured party. *Evans v. Buffington Harbor River Boats, LLC*, 779 N.E.2d 1103, 1113-14 (Ind. App. 2003). That recovery belongs to the injured person and must be properly proven. Finally, the law also does not allow recovery for the emotional damages to a spouse. Those damages are recoverable under a claim for negligent infliction of emotional distress. *Johnson v. McPhee*, 147 Idaho 455, 466, 210 P.3d 563, 574 (2009). A loss of consortium award only covers the loss of an injured person's material services,

companionship, love, felicity, support, aid, protection, affections, and sexual relations previously provided to a spouse. *Nichols v. Sonneman*, 91 Idaho 199, 205, 418 P.2d 562, 568 (1966).

The award here likely violates these restrictions. Gale Phillips testified that her husband's injury hurt the family structure (Tr. Vol. I, p. 910, L. 12-14). Plaintiffs' closing-argument request of $1 million for Gale Phillips' loss of consortium was based on an alleged injury to the entire family unit:

> That [$1 million] says it, I tell you. That says what these values are. That says we, as a society, value this part of the harms and losses ***that this family has and is and will endure***.
>
> Is a million dollars enough? Of course not. But a million dollars says the right thing. I'd say the last line of the verdict form, that's what should go there.
>
> Do you have to? No. Is it the right thing to do? I submit to you it is. You've seen ***the losses to this family that has made the right choices***. (Tr. Vol. I, p. 1052, L. 11-22; emphasis supplied).

These words had the capacity to arouse the jury's passions — and likely did. *Wilson v. J. R. Simplot Co.*, 143 Idaho 730, 732, 152 P.3d 601, 603 (2007). Plaintiffs now ignore them.

Plaintiffs note the loss of care of James Phillips provided to his children:

> Before the fall, Jim was a devoted husband and father who was significantly involved ***in his children's upbringing and care***. After the fall, the assistance he provided to Gale ***with their care*** — cooking, helping with their homework, interfacing with their doctors, taking them on trips and other activities — ceased. See *id.* §6.b. These are undeniably services provided not just to the children but also to Gale, who is responsible for them . . . . Instead of having help with her two disabled children, Gale now has another disabled person in the home. Indeed, since the fall, Jim's needs interfere with his children's care. She cannot even trust him to stay home with the boys. See *id.* Gale has had to change the

> family lifestyle and help her children understand Jim's difficulties (Pl. 43-44; emphasis supplied).

Phillips and his wife might have been a parenting team, but Phillips' parenting services were provided to his children, not to Gale Phillips. She may not recover for services lost to her children. Neither may she recover for the value of her own efforts to replace her husband's services to her children.

Plaintiffs misread *Nichols v. Sonneman*, 91 Idaho 199, 418 P.2d 562 (1966). This Court did not rule that a spouse is entitled to recover loss of consortium damages for the injured person's lost services to their children. It merely reported the spouse's testimony that she was providing for the care of her children. 91 Idaho at 205, 418 P.2d at 568. The Court did not discuss or recognize a claim for loss of parental consortium.

Plaintiffs wrongly accuse defendants of a "futile, misguided, and even cynical attempt" to change positions on appeal regarding damages (Pl. 42). Defendants' position has not changed. At trial, defendants challenged the extent of James Phillips' losses. They still do. But the jury rejected defendants' position. On appeal, defendants merely summarize plaintiffs' evidence to show that the award to Gale Phillips' award is excessive.

Contrary to *Dinneen v. Finch*, 100 Idaho 620, 625-26, 603 P.2d 575, 580-81 (1979), the trial court did not disclose its own calculation of an appropriate award. Absent that number, this Court cannot state whether the trial court's calculation would have revealed a difference so large as to create the appearance of passion or prejudice. The trial court's calculation would have been

especially helpful given its statement that it would have awarded lower non-economic damages to both plaintiffs (R. Vol. III, p. 579, L. 8-9).

But even without that disclosure, reversal or remittitur is warranted. The trial court failed to recognize that passion and prejudice had been directed against defendants. Plaintiffs' theme was that Erhart made "bad choices," had a "reckless perspective" as to the staircase, and even worse, was a "reckless fellow who can't take any responsibility for what he's done" (Tr. Vol. I, p. 18, L. 2-7, 19-20; p. 37, L. 17-19; p. 1013, L. 2-3; p. 1016, L. 8-10). Their witness Angela Sisco ripped into defendants by stating that repairs were "half-assed completed or not done or pushed off" (Tr. Vol. I, p. 530, L. 4-6). She made sure to mention that RCAC terminated its lease "with cause" — a cause Sisco did not explain (Tr. Vol. I, p. 531, L. 1-6). By contrast, plaintiffs made Gale Phillips look so sympathetic that in the court's own words she was "somewhat over-dramatic and self interested" (R. Vol. III, p. 579, L. 3). Given plaintiffs' bad-man/good-woman approach to the evidence, the jury responded by awarding excessive damages.

The issue here is not whether the court erroneously admitted evidence of Gale Phillips' current situation (Pl. 44 n.9). The issue is whether Gale Phillips' award is excessive because of plaintiffs' resort to inappropriate elements of damages and to passion and prejudice. The trial court abused its discretion by failing to grant a new trial as to Gale Phillips' damages or set a remittitur.

CONCLUSION

For the foregoing reasons, defendants-appellants Milt E. Erhart and Mary C. Erhart urge this Honorable Court to enter an order vacating the jury verdict; reversing the judgment,

amended judgment, and memorandum decision and order; and entering judgment in favor of defendants-appellants, with costs. Alternatively, defendants urge this Court to: (a) order a new trial as to liability and damages, (b) order a new trial as to Gale Phillips' damages, (c) enter a remittitur of Gale Phillips' damages to $52,000 or such other amount that this Court deems just, or (d) remand the issue of Gale Phillips' damages to the district court with instructions to analyze the issue under the *Dinneen* standard, all with costs to defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Under penalty of perjury, the undersigned certifies she filed with the Clerk of the Idaho Supreme Court an original and seven (7) copies of Appellant's Reply Brief and that she served two (2) copies of Appellants' Reply Brief on the following attorneys: John T. Edwards & Kurt Holzer, Holzer & Edwards, Chtd., 1516 West Hayes, Boise, ID 83702-5316, all by first-class postage prepaid United States mail from Chicago, IL on August 11, 2010.

Lindsay C. Mosher