STATE OF MINNESOTA

IN SUPREME COURT

A20-0267

Court of Appeals

Thissen, J.
Dissenting, Anderson, J., Gildea, C.J.

Virginia Staub, as trustee and
next-of-kin of Joyce Esther Weeks, decedent,

Appellant,

vs.

Filed: September 22, 2021
Office of Appellate Courts

Myrtle Lake Resort, LLC, and

James Lown,

Respondents.

Jeremy Brantingham, Patrick McDonald, Brantingham Law Office, Minneapolis, Minnesota; and

Andrew Irlbeck, Andrew Irlbeck Lawyer Chartered, Saint Paul, Minnesota, for appellant Virginia Staub.

Jerome D. Feriancek, Paige V. Orcutt, Trial Group North, PLLP, Duluth, Minnesota, for respondent Myrtle Lake Resort, LLC.

Michael J. Tomsche, Kelly P. Magnus, Tomsche, Sonnesyn & Tomsche, P.A., Golden Valley, Minnesota, for respondent James Lown.

James S. Ballentine, Matthew J. Barber, Schwebel Goetz & Sieben, P.A., Minneapolis, Minnesota, for amicus curiae Minnesota Association for Justice.

Louise A. Behrendt, Emily L. Mugaas, Meagher & Geer, PLLP, Minneapolis, Minnesota, for amicus curiae Minnesota Defense Lawyers Association.

S Y L L A B U S

The district court erred by granting respondents' summary judgment motions on the basis that no genuine issue of material fact as to proximate cause existed.

Reversed and remanded.

O P I N I O N

THISSEN, Justice.

This case arises from the death of Joyce Weeks,[1] who fell down a concrete stair, which is attached to the main lodge building at Myrtle Lake Resort in Orr, Minnesota. Appellant Virginia Staub, as Joyce's trustee and next of kin, brought a wrongful death claim against respondents Myrtle Lake Resort, LLC and James Lown (collectively respondents), asserting that the degraded and dangerous condition of the stair proximately caused Joyce's fall and death.

Myrtle Lake and Lown each moved for summary judgment. The district court granted the motions based on lack of proximate cause because no witness saw how Joyce began to fall. The district court reasoned that a jury would have to "engage in speculation" to find that Myrtle Lake's and Lown's alleged negligence proximately caused Joyce's death. The court of appeals affirmed.

We hold that the district court erred by granting summary judgment because a genuine issue of material fact exists as to the question of whether the condition of the stair proximately caused Joyce to fall. Because this case comes to us following a grant of

[1] Because one of the witnesses in this case is Joyce's husband, Sam Weeks, we refer to Joyce and Sam by their first names to avoid confusion.

summary judgment, we apply our well-settled rule that all evidence in the record and all reasonable inferences that a jury may draw from such evidence must be viewed in a light most favorable to Staub, the nonmoving party. *See Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 189–90 (Minn. 2019). We also reaffirm our well-established rule that a plaintiff need not introduce direct eyewitness evidence of a fall to establish proximate cause. *See Majerus v. Guelsow*, 113 N.W.2d 450, 455 (Minn. 1962).

Further, we apply our rule that a plaintiff may use circumstantial evidence to establish that a particular condition was one substantial factor in causing an injury when a jury may reasonably infer that the condition was such a substantial factor. *See Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 372 (Minn. 2008); *Smith v. Kahler Corp.*, 211 N.W.2d 146, 150 (Minn. 1973). Finally, we note that summary judgment is inappropriate when a plaintiff's proximate cause theory asserts that a condition is a substantial factor in causing an injury under one of the following circumstances: (1) the plaintiff's theory is consistent with alternative proximate cause theories or, (2) when the plaintiff's theory is inconsistent with such alternative theories, it preponderates over those alternative theories. *See Osborne*, 749 N.W.2d at 380 n.8.

Accordingly, we reverse the court of appeals and remand to that court to address the remaining issues on appeal.

FACTS

On July 10, 2016, Joyce Weeks fell down a concrete stair, which is attached to the main lodge building at Myrtle Lake Resort. She sustained a spinal cord fracture and died one week later. On June 26, 2018, Joyce's daughter, Virginia Staub, as trustee and next of

kin for Joyce, filed a wrongful death lawsuit against Myrtle Lake and Lown. Lown is the president and sole member of Myrtle Lake, which owns the resort property.

In her complaint, Staub alleged that Myrle Lake's and Lown's negligent failure to maintain the stair in a safe condition proximately caused Joyce's fall. She also alleged that Joyce and her husband Sam Weeks had repeatedly complained about the stair, telling Lown that it was unsafe and needed to be replaced. The stair consisted of a small landing immediately outside of the lodge door and two sets of steps leading down from each side of the landing: one longer set of ten steps leading down toward the lake and a shorter set of five steps facing the parking area. Each set of steps had a wooden railing alongside it. Joyce fell down the longer set of steps. Witnesses observed her during the course of the fall, but no one directly saw how she began to fall. Consequently, as to the question of how Joyce fell, the record consists of circumstantial evidence, including deposition testimony and accompanying affidavits from witnesses present at the time of the fall and two expert reports.

Three witnesses testified as to the events surrounding Joyce's fall: Sam Weeks (Joyce's husband), George Brown (a friend of Joyce and Sam and frequent resort guest), and David Wilcox (another resort guest).

Testimony of Sam Weeks

Sam testified that he and Joyce lived at the resort full time and served as caretakers by performing maintenance work, cleaning the cabins, and running the lodge's bar and restaurant. Shortly after taking over operations for the resort in 2014, and many times thereafter, Sam told Lown that the stair was "dangerous[,]" "in terrible shape[,]" and

needed to be replaced. For example, the landing at the top of the stair was "rough, rocky[,]" and uneven, and the steps themselves were "leaning, chipped, cracked, [and] weathered."

Although the lodge had other means of ingress and egress, the stair was the primary means by which Joyce and Sam accessed their living quarters in the lodge; alternative routes—such as an inside stairway—generally were not available because of guest privacy concerns. On most days, Joyce would wash guests' laundry and linens in the upstairs of the lodge and take the laundry basket out to her car to drive to the cabins. She typically used the stair to exit the lodge. Joyce had complained about and had issues using the stair and would use the shorter set of steps facing the parking area, not the longer set of steps down which she fell. Although she had a knee replacement 6 to 8 months before the fall, she "was doing real well" and "had no problems."

On the morning of July 10, 2016, Sam was inside the lodge eating breakfast and preparing to take his insulin. He "heard a holler" and looked out the window to see the laundry basket Joyce had carried outside sitting on the landing. He opened the door and saw Joyce laying at the bottom of the longer set of steps. He rushed down to her, found her unresponsive, and started CPR. Sam did not see Joyce fall. He stated that because Joyce would always use the shorter set of steps, he could not "understand how she went down the other side."

Testimony of George Brown

Brown testified that he was a frequent resort guest and a friend of Sam and Joyce who, along with his wife Delaine, helped with maintenance and upkeep around the resort when visiting. He testified that Joyce would normally park her car near the shorter set of

steps and set the laundry basket down on the landing so Delaine could pick it up, take it to the car, and accompany Joyce to clean the cabins. Sometimes, however, Joyce would take the basket directly to the car on her own. And although Sam testified that Joyce always took the shorter set of steps, Brown stated that he had seen Joyce use the longer set of steps "many times before that."

On July 10, 2016, Brown and Delaine were having coffee in the lodge with Sam and Joyce. Joyce got up to get her car keys and retrieve the laundry in preparation for cleaning the cabins. Sam went to the living quarters to take his insulin while Joyce "went out." Brown got up to go outside, but first looked out the lakeside window to see how David Wilcox—another guest—was doing fishing that morning. He then saw Wilcox "running up the hill" from the lake. Brown went out the door by the stair and heard Wilcox say that Joyce "fell off the steps." He looked down and saw Joyce "rolling off the steps" and managed to stop her on the last step. Brown "did not see the start of her fall," nor did he see her at the top of the steps before she fell. He only saw Joyce after she was "already halfway down" the steps.[2] Brown could not recall with certainty whether anything had been placed on the stair, though he said the laundry basket may have been set on the "left-

[2] Brown said that Sam came out of the lodge after Brown did, at most 1 minute after Joyce's fall.

hand side" of the landing. Brown said that he didn't know whether Joyce had planned to use the longer set of steps or whether she just fell off that side.[3]

Testimony of David Wilcox

Wilcox testified that he was a friend of Brown's and had been staying at the resort for a few days before Joyce's fall. On the morning of July 10, 2016, Wilcox was on the main dock along the lake fishing by himself, facing away from the lodge. He heard Joyce come out of the door of the lodge and "looked over" briefly to see her put the laundry basket down near the middle of the landing. Wilcox then turned back to the lake and continued fishing. About 30 to 60 seconds later, Wilcox heard a set of keys drop on concrete but did not turn to look. Shortly thereafter, Wilcox heard Joyce make a startled "whoo" noise. He turned around and saw her "hit the ground" or "roll" at the bottom of the longer set of steps.[4] He did not see Joyce begin to fall, and did not know how she lost her balance, how she fell, whether she hung onto the railing along the landing or steps, or whether she was using the longer set of steps intentionally before she fell. Wilcox started up to where Joyce had fallen, but Brown came out of the lodge and got to Joyce first. Sam got there about a minute later.

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[3] In his predeposition affidavit, Brown stated: "I don't know what made Joyce use those [longer set of steps] that day specifically, but I know she only used them when she had to."

[4] Wilcox first stated that although he did not see Joyce "hit the ground," he "did see her roll." But later he stated that Joyce hit the ground as he turned around.

Expert reports

Both Staub and Myrtle Lake had expert reports completed on the condition of the stair. Great Northern Environmental Solutions completed a report for Staub. It found that "the concrete steps were beyond practical repair" and could have been replaced with "all-weather wood constructed stairs, complete with guard rail and hand rail for less than $800." Great Northern concluded that Myrtle Lake "was negligent in maintaining" the concrete steps, which were degraded, cracked, inconsistently spaced, and unsafe to use.

Scalzo Architects completed a report for Myrtle Lake. Scalzo found that the stair was "in serviceable condition and not in disrepair" and that the railing was "secure and sturdy." Although the stair showed "some deterioration after years of weather and use," the deterioration was "not significant enough to create a hazardous condition." Scalzo concluded that the "observed deterioration" did not create "an unsafe condition" as the stair did "not crumble or break during use." Both reports contained several photos documenting the physical condition of the stair, including the landing and both sets of steps.

Following discovery, Myrtle Lake and Lown each moved for summary judgment. They argued that Staub had failed to establish proximate cause sufficient to survive summary judgment and could "only speculate as to the cause of the fall."[5]

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[5] Lown also argued that he was entitled to summary judgment because he enjoyed immunity under Minn. Stat. § 322C.0304, subd. 1 (2020); a statute that, with some exceptions, shields members of a limited liability company from liabilities incurred by the limited liability company. The district court agreed and granted summary judgment to Lown on the additional ground that Staub failed to introduce evidence that Minn. Stat. § 322C.0304 did not apply to Lown. The court of appeals did not address that issue. *Staub*

The district court granted both motions. It found that the stair was in poor condition and "cracked, chipped, leaning, and weathered." The court also found that as a result of falling down the longer set of steps, Joyce sustained injuries that caused her death. But the court also found that "[n]o one observed what caused [Joyce] to fall down the stairs. No one saw [Joyce] take any steps down the stairs." The court commented that, "[u]nfortunately, the only person that would know what caused [Joyce] to fall is the decedent. No one saw how [Joyce] fell." It then offered several competing theories that could explain why Joyce fell, positing that "[s]he may have fallen because she had a dizzy spell, or she may have tripped over the laundry basket, or may have been distracted by something." The court concluded that, "to find that defendant's negligence led to [Joyce's] death, a jury would have to engage in speculation." Ultimately, the court held that "[t]here are no facts upon which a jury could determine that the negligence of Myrtle Lake Resort, LLC, caused [Joyce] to fall down the stairs."

The court of appeals affirmed. *Staub v. Myrtle Lake Resort, LLC*, No. A20-0267, 2020 WL 7330583, at *4 (Minn. App. Dec. 14, 2020). It held that the degraded condition of the stair and repeated requests to repair it did not "establish a prima facie case for proximate cause." *Id.* at *3. Like the district court, the court of appeals stated: "No one saw [Joyce] fall," adding that "[o]ne can only speculate as to what caused [Joyce] to fall,

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v. Myrtle Lake Resort, LLC, No. A20-0267, 2020 WL 7330583, at *3 n.2 (Minn. App. Dec. 14, 2020). We decline to do so as well.

Myrtle Lake and Lown each raised a series of other alternative arguments at the summary judgment stage in addition to their proximate cause defense. They raise similar arguments before us on appeal. The district court did not reach these arguments, and we decline to do so.

and mere speculation is not enough." *Id.* It also offered various theories as to why Joyce fell:

> While we can speculate that the degraded condition of the stair[], which is obvious from the photographs, may have been the most likely reason for the fall, there are many other ways this could have happened—she could have been startled by an owl or a pesky mouse, she could have tripped over the laundry basket, etc. Unfortunately, because she is no longer with us, we will never know.

Id. at *3 n.1. We granted review.

ANALYSIS

Staub appeals from an order granting summary judgment, arguing that the district court erred because she introduced circumstantial evidence sufficient to establish that Myrtle Lake's and Lown's conduct "was a substantial factor" in Joyce's fall and death. Staub asserts that the most likely theory for Joyce's fall is that she fell due to the degraded condition of the negligently maintained stair, not alternative theories such as Joyce's knee giving out or that Joyce tripped over the laundry basket. Despite a lack of direct evidence, Staub claims that "the circumstantial evidence regarding the condition of the stair[] is enough to justify a jury finding" that the condition of the stair proximately caused Joyce's fall; therefore, summary judgment was inappropriate.

Because negligence cases are fact-intensive, the procedural posture of each case matters a great deal. *See Warren v. Dinter*, 926 N.W.2d 370, 380 (Minn. 2019) (emphasizing the summary judgment standard when resolving a duty of care issue in a professional negligence case); *Fenrich v. The Blake School*, 920 N.W.2d 195, 206–07 (Minn. 2018) (highlighting the significance of procedural posture when deciding "a close

call" on an appeal from a grant of summary judgment). That this case comes to us following a grant of summary judgment is central to our decision today. Indeed, a primary difference between our decision and the dissent is our insistence that on a motion for summary judgment, the facts *and the reasonable inferences to be drawn from those facts* must be resolved in Staub's favor. Although the dissent effectively illustrates that Myrtle Lake and Lown ultimately may be able to convince a jury that the condition of the stair did not cause Joyce to fall, that analysis is not our inquiry at this stage of the proceedings.

Summary judgment is appropriate only "when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party and resolving all doubts and factual inferences against the moving party. *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185 189–90 (Minn. 2019). "In a negligence action, the defendant is entitled to summary judgment when the record reflects a complete lack of proof on" proximate cause and "[a] nonmoving party cannot defeat a summary judgment motion with unverified and conclusory allegations . . . ." *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). Summary judgment, however, is a "blunt instrument." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (citation omitted) (internal quotation marks omitted). It should not be granted when reasonable persons could draw different conclusions from the evidence presented. *Id.*

Here, we must decide whether, when viewing the record in a light most favorable to Staub and resolving all factual doubts and inferences against Myrtle Lake and Lown, a

genuine issue of material fact exists as to whether the condition of the stair proximately caused Joyce to fall. When answering that question, we filter our case law on proximate cause and circumstantial evidence through the summary judgment standard.

A.

The district court granted summary judgment based on its conclusion that no genuine issue of material fact existed as to whether the degraded and dangerous condition of the stair resulting from Myrtle Lake's and Lown's negligent maintenance proximately caused Joyce's fall and death. "[F]or a party's negligence to be the proximate cause of an injury," the injury must be a foreseeable result of the negligent act and the act must be a substantial factor in bringing about the injury.[6] *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *see George v. Est. of Baker*, 724 N.W.2d 1, 10 (Minn. 2006) (stating that a negligent act is a proximate "cause of harm if the act was a substantial factor in the harm's occurrence"). There may be more than one substantial factor—in other words, more than one proximate cause—that contributes to an injury. *See Osborne*, 749 N.W.2d at 375; *Nelson v. Holand*, 139 N.W.2d 518, 521–22 (Minn. 1965).

"Generally, whether the defendant's negligence proximately caused the plaintiff's injuries is a question of fact for the jury." *Canada ex rel. Landy v. McCarthy*, 567 N.W.2d 496, 506 (Minn. 1997). Further, "[i]t is for the jury to draw the inferences [about proximate cause] and not this court." *Smith v. Kahler Corp.*, 211 N.W.2d 146, 150 (Minn. 1973).

[6] The parties here do not dispute on appeal whether a fall and injury are a foreseeable result of negligently maintained steps. The only question before us related to proximate cause is whether the degraded condition of the stair was a substantial factor in bringing about Joyce's fall and injury.

"However, when reasonable minds could reach only one conclusion, the existence of proximate cause is a question of law." *McCarthy*, 567 N.W.2d at 506. A finding of proximate cause "cannot be based upon mere speculation or conjecture." *E.H. Renner & Sons, Inc. v. Primus*, 203 N.W.2d 832, 834 (Minn. 1973).

A plaintiff is not required to provide eyewitness testimony or other direct evidence of proximate cause. *See Majerus v. Guelsow*, 113 N.W.2d 450, 455 (Minn. 1962). Rather, inferences drawn from circumstantial evidence can, on their own, support a finding of proximate cause in negligence actions. *See Gerster v. Special Adm'r for Wedin's Est.*, 199 N.W.2d 633, 635 (Minn. 1972) (stating that circumstantial evidence can suffice to support a jury verdict finding negligence); *Kludzinski v. Great N. Ry. Co.*, 153 N.W. 529, 529–31 (Minn. 1915) (concluding that circumstantial evidence suggesting defendant railroad company's failure to "keep a proper lookout" proximately caused decedent to be crushed by a railcar was sufficient despite lack of eyewitness evidence).

When relying solely on circumstantial evidence, a plaintiff may seek to establish certain inferences to argue that a defendant's negligent act proximately caused an injury. *See Cullen v. Pearson*, 253 N.W. 117, 119 (Minn. 1934) ("Negligence . . . may be proved by circumstantial evidence. The jury may draw all reasonable inferences from the facts and circumstances shown."). "[C]ircumstantial evidence is sufficient if it furnishes a reasonable basis for the jury to infer that some negligent act of the defendant was the cause of the injury." *Kludzinski*, 153 N.W. at 530. Indeed, the mere fact that the circumstantial evidence "may justify other conflicting inferences" does not prevent the jury from drawing an inference that the defendant's negligence proximately caused the plaintiff's injury.

Knuth v. Murphy, 54 N.W.2d 771, 775 (Minn. 1952); *see Hagsten v. Simberg*, 44 N.W.2d 611, 613 (Minn. 1950) (explaining that a plaintiff's theory of proximate cause need not "be proved beyond a reasonable doubt or demonstrate the impossibility of every other reasonable hypothesis" (quoting *Sherman v. Minn. Mut. Life Ins. Co.*, 255 N.W. 113, 115 (Minn. 1934))).

Because a plaintiff bears the burden of proof to establish proximate cause, however, circumstantial evidence that is introduced "must be something more than merely consistent with plaintiff's theory of the case." *Zinnel v. Berghuis Constr. Co.*, 274 N.W.2d 495, 498–99 (Minn. 1979). "Where the entire evidence sustains, with equal justification, two or more inconsistent inferences so that one inference does not reasonably preponderate over the others, the complainant has not sustained the burden of proof on the proposition which alone would entitle him to recover." *E.H. Renner & Sons*, 203 N.W.2d at 835. Because two or more *consistent* theories of proximate cause may each function as a substantial factor in bringing about a certain result, however, a plaintiff need not establish that one of those consistent theories preponderates over the others to bear her burden of proof as long as a reasonable jury could conclude that the plaintiff's theory was one of the substantial factors. *Osborne*, 749 N.W.2d at 380 n.8.

In sum, circumstantial evidence may be used to sustain a plaintiff's theory of proximate cause, but when the plaintiff's and the defendant's theories of proximate cause are inconsistent, the plaintiff's theory must "reasonably preponderate" over any other theories. *E.H. Renner & Sons*, 203 N.W.2d at 835.

B.

Having reviewed the relevant case law governing the use of circumstantial evidence to establish proximate cause, we now apply that law to the facts of this case under our summary judgment standard to determine whether a genuine issue of material fact exists as to whether the condition of the stair proximately caused Joyce to fall. *See Gradjelick*, 646 N.W.2d at 230–34 (clarifying the governing substantive law before moving on to apply that substantive law under the summary judgment standard). When viewing the record in a light most favorable to Staub and resolving all factual doubts and inferences against Myrtle Lake and Lown as we must, *Henson*, 922 N.W.2d at 190, we conclude that a genuine issue of material fact exists such that a reasonable jury could infer that the poor and degraded condition of the stair was a substantial factor in causing Joyce to fall. Consequently, the district court erred by granting summary judgment.

1.

We first reject the reasoning by the district court and the court of appeals that because no one saw how Joyce began to fall down the longer set of steps, summary judgment is appropriate. That is not the law in Minnesota.

A plaintiff need not introduce direct eyewitness evidence of a fall to establish proximate cause. Our decision in *Majerus* illustrates this principle with facts that are highly similar to this case. In *Majerus*, the decedent was found dead in the basement of his apartment building approximately 30 feet from the bottom of the basement stairway. 113 N.W.2d at 452. The decedent's wife brought a wrongful death claim against their landlord, alleging that the condition of the negligently maintained stairway caused her husband's

death. *Id.* The case was submitted to a jury, which found that the landlord was negligent by failing to maintain the stairway and that the landlord's negligence proximately caused the decedent's death. *Id.* The district court denied the landlord's motion for a judgment notwithstanding the verdict and the landlord appealed, challenging the jury's proximate cause finding. *Id.* at 454. The record consisted entirely of circumstantial evidence because no one witnessed the decedent's fall. Most of the evidence centered on the cause of decedent's death (a fall) and the degraded condition of the wooden stairway, which, according to testimony from multiple witnesses, was chipped, uneven, and partially lacking a handrail. *Id.* at 453. Additionally, another tenant in the building testified that she "was really afraid" of the stairway. *Id.*

We upheld the jury verdict and finding of proximate cause, concluding that there was "evidence from which a jury could infer that the death of decedent resulted from a fall down the stairway" and that the stairway "was defective in places" and negligently maintained.[7] *Id.* at 454–55. We further concluded that sufficient evidence existed to support the inference that the stairway's defects were the cause of the fall and death. *Id.* at 455–56. We also observed that the plaintiff did not have to establish proximate cause by

[7] In addition to the evidence mentioned above, the decedent's flashlight and tools were found under the stairs and there was fresh splinter on one of the steps. *Id*. at 453. A pathologist also opined that the decedent's subsequent death resulted from a fall down the stairway. *Id.* at 454. We relied on that evidence to resolve the contested question—not at issue in this case—of whether the decedent in fact fell down the stairway. *Id*. at 454–55. Further, our discussion of whether the poor condition of the stairway proximately caused the decedent's fall did not turn on evidence introduced to prove that the decedent actually fell; rather, it turned on the reasonableness of the jury's inference that defects in the stairway were a substantial factor in the fall. *See id*. at 455.

direct evidence of the decedent's fall, stating that "*it is not the law that there must be an eyewitness to the accident*; it is enough if the evidence is such that the jury can reasonably infer that the defective stair[way] was the cause of the injury and death." *Id.* at 455 (emphasis added). Finally, we explained that

> a jury could reasonably infer that the defect in part of the stairway was the cause of the accident which culminated in decedent's death. It is true that there are other possible inferences, such as, foul play resulting in someone pushing him down the stairs, his falling while intoxicated, an injury received before he returned to the apartment; but none of these creates as reasonable an inference as that reached by the jury.

Id. After reviewing several similar cases,[8] we concluded that "whether the evidence sustains the inference of proximate cause" was a question for the jury, and we would not disturb the jury's finding "when it has made an inference reasonably warranted by the evidence." *Id.* at 456.

Majerus remains good law.[9] A plaintiff need not introduce eyewitness evidence to prove her claim or to elevate her theory above mere speculation to the point where it

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[8] *See, e.g.*, *Standafer v. First Nat'l Bank of Minneapolis*, 68 N.W.2d 362, 366 (Minn. 1955) ("While it is true that the proof fails to show exactly how the accident happened, that likewise is true in many negligence cases. It is not necessary that there be eyewitnesses to the happening of an accident before there may be recovery."); *Paine v. Gamble Stores, Inc.*, 279 N.W. 257, 259–61 (Minn. 1938) (upholding jury verdict on proximate cause based on the theory—supported solely by circumstantial evidence—that a faulty handrail caused decedent to fall down a stairway); *Mitton v. Cargill Elevator Co.*, 144 N.W. 434, 435–36 (Minn. 1913) (concluding that plaintiff had introduced sufficient circumstantial evidence of the condition and location of a steep stairway to send the question of proximate cause to a jury despite lack of eyewitness evidence).

[9] Understanding that *Majerus* is strong support for our decision today, the dissent suggests that we should simply overrule *Majerus* even though it has been Minnesota law for nearly 60 years. We see no reason to do so. *Palmer v. Walker Jamar Co.*, 945 N.W.2d

preponderates over competing inconsistent theories. This rule from *Majerus* applies easily here because the facts of this case are so similar. Both cases involve wrongful death actions rooted in a claim asserting negligent maintenance of a stairway, which left the stairway in a degraded and dangerous condition. Both cases also center on the question of whether the condition of the stairway proximately caused the decedent's fall and death. And in both cases, no one directly witnessed how the decedent began to fall. If anything, the circumstantial evidence here is stronger than in *Majerus*; multiple witnesses saw Joyce in motion at or near the bottom of the longer set of steps, whereas in *Majerus*, the decedent's

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845, 850 (Minn. 2020) (stating that we are extremely reluctant to overrule precedent without a compelling reason).

Meanwhile, Lown attempts to distinguish *Majerus* in part by pointing to dicta from our decision in *Zinnel*, which suggested that the plaintiff in *Majerus* may have been aided by a now-repealed statutory presumption of due care for plaintiffs in negligence actions. *See Zinnel*, 274 N.W.2d at 500 n.10 (stating that "it is likely the plaintiff in *Majerus* was aided by the presumption of due care provided in" Minn. Stat. § 602.04 (1976)). But *Zinnel* did not disturb the legal doctrine espoused in *Majerus*; indeed, in *Zinnel* we primarily distinguished *Majerus* on factual grounds because, unlike in *Majerus*, the plaintiff's inconsistent theory in *Zinnel* was "no more reasonable than many other theories which could [have been] developed." *Id.*

Moreover, the statutory presumption of due care we mentioned in *Zinnel* went primarily to the question of whether the decedent in *Majerus* was contributorily negligent, which at the time was a complete bar to recovery. *See Price v. Amdal*, 256 N.W.2d 461, 469 (Minn. 1977) (holding that Minn. Stat. § 602.04 was "an unconstitutional denial of equal protection to those survivors against whom a wrongful-death action is brought" following passage of the comparative fault statute because it unduly favored plaintiffs when deciding the question of whether and how much they could recover from a negligent defendant); *Winge v. Minn. Transfer Ry. Co.*, 201 N.W.2d 259, 263 (Minn. 1972) (noting that before passage of Minnesota's comparative fault statute in 1969, "contributory negligence of plaintiff was a complete defense" and weighing the comparative fault of plaintiff and defendant was prohibited). Consequently, the due care presumption did not impact our core discussion of proximate cause in *Zinnel* because that presumption was chiefly relevant to the issue of whether the decedent would be able to recover for damages, not whether the defendant faced any liability for proximately causing the decedent's injury.

body was discovered several hours after the incident, about 30 feet from the stairway, and there was no direct evidence that he actually fell down the stairway. 113 N.W.2d at 453.

2.

We now consider whether a genuine issue of material fact exists as to whether the poor, degraded, and dangerous condition of the stair was a substantial factor in causing Joyce to fall. We conclude that a genuine issue does exist. Viewing the evidence and associated inferences in a light most favorable to Staub, a jury could reasonably infer that the condition of the stair was one substantial factor causing Joyce to fall. To the extent that Myrtle Lake's and Lown's competing alternative theories conflict with Staub's theory of proximate cause, the evidence and inferences, when viewed in a light most favorable to Staub, also reflect that a genuine issue of material fact exists as to whether Staub's theory preponderates over the alternative theories. Further, for reasons we explain below, a jury could reasonably determine that Staub's proximate cause theory does not necessarily conflict with the alternative theories. In that event, Staub would not need to prove that her proximate cause theory preponderates over those theories.[10]

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[10] Staub asserted at oral argument that *any* evidence of a relevant building code violation, on its own, could establish a causal relationship sufficient to survive summary judgment. Thus, Staub appears to imply that a successful negligence per se claim automatically establishes proximate cause as a matter of law. Staub is mistaken.

A negligence per se theory of tort liability "substitutes a statutory standard of care for the ordinary prudent person standard of care, such that a violation of a statute (or an ordinance or regulation adopted under statutory authority) is conclusive evidence of duty and breach." *Gradjelick*, 646 N.W.2d at 231 n.3. A defendant may face liability for negligence per se when "the persons harmed by the violation are within the intended protection of the code and if the harm suffered is of the type the code was intended to prevent." *Id.* at 231. A successful negligence per se claim, however, establishes as a matter

Here, viewed in a light most favorable to Staub, the evidence—including deposition testimony, expert reports, and photographs—establishes the following facts:

- The stair was degraded and in poor condition; the landing was rough and rocky and the steps themselves were cracked, chipped, inconsistently spaced, leaning, and unsafe to use.[11]
- Sam and Joyce had complained to Lown about the state of the stair and had warned Lown that the stair represented a safety hazard.
- Joyce regularly used the stair leading out of the lodge and had complained about the challenge of using it. She had previously used the longer set of steps down which she fell.
- Finally, on the date of the fall, Joyce exited the lodge onto the landing . Shortly thereafter, she fell down the longer set of steps, although how she began to fall remains uncertain. She died as a result of injuries sustained during her fall.

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of law only those elements of duty and breach; it does *not* establish proximate cause, which the plaintiff must still prove with sufficient evidence. *See Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981) (noting that "negligence per se is not liability per se" and that a defendant can still assert lack of proximate cause in the event a plaintiff establishes duty and breach via a negligence per se theory of liability).

At any rate, we decline to address the competing arguments made by the parties about the applicability (or lack thereof) of various building codes and standards to the resort generally and the stair specifically, as they are not necessary to resolve the issue in this case: whether Staub has introduced sufficient evidence on proximate cause to survive summary judgment.

[11] Myrtle Lake and Lown dispute Staub's contention that the stair was dangerous. Whether the stair was in fact dangerous—in other words, whether Myrtle Lake and Lown were actually negligent in maintaining the stair and breached some duty of care to Joyce—is an issue that may be addressed on remand. Given the procedural posture here, however, we assume that the stair had deteriorated to the point where it was dangerous because Staub introduced evidence supporting such a conclusion: the photographs, the report from Great Northern Environmental Solutions, and witness testimony and affidavits discussing the dangerous condition of the stair. The fact that there is competing evidence—such as the Scalzo report, which concluded that the stair was not dangerous—does not alter our assumption. *See Henson*, 922 N.W.2d at 190 (noting that on appeal from summary judgment, we resolve all doubts and factual inferences against the moving party).

Life experience and common sense, which a jury may rely on to draw reasonable inferences when making a decision, tell us that a degraded, cracked, and chipped stair, leaning away from a building, is a dangerous condition that may cause a person using the stair to fall. And at this stage in the proceeding, we must accept the fact that the stair was in a poor and degraded condition. We also accept Staub's reasonable inference that the condition of the stair meant that it was unsafe to use. Further, there is no dispute that Staub was on the landing before she fell and that she, in fact, fell. Thus, at the summary judgment stage, the circumstantial evidence on which Staub relies amounts to more than "mere speculation or conjecture." *See E.H. Renner & Sons*, 203 N.W.2d at 834. Consequently, based on the evidence in the record, a jury could reasonably infer that the poor and degraded condition of the stair was a substantial factor in causing Joyce's death. *See Lubbers*, 539 N.W.2d at 401; *compare Gehrke v. McCabe's Ace Hardware, Inc.*, No. C4-01-1408, 2002 WL 15679, at *2–3 (Minn. App. Jan. 8, 2002) (affirming grant of summary judgment and parsing preponderating from speculative theories of proximate cause by observing that there was *no evidence of a dangerous condition* "in the area of [the plaintiff's] fall, and there [were] other reasonable circumstantial explanations of causation").[12]

[12] Staub argues that, "[w]hen a [defendant] engages in conduct considered wrongful because it leads to a harm, a jury should be able to infer that said conduct was the cause of the harm using circumstantial evidence." In other words, Staub argues that evidence of a defendant's breach of duty—on its own—can serve as circumstantial evidence upon which a factfinder may infer proximate cause.

Staub cites to foreign cases, principally *Liriano v. Hobart Corp.*, 170 F.3d 264 (2d Cir. 1999) and *Blados v. Blados*, 198 A.2d 213 (Conn. 1964), to support this contention.

In addition, no other reasonable circumstantial explanations of causation preponderate over Staub's theory. If anything, the alternative theories advanced by Myrtle Lake and Lown (and the lower courts) skew toward speculation. For example, the theories that Joyce fell due to dehydration because she drank coffee and it was a sunny July day or that she fell because she was startled by a mouse or an owl have absolutely no support in the record.

Even if the cases cited by Staub support her breach-causation argument, our case law does not. *See, e.g.*, *Pietila v. Congdon*, 362 N.W.2d 328, 333 (Minn. 1985) (noting that even assuming defendants owed a duty of care to plaintiff and breached that duty, plaintiff still had to prove separately that the breach proximately caused the deaths at issue). Framed in the context of this case, Staub cannot infer proximate cause *solely* by establishing breach, i.e., proving that Myrtle Lake and Lown failed to properly maintain the stair in a safe condition. The dissent's position that we are in fact adopting such a standard (which the dissent inaptly calls *per se* negligence) is not well founded. Rather, Staub must prove not only that Myrtle Lake and Lown breached some duty of care by failing to maintain the stair but also that their breach—the resulting defective condition of the stair—proximately caused Joyce's fall. Based on circumstantial evidence that not only shows that the stair was poorly maintained such that it could cause a fall, and that Joyce was using that stair and was observed falling down that stair, a jury could infer that the poorly maintained stair was the proximate cause of Joyce's fall. *See Majerus*, 113 N.W.2d at 455. We do not impermissibly shift the burden of proof as the dissent suggests.

To the extent that Staub's breach-causation argument can also be construed as an implicit claim based on res ipsa loquitur ("the thing speaks for itself"), it also lacks merit. The doctrine of res ipsa loquitur permits an inference of causation based on limited circumstantial evidence when certain requirements are met. *See Hestbeck v. Hennepin Cnty.*, 212 N.W.2d 361, 365 (Minn. 1973). For a court to consider res ipsa loquitur, a plaintiff "must prove three pre-conditions to its application: (1) that ordinarily the injury would not occur in the absence of negligence; (2) that the cause of the injury was in the exclusive control of the defendant; and (3) that the injury was not due to plaintiff's conduct." *Hoven v. Rice Mem'l Hosp.*, 396 N.W.2d 569, 572 (Minn. 1986). Res ipsa loquitur does not apply here, chiefly because the injury at issue—an injury resulting from a fall down a set of steps—is something that may happen in the ordinary course without any negligence. Moreover, although Staub raised the issue in her memorandum opposing summary judgment before the district court, she did not argue a res ipsa theory before the court of appeals and does not do so before us.

Myrtle Lake and Lown also suggest that Joyce's replaced knee may have given out, causing her fall. There is no evidence that Joyce's knee was bothering her on the day of the fall. More importantly, there is testimony in the record—which we must credit—that Joyce "was doing real well" and "had no problems" with her recent knee replacement on the day of her fall.

Further, when viewed through the appropriate summary judgment lens where all facts and inferences must be construed in Joyce's favor, a genuine issue of material fact exists as to whether a jury could reasonably infer that Staub's theory that Joyce fell because of the condition of the steps preponderates over Myrtle Lake's and Lown's alternative theories.

For example, Myrtle Lake and Lown suggest that Joyce may have tripped over the laundry basket on the landing or was distracted while talking on a cell phone. But testimony in the record tells us that the laundry basket remained on the landing after Joyce's fall, suggesting that Joyce did not trip over the basket. Further, a witness testified that Joyce "was not talking on the phone" when she came outside onto the landing. In fact, there is no evidence that anyone saw Joyce with a phone before she fell.[13] On summary

[13] To bolster the alternative claim that Joyce fell because she was distracted by her phone, the dissent relies heavily on the fact that a cell phone—that one witness said "must have been" Joyce's phone without further confirmation—was found in the grass after the fall by someone other than the witness. There is no evidence as to how the phone ended up in the grass nor evidence that Joyce even had a cell phone with her when she fell. The record discloses that she regularly carried the "bar phone," which was not a cell phone, around the resort. Another witness said that there was poor or no cell service in the area.

Ultimately, the dissent's narrative about Myrtle Lake's and Lown's theory that Joyce fell because she was distracted by the phone is a good example of how the dissent

judgment, we accept that the laundry basket did not tip over and that Joyce was not talking on a phone. Accordingly, assuming as we must that a jury would draw all facts and inferences in Joyce's favor, Staub's theory preponderates over Myrtle Lake's and Lown's competing theories that Joyce tripped over the laundry basket or was distracted by a cell phone.

Third, Myrtle Lake and Lown suggest that Joyce may have lost her balance by bending over to pick up keys that she dropped. They support this claim with testimony that a witness heard keys drop a short time before Joyce fell. But unlike the hard fact that the stair was in a poor, degraded, and dangerous condition, (1) no one saw Joyce bend over to pick up any keys and (2) there is no other evidence aside from the sound of dropping keys that *Joyce* actually dropped keys or evidence of what happened to the keys if they were dropped, such as testimony that Joyce had keys in her possession after the fall. In the absence of such evidence, when construing factual doubts against Myrtle Lake and Lown on summary judgment, we do not assume that Joyce bent over to pick up keys.

Finally, none of the alternative theories are necessarily inconsistent with Staub's position that Joyce fell because of the poor, degraded, and dangerous condition of the stair. For instance, a jury could reasonably infer that the combination of Joyce bending over to pick up keys and the poor, degraded, and dangerous condition of the stair caused her to fall; in other words, that each cause independently served as a substantial factor in the fall.

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ignores the procedural posture of the case. By picking out pieces of evidence that support the alternative theory of causation, the dissent ignores our role on review of summary judgment: to view all the evidence, and inferences to be drawn from that evidence, in a light most favorable to the nonmoving party. *Henson*, 922 N.W.2d at 189–90.

Likewise, the theories that Joyce's alleged knee problems or the possibility that she tripped over the laundry basket caused her fall do not conflict with the theory that Joyce fell in part due to the condition of the stair. Consequently, even if we concluded that one of the alternative theories was an equally likely proximate cause of the fall as the poor, degraded, and dangerous condition of the stair, a jury viewing all facts and inferences in favor of Staub could reasonably conclude that each theory was a substantial factor, rendering summary judgment inappropriate. *See Osborne*, 749 N.W.2d at 380 n.8 (noting that if two or more theories of proximate cause "are consistent and are both substantial factors in bringing about the result, they may both be a proximate cause of that result").

C.

The dissent takes a different view of our summary judgment standard and circumstantial evidence case law to conclude that our decision today "widens the door for speculative awards."

First, the dissent claims that our decision permits future juries "to infer causation without *any* evidence tending to show that, *on a particular occasion*, the condition caused the plaintiff's injury." It does not. The dissent's argument is premised on an incorrect assumption that Staub failed to introduce any evidence, aside from the degraded and dangerous condition of the stair and proof that Joyce died as a result of falling down the longer set of steps, to create a genuine dispute of material fact as to whether the condition of the stair proximately caused Joyce's fall. Staub introduced direct evidence in the form of witness testimony that on the day of the fall, Joyce (1) exited the lodge onto the landing

and (2) fell down the longer set of steps.[14] This is more than simple evidence of the condition of the stair; it serves as relevant evidence of Joyce's use of the stair on a particular occasion.

Second, the dissent claims that our decision "misinterprets our law on circumstantial evidence." Specifically, the dissent contends that we err by applying the rule that we adopted in *Osborne* that (1) when a reasonable juror could conclude that a plaintiff's theory of causation was a substantial factor in causing harm and (2) when alternative theories are consistent with the plaintiff's theory (i.e., when each theory of causation could be one of the substantial factors causing harm), a plaintiff need not establish that her theory of causation preponderates over alternative theories. *See* 749 N.W.2d at 380 n.8.

The dissent makes two arguments to support this contention. First, the dissent cites to *E.H. Renner & Sons*, 203 N.W.2d at 835; *Zinnel*, 274 N.W.2d at 499; and *Village of Plummer v. Anchor Casualty Co.*, 61 N.W.2d 225, 227 (Minn. 1953), in which we highlighted the need for a plaintiff's theory to preponderate over competing inconsistent theories of proximate cause. The dissent notes that in each of those cases, we upheld

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[14] The dissent takes issue with our description of "the stair" as including the landing and both sets of steps collectively. The dissent implies that because Staub did not introduce evidence demonstrating that Joyce began to descend the longer set of steps down which she fell, Staub failed to introduce *any* evidence at all that she was using the steps at the time of the incident.

We disagree. Photographs from the record demonstrate that the landing and both sets of steps were all connected and functioned as a single means of egress from the lodge and all were in a similar state of deterioration. Thus, it is not unreasonable to consider "the stair" as a single unit that Joyce had to navigate. And as discussed above, Staub introduced evidence that Joyce stepped out onto the landing, which at least one witness characterized as degraded and leaning away from the building.

directed verdicts because the plaintiffs failed to meet their burden to show that their theory preponderated over competing theories even though the theories in each case were not necessarily inconsistent. The dissent's analysis may be true as a descriptive matter. But that descriptive fact is not analytically relevant. In none of those cases did we directly confront and address the legal question of whether the rule that a plaintiff must show that her theory of causation preponderates over alternative theories should apply when each theory could be one of several substantial factors causing the harm.

We confronted that issue in *Osborne*, which was decided after the cases cited by the dissent. *Osborne* arose after a person jumped off a bridge to his death. 749 N.W.2d at 369. Osborne's family sued a bowling alley that had served Osborne alcohol, claiming that Osborne's intoxication was a proximate cause of his death. *Id.* at 368–69. The defendant countered that Osborne jumped from the bridge to escape law enforcement, noting that after leaving the bowling alley, he was chased by the police. *Id.* at 369–70. On review of the district court's grant of summary judgment in favor of the defendant, we held that a jury could reasonably conclude that Osborne's intoxication and his desire to escape the police were both substantial factors that caused his death; in other words, they were not inconsistent theories of proximate cause. *Id.* at 370, 380–81. We rejected an argument made by the dissent in *Osborne* (like the argument the dissent makes here) that Osborne's family could not prevail because the intoxication theory did not preponderate over the desire-to-escape-the-police theory. *Id.* at 380 n.8. In doing so, we stated that "the existence of more than one cause of the injury does not necessarily lead to the conclusion that they

are inconsistent or that they are not both substantial factors in bringing about the injury." *Id.*

Which leads us to the dissent's second argument: we should ignore our decision in *Osborne* as binding precedent and limit it to the facts of the case. As with the dissent's proposal to overrule *Majerus*, we find no compelling reason to limit the legal principle that drove our decision in *Osborne*. *Cf. Palmer*, 945 N.W.2d at 850 (stating that we are extremely reluctant to overrule precedent without a compelling reason). *Osborne* is a relatively recent case and, as noted, in deciding that case we rejected an argument quite like the argument upon which the dissent relies in urging us to cabin the decision. Further, the conclusion in *Osborne* makes sense. A plaintiff may establish proximate cause by proving that a defendant's conduct was a substantial factor in causing harm even when the evidence establishes that the conduct of some actor or force other than the defendant was also a substantial factor in causing harm. In that context, when the existence of an alternative substantial factor does not defeat the plaintiff's claim, there is no reason that the conduct the plaintiff claims is a substantial factor must preponderate over the alternative substantial factor. The plaintiff may prevail when the alternative substantial factor theory is true. In other words, when there are two causes of a harm and a defendant may be found liable if the plaintiff shows that the defendant is responsible for just one of the causes, it makes no logical sense to require that the plaintiff prove that the cause for which the defendant is responsible is more significant than the other cause. *Osborne* makes this clear, and the dissent's continued reliance on pre-*Osborne* case law—which did not address the precise legal question at issue here and in *Osborne*—does not alter this reality.

D.

In sum, a plaintiff need not introduce direct eyewitness testimony of a fall to establish proximate cause and may rely solely on circumstantial evidence to do so. Here, when viewing all facts and reasonable inferences in a light most favorable to Staub, as we must on review of summary judgment, we conclude that a jury could reasonably find that Staub's proximate cause theory—that the poor, degraded, and dangerous condition of the stair was a substantial factor causing Joyce's fall and death—preponderates over competing theories to the extent that those theories are inconsistent with Staub's. In addition, we conclude that a jury could reasonably find that Staub's theory does not necessarily conflict with Myrtle Lake's and Lown's alternative theories. Thus, even assuming another theory was a substantial factor in Joyce's fall, such a conclusion does not automatically mean that the condition of the stair was *not* a substantial factor. In other words, whether we view all of the proximate cause theories argued here as inconsistent or consistent based on the facts and reasonable inferences derived from the record, Staub has met her burden to establish a genuine dispute of material fact sufficient to survive summary judgment. Consequently, the district court erred by granting summary judgment to Myrtle Lake and Lown.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to that court for further proceedings.[15]

Reversed and remanded.

[15] The district court also granted summary judgment to Lown on the independent basis that Lown enjoyed immunity from liability under Minn. Stat. § 322C.0304, subd. 1. The court of appeals did not address that issue. *Staub*, 2020 WL 7330583, at *3 n.2. Accordingly, we remand to the court of appeals to address whether the district court properly granted summary judgment on Lowe's claim that Minn. Stat. § 322C.0304 shields him from liability. Once the court of appeals has done so, the case may be remanded to the district court for further proceedings consistent with this opinion.

D I S S E N T

ANDERSON, Justice (dissenting).

I agree with the court that a plaintiff need not introduce eyewitness evidence to prevail on a claim of negligence. *Standafer v. First Nat'l Bank*, 68 N.W.2d 362, 366 (Minn. 1955) ("It is not necessary that there be eyewitnesses to the happening of an accident before there may be recovery."). But I disagree that appellant Virginia Staub has made a sufficient showing to raise her claim beyond "[m]ere speculation." *See Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). Staub has produced no evidence, eyewitness or otherwise, showing that the defects in the stair was the reason that Joyce Weeks fell. At most, she has shown that those defects were one of several possible causes. Consequently, any verdict in favor of Staub would be speculative, and summary judgment is appropriate. Because the court's reversal of summary judgment is unjustified and widens the door for speculative awards, I respectfully dissent.

The court holds that Staub's offer of proof is enough to survive summary judgment. I disagree for two related reasons: one, there is a complete lack of evidence about the reason Joyce fell, and two, the likelihood of Staub's theory of causation fails to outweigh the likelihood of other potential causes. I address each in turn.

A.

It is axiomatic that a plaintiff's claim cannot rest on "mere conjecture." *Orth v. St. Paul, M. & M. Ry. Co.*, 50 N.W. 363, 365 (Minn. 1891); *see Bob Useldinger & Sons, Inc.*, 505 N.W.2d at 328 ("Mere speculation, without some concrete evidence, is not enough to avoid summary judgment."). Thus, "when the record reflects a *complete lack of proof* on

an essential element of the plaintiff's claim," the plaintiff has failed to create a genuine issue of material fact for trial, and the defendant is entitled to summary judgment. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (emphasis added).

Staub presented evidence to show that the stair was in a defective condition: the landing was rough and had a few cracks, and the steps were cracked, chipped, and inconsistently spaced. Because I am reviewing the district court's decision to grant summary judgment in favor of respondents Myrtle Lake Resort and James Lown (collectively respondents), I accept these facts as true. *See Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 190 (Minn. 2019) (explaining that on review of an order granting summary judgment, we view the evidence in a light most favorable to the nonmoving party and resolve all doubts and factual inferences in that party's favor).

According to the court, that evidence, combined with "[l]ife experience and common sense," is enough to avoid summary judgment. The court reasons that because life experience and common sense "tell us that a degraded, cracked, and chipped stair, leaning away from a building, is a dangerous condition that *may* cause a person using the stair to fall," Staub's evidence rises beyond mere speculation or conjecture.

I disagree. The only evidence to support Staub's theory is evidence of the defective condition of the stair. Perhaps this evidence shows that the condition *could* have caused Joyce to fall. But the record contains no other evidence suggesting that, on this particular occasion, the condition of the stair was the cause of Joyce's fall. We know only that Joyce fell; no one saw how that fall began. Witnesses saw her on the landing before she fell and on the steps as she was falling, but they did not see the start of her fall. There also is no

physical evidence from the landing, steps, or rail, such as a fresh chip of cement, to suggest that a specific defect caused her to fall. And the record does not contain any statements from Joyce about why she fell.

The lack of any additional evidence to show causation, beyond evidence of the allegedly dangerous condition, sets this case apart from several slip and fall cases in which we found that the plaintiff had produced enough evidence to support the claim. For example, in *Lutz v. Lilydale Grand Central Corp.*, we held that the jury could reasonably infer that the plaintiff slipped on ice in a parking lot, based in part on the plaintiff's own statements, including about her degree of care in crossing the lot. 250 N.W.2d 599, 600 (Minn. 1977). In *Smith v. Kahler Corp.*, we held that the jury could have reasonably inferred that the plaintiff tripped over a chair in a cocktail lounge, based in part on the plaintiff's description of how she caught her foot and fell around the chair. 211 N.W.2d 146, 150 (Minn. 1973). Again, we have no statements from Joyce about why or how she fell.

In *Paine v. Gamble Stores*, the jury did not have the benefit of statements by the injured party, who died because of his fall. 279 N.W. 257, 258 (Minn. 1938). Nevertheless, we held that the jury could reasonably infer that the deceased person fell because of a missing handrail based on a variety of circumstantial evidence: the body lay directly below the place where the rail was broken, no dust was disturbed on the bottom steps, there was a fresh scratch in the wall close to the broken rail, and the deceased had a weak leg that sometimes required him to grasp for support. *Id.* at 260. Here, we do not have any comparable circumstantial evidence establishing the reason that Joyce fell.

Thus, in each of these cases, there was evidence of a dangerous condition *and* evidence tending to show that the dangerous condition was operative in that particular instance. Here, there is *no* additional evidence suggesting that the condition of the stair in fact caused Joyce to fall. That void is fatal to Staub's claim. *See Lubbers*, 539 N.W.2d at 401 (granting summary judgment because there were not "any facts in the record giving rise to a genuine issue for trial on the essential element of proximate cause").[1]

Contrary to the court's confident assertion, life experience and common sense do not fill that void.[2] Life experience and common sense tell us many things, not just the

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[1] The court claims that the evidence showing causation on *this particular occasion* is direct testimony that Joyce walked out of the lodge onto the stair and fell down the longer set of steps. But again, that evidence shows nothing more than (1) the existence of a dangerous condition in the vicinity of the injured person and (2) the fact of injury. The record contains no direct testimony that shows the *reason* Joyce fell, which is the disputed issue.

[2] The cases cited by the court do not support its conclusion that evidence of a dangerous condition plus life experience and common sense are sufficient in themselves to raise Staub's claim beyond mere speculation. *See Lubbers*, 539 N.W.2d at 401; *Gehrke v. McCabe's Ace Hardware, Inc.*, No. C4-01-1408, 2002 WL 15679 (Minn. App. Jan. 8, 2002). In both cases, the plaintiff *failed* to present sufficient evidence to survive summary judgment.

The case that best supports the court's approach is *Majerus v. Guelsow*, 113 N.W.2d 450 (Minn. 1962). *Majerus* is factually similar to the situation here because the plaintiff relied entirely on circumstantial evidence to prove that the defects in the defendant's basement stairway proximately caused the decedent's fall and subsequent death. *See id.* at 455 (concluding that a jury could reasonably infer that the defect in part of the stairway was the cause of the accident). As here, there was no testimony by the decedent about how he fell.

I conclude that *Majerus* was decided incorrectly because, as here, there was no evidence beyond the condition of the stairway to support a finding that the defects in the stairway proximately caused the decedent to fall. *See id.* at 457 (Otis, J., dissenting); *id.* at 458 (Knutson, C.J., dissenting). We should take this opportunity to overrule *Majerus* or at least limit its reasoning to the facts of that case.

inference accepted by the court. These concepts tell us that people are less likely to be injured by a hazard of which they are aware. Joyce was well aware of the condition of the stair and had complained about that condition to respondents. We are also informed by these concepts that people are less likely to be injured by a hazard they have navigated many times. Joyce had used the stair repeatedly. And as a matter of life experience and common sense, there are many reasons why a person may trip and fall. Here, the evidence equally sustains at least two theories about why Joyce fell that are equally plausible with the theory asserted by Staub, which is the next reason why Staub has failed to meet her burden.[3]

B.

When a plaintiff relies entirely on circumstantial evidence to prove causation, a plaintiff must make a greater showing than when the plaintiff relies on direct evidence. *See Hagsten v. Simberg*, 44 N.W.2d 611, 613 (Minn. 1950) (stating that we require "a greater degree of persuasiveness from circumstantial evidence than is required from direct evidence"). It is not enough that the evidence is "merely consistent with [the] plaintiff's theory of the case." *Zinnel v. Berghuis Constr. Co.*, 274 N.W.2d 495, 499 (Minn. 1979).

But even if *Majerus* remains good law, my resolution of this case would not change because I also conclude that Staub has not shown that her theory of causation outweighs other possible theories and, therefore, *Majerus* is distinguishable because it found that the plaintiff's theory was more likely than the alternative theories. *See* 113 N.W.2d at 455.

[3] I agree with the court that several of the alternative explanations have either no support in the record or are contrary to facts in the record. For example, there is no evidence that Joyce was startled by a mouse or owl, and it is unlikely that Joyce tripped over the laundry basket because a witness testified that the basket remained on the landing after Joyce fell.

Rather, the evidence must permit a rational factfinder to conclude that it is *more likely* that the injury was caused by the defendant's action than by any other circumstance. *Smock v. Mankato Elks Club*, 280 N.W. 851, 852 (Minn. 1938) ("Reasonable minds functioning judicially must be able to conclude from the circumstances that the theory adopted by the verdict outweighs and preponderates over any other theory."); *Alling v. Nw. Bell Tel. Co.*, 194 N.W. 313, 314–15 (Minn. 1923) ("The burden is on [the] plaintiff to show that it is more probable that the harm resulted in consequence of something for which the defendant was responsible than in consequence of something for which he was not responsible."). When the plaintiff fails to make this showing, the question of liability is not one for the jury. *See Saaf v. Duluth Police Pension Relief Ass'n*, 59 N.W.2d 883, 887 (Minn. 1953) ("Where two opposing inferences can be drawn with equal justification from the same circumstantial evidence[,] . . . both must be rejected as purely speculative."); *Smock*, 280 N.W. at 852 (ordering judgment notwithstanding the verdict to be entered in favor of the defendant).

Because Staub relies entirely on circumstantial evidence, she bears the burden of producing evidence that permits a rational factfinder to find that her theory of causation outweighs any alternative theory. *See Alling*, 194 N.W. 313, 314–15. The court disagrees that Staub must make this showing but concludes that, in any event, Staub's theory outweighs other possible explanations.[4]

[4] According to the court, a plaintiff's theory of causation must outweigh an alternative explanation only when that alternative is "fundamentally inconsistent" with the plaintiff's theory. Because it is not physically impossible for the condition of the stair *and* the

Here, there are at least two alternative explanations for why Joyce fell that are equally consistent with the evidence as the theory charged by Staub. The first alternative is that Joyce lost her balance while picking up her keys from the landing.

The court dismisses this theory because, it claims, there is no evidence that Joyce actually dropped her keys or bent down to pick them up, aside from a witness who heard the sound of dropping keys. But the court overlooks the broader context that supports this inference.

Witnesses explained that Joyce was in the process of bringing the basket of laundry out to her car, which she always used to bring the laundry to and from the cabins. Obviously, Joyce could not drive the car without a car key. Another witness heard keys hit "concrete" shortly after Joyce stepped out onto the concrete landing, and he believed the sound to be caused by the "string of keys" Joyce used to unlock cabins. A witness also attested that Joyce's car was parked in its usual spot at the time of the accident. Taken as a whole, these facts strongly suggest that Joyce had a set of keys with her, which she needed to drive her car or unlock the cabins, *and* that she dropped those keys after she stepped outside onto the concrete landing. From those facts, a jury could reasonably infer that Joyce bent over to pick up the keys after she dropped them. Moreover, life experience and common sense tell us that a 70-year-old woman, who was, as at least one witness testified,

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explanations proposed by respondents to have each played a part, the court concludes that Staub's theory need not predominate. As I explain in section C, the court misinterprets the meaning of "inconsistent" from our precedent.

"overweight," could lose her balance and fall while picking up her keys from a narrow landing partially obstructed by a laundry basket.[5]

A second explanation for why Joyce may have fallen is that she was distracted by her phone. The court dismisses this theory because a witness stated that Joyce was not talking on a phone when she stepped outside onto the landing. But accepting that fact as true says nothing about what Joyce was doing *after* she set the laundry basket down. A witness stated that after Joyce set the basket down, it was 30 to 60 seconds before he heard the keys drop. It was then approximately 30 seconds more before he heard Joyce yell. That leaves ample time for Joyce to have used a phone in some manner. Notably, a witness testifies that Joyce always carried a phone with her, and a phone was found on the ground next to the stair after Joyce fell.[6] Because the phone ended up on the ground next to the stair, a jury could reasonably infer that Joyce was holding it at the time that she fell. And life experience and common sense tell us that a person can trip entirely because of their own negligence when they are paying attention to a phone rather than where they are walking.

Thus, the facts are equally consistent with at least two alternative reasons that Joyce may have fallen: she lost her balance while picking up her keys, or she tripped because she

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[5] The court refuses to infer that Joyce bent over to pick up keys because all reasonable inferences must be drawn in favor of Staub. But it is not *reasonable* to infer that Joyce would leave her keys on the landing when she needed them to drive her car or unlock the cabins.

[6] Although witnesses disagreed about whether the phone was a cell phone or a wireless phone used in the bar, they agreed that Joyce must have been the one carrying it.

was looking at her phone. The court brushes over the facts supporting these inferences in its haste to conclude that life experience and common sense assure us that the condition of the stair is the most likely reason that Joyce fell.

The court also conveniently passes over critical assumptions in Staub's theory. The court repeatedly refers to the defective "stair," which it uses as shorthand for the landing, both sets of steps, and, possibly, the handrail. But there is *no evidence* that Joyce walked down the steps or touched the handrail before she fell. Witnesses saw Joyce on the *landing*, but no witness saw her walk down the steps. To the contrary, witnesses stated that Joyce would *avoid* using the longer set of steps, and given that Joyce would ordinarily take the shorter set of steps to bring the laundry to her car, no witness knew why she would use the longer set of steps on this occasion. Accordingly, it is pure speculation that Joyce fell because of a crumbling, cracked, leaning, or chipped *stair*.

As for the condition of the *landing*, there is evidence that the landing was not level with the door to the resort and that its surface was "rough" and had some cracking. But it is not clear what degree of risk these defects posed or whether these issues are more likely to cause a 70-year-old woman to fall off a landing than the act of bending over to pick up keys or using a phone.[7] Appealing to life experience and common sense when all three theories are equally consistent with the evidence is nothing more than an invitation for the jury to engage in speculation and conjecture. *See Saaf*, 59 N.W.2d at 887; *Smock*, 280

[7] No expert testified as to the mechanism of the injury, such as how a crack or the rough surface on the landing could have caused Joyce to fall.

N.W. at 852 ("[A] jury may not be permitted to guess as between two equally persuasive theories consistent with the circumstantial evidence.").

Our decision in *Zinnel* is instructive. There, a plaintiff sued highway contractors for death and injuries arising out of a car crash. . 274 N.W.2d at 496. The plaintiff claimed that inadequate signing, striping, and barricading of the construction zone was the proximate cause of the accident. *Id.* at 498. We agreed with the district court that the plaintiff's theory was possible but "no more supported by" the facts than a theory that speculated that the other driver's negligence was the sole proximate cause of the accident. *Id.* at 499. Therefore, we affirmed a directed verdict in favor of the contractors. *Id.*

Here, we are faced with a legally similar situation. Staub presented a theory that is consistent with the facts, but that theory is "no more supported" than alternative explanations relating to Joyce's phone or keys. All of these theories are speculation. Accordingly, the question of negligence is not one for the jury, and the district court properly granted summary judgment to respondents. *See Lubbers*, 539 N.W.2d at 402; *Smock*, 280 N.W. at 852. To permit otherwise is to "substitute speculation for proof and effectively shift from plaintiff to defendants the burden of proof" on causation. *Hagsten*, 44 N.W.2d at 615 (refusing to permit an inference of negligence or causation from the fact of an accident).

C.

Beyond the application for this case, I am concerned by the implications of the court's decision, which substantially widens the door for plaintiffs to bring speculative claims.

According to today's decision, proof of a dangerous condition plus life experience and common sense is all that it takes for a plaintiff to avoid summary judgment on the element of proximate causation when the injury is of a type known to result from the condition. Following the example in *Majerus*, the court makes clear that under such circumstances, a jury is permitted to infer causation without *any* evidence tending to show that, *on a particular occasion*, the condition caused the plaintiff's injury. But as I explained, this approach requires less than the offers of proof we have upheld in other slip and fall cases, *see Lutz*, 250 N.W.2d at 600; *Smith*, 211 N.W.2d at 150; *Paine*, 279 N.W. at 260, and invites speculation.

A practical implication of the court's decision is that it turns negligence per se into "liability per se" for the purpose of summary judgment When the plaintiff is a person for whom a statute is intended to protect, and when the harm is of a type that the statute was designed to prevent, a violation of the statute is negligence per se—that is, conclusive evidence of the elements of duty and breach. *Gradjelick v. Hance*, 646 N.W.2d 225, 231 n.3 (Minn. 2002). But a plaintiff still must prove proximate causation. *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981) (explaining that negligence per se is not liability per se because the defendant can challenge proximate causation).

The court agrees in theory that negligence per se does not establish proximate causation, *supra* at 19–20 n.12, but the court's reasoning hollows out the plaintiff's burden, at least at summary judgment. After all, *by definition*, negligence per se involves a dangerous act or condition that the law is designed to prevent. But if the law is *designed* to prevent a particular harm, then it must be true that life experience and common sense

tell us that the dangerous act or condition is *known to cause* the harm. And, according to the court, that is all it takes to satisfy a plaintiff's burden to prove proximate causation at the summary judgment stage. This is impermissible burden-shifting. *See Hanrahan v. Safway Steel Scaffold Co.*, 46 N.W.2d 243, 249 (Minn. 1951) ("Mere proof of the happening of an accident or proof that death or injury resulted from the act of another is not enough to establish negligence *or its causal relation* to the injury." (emphasis added)); *Hagsten*, 44 N.W.2d at 615.[8]

That is not the only burden the court cuts loose. Traditionally, when a plaintiff relies entirely on circumstantial evidence to prove causation, the plaintiff's theory must outweigh *any* other theory.

> [A] jury may not be permitted to guess as between two equally persuasive theories consistent with the circumstantial evidence. The evidence must be something more than consistent with the plaintiff's theory of how the accident occurred. Reasonable minds functioning judicially must be able to conclude from the circumstances that the theory adopted by the verdict outweighs and preponderates *over any other theory*.

Smock, 280 N.W. at 852 (emphasis added).

The court jettisons this requirement because none of the alternative theories are "necessarily inconsistent" with Staub's position. That is, because it is possible that Joyce fell *both* because of the defective condition of the landing or steps *and* because she was trying to pick up her keys, the court concludes that Staub need not establish that one theory is more likely than the other. *See id.*

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[8] Notably, the court has no response to my concern.

The court's approach misinterprets our law on circumstantial evidence. We have repeatedly said that when a plaintiff's theory of causation is based entirely on circumstantial evidence, the evidence must permit a reasonable factfinder to conclude that an inference in support of the plaintiff's case is more likely than *any other alternative*. *See id.*; *Bauer v. Miller Motor Co.*, 267 N.W. 206, 209 (Minn. 1936) ("No recovery can be had if it is more probable that the accident was produced by *some cause* for which the defendant was not liable." (emphasis added)); *Robertson v. Chicago, R. I. & P. Ry. Co.*, 225 N.W. 160, 162 (Minn. 1929) ("To warrant a recovery the evidence must furnish a reasonable basis for a finding that the accident is more likely to have resulted from the negligence alleged than from *other causes*." (emphasis added)); *Alling*, 194 N.W. at 315 ("If the facts furnish no sufficient basis for inferring *which of several possible causes* produced the injury, a defendant who is responsible for only one of such possible causes cannot be held liable." (emphasis added)); *see also Hartwig v. Loyal Order of Moose, Brainerd Lodge No. 1246*, 91 N.W.2d 794, 807–08 (Minn. 1958) (quoting *Smock*, 280 N.W. at 852)); *Huntley v. Wm. H. Ziegler Co.*, 17 N.W.2d 290, 297–98 (Minn. 1944) (quoting *Robertson*, 225 N.W. at 161)).

It is true that we have sometimes described the plaintiff's burden in terms of outweighing "inconsistent" theories. *See, e.g.*, *E.H. Renner & Sons v. Primus, Inc.*, 203 N.W.2d 832, 835 (Minn. 1973) ("Where the entire evidence sustains, with equal justification, two or more *inconsistent inferences* so that one inference does not reasonably preponderate over the others, the complainant has not sustained the burden of proof . . . ." (emphasis added)); *see also Zinnel*, 274 N.W.2d at 498 (quoting *E.H. Renner & Sons*, 203

N.W.2d at 835); *Vill. of Plummer v. Anchor Cas. Co.*, 61 N.W.2d 225, 227 (Minn. 1953). But these cases do not apply "inconsistent" in the way that the court does here.

In *E.H. Renner & Sons*, we affirmed a directed verdict because there was no way to tell whether the reason a water pump failed was because of the plaintiff's negligence or some other cause. 203 N.W.2d at 835 ("[The] relationship between any acts or omissions on the part of the plaintiff and the failure of the [water] pump are wholly a matter of conjecture."). Notably, there was no fundamental conflict between an allegedly negligent installation of a rod by the plaintiff and the alternative theory of inadequate lubrication in the pump. *See id.* at 834 (identifying alternative theories). But we did not excuse the defendant's lack of proof simply because multiple theories were technically consistent; any verdict still would have been based on pure conjecture. *Id.* at 835.

Next, in *Zinnel*, we upheld a directed verdict for the defendant construction contractors because, under the facts of the case, it was no more likely that a car accident was caused by inadequate construction controls than by the other driver's negligence. 274 N.W.2d at 499. But there is nothing fundamentally inconsistent about inadequate construction controls and negligent driving. Although it is theoretically possible that each played a part in causing the accident, that possibility did not entitle the plaintiff to have the jury speculate about which theory, or a combination of the two, was the cause.

Finally, in *Village of Plummer* we upheld a directed verdict against the plaintiff because the evidence equally supported inferences that the store lost money because of a wrongful conversion by the manager, as alleged by the plaintiff, or by the intentional or negligent misconduct of other people. 61 N.W.2d at 227. Obviously, it is possible for a

store to lose money for multiple reasons simultaneously, but once again we did not excuse the plaintiff's burden to show that its theory outweighed any alternative that could have been the sole cause of the loss.

Based on the facts of these cases, it is clear that the court's interpretation of "inconsistent" is mistaken. An inconsistent inference is simply one that could account for the plaintiff's injury *without* the plaintiff's theory of causation being true. We do not excuse the plaintiff from his or her burden whenever it is *possible* that an alternative inference and the plaintiff's proposed inference each could have played a part. To conclude otherwise is to presume that, in each of these cases in which we used the word "inconsistent," we then immediately misapplied it. That presumption is absurd.[9]

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[9] The court claims that the facts of these cases are "not analytically relevant" because we were not specifically asked in these cases to decide whether the rule changes when each theory could be one of several substantial factors causing the harm.

The problem for the court is that it simultaneously wants to rely on the word "inconsistent" in the rule stated by these cases, particularly *E.H. Renner & Sons*, but to ignore the way that these cases applied the very rule on which the court relies. The court cannot have it both ways.

Furthermore, the court has *no explanation* for the many cases I cite that clearly state that a plaintiff's theory must preponderate over *all* other theories that could have caused the plaintiff's injury without giving rise to the defendant's liability. *See, e.g.*, *Smock*, 280 N.W. at 852.

Finally, the approach followed by the court goes beyond even *Majerus* and our other slip and fall cases, in which we consistently required the plaintiff's theory to outweigh the possibility that an alternative theory, even if technically consistent with the plaintiff's theory, could have been the sole cause of the plaintiff's injury. *See Lutz*, 250 N.W.2d at 600 (determining that the inference in support of the verdict "reasonably outweighs and preponderates over other theories or inferences"); *Smith*, 211 N.W.2d at 151 (finding that the jury reasonably could have concluded that the plaintiff's own negligence "was not a substantial factor in bringing about her fall"); *Paine*, 279 N.W. at 260 (observing that the "preponderance" of the evidence was with the verdict and not with the "possibilities" proposed by the defendant); *Majerus*, 113 N.W. at 455 (finding that none of the other

The court supports its approach with two of our decisions. *See E.H. Renner & Sons*, 203 N.W.2d at 835 (stating that an inference of causation in favor of the plaintiff must outweigh "inconsistent" inferences); *Osborne*, 749 N.W.2d at 380 (declining to consider whether the plaintiff's theory of causation preponderated over another possible cause because there was "nothing inconsistent" about finding two proximate causes). Neither justifies the court's approach.

As should be apparent, the court's reliance on *E.H. Renner & Sons* is misplaced because that case did not apply the meaning of "inconsistent" that the court uses here. And *Osborne* does not justify the court's approach because *Osborne* also misapplied the rule from *E.H. Renner & Sons*.[10] Consequently, the court's position is contrary to the clear weight of our precedent.

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possible inferences of causation were "as reasonable an inference as that reached by the jury").

[10] In *Osborne*, a dram shop case, we agreed that a district court must grant summary judgment when the evidence supports " 'two or more inconsistent inferences so that one inference does not reasonably preponderate over the others.' " 749 N.W.2d at 380 (quoting *E.H. Renner & Sons*, 203 N.W.2d at 835). We then concluded that, because there was "nothing inconsistent" about finding two proximate causes, the evidence did not need to provide a basis for distinguishing between two potential causes. *Id.* Instead, the jury could find that either, or a combination, of the two causes produced the injury. *Id.*

This reasoning, if not the result, was flawed. Certainly, there can be more than one proximate cause of an injury. But that does not relieve the plaintiff of the burden—when relying entirely on circumstantial evidence—of providing the jury with a reasonable basis for preferring a cause or a combination of causes leading to liability over an alternative cause not leading to liability. *See Robertson*, 225 N.W. at 161 ("To warrant a recovery the evidence must furnish a reasonable basis for a finding that the accident is more likely to have resulted from the negligence alleged than from other causes.").

As a practical matter, we need not overrule *Osborne* because the evidence supporting the plaintiffs' theory was much stronger than here. We recognized that the

Moreover, the court's approach invites a jury to speculate about whether the plaintiff's theory, an alternative theory, or some combination of the two proximately caused an injury, as long the theories are not fundamentally inconsistent. A better approach—and one supported by our long line of precedent—is to require that the inference that the plaintiff's theory was *a* cause (but not necessarily the *sole* cause) of the injury outweighs an inference that an alternative theory or theories was the sole cause.

D.

The record lacks any evidence of the reason Joyce fell, beyond evidence of the defective condition of the stair. Consequently, Staub has shown at most that the defective condition was a *possible* cause. Because there is no way for a jury to determine the cause of Joyce's fall without resorting to improper speculation and conjecture, Staub has not met her burden, and I would affirm the court of appeals. The court prefers instead to relieve Staub of her burden of presenting a nonspeculative claim and her burden of showing that

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"known and proven effects of alcohol," combined with the nature of the act—namely, jumping off a bridge into a river to avoid arrest—provided the plaintiffs with sufficient evidence to create a genuine issue of material fact as to whether the intoxication proximately caused the deceased to jump. 749 N.W.2d at 377. Moreover, unlike here, the evidence in *Osborne* included an expert who opined that the intoxication played a " 'substantial part' " in the deceased's decision to jump. *Id.* at 381. Consequently, a factfinder could reasonably conclude that it was more likely that the intoxication was a substantial factor in the deceased's decision to jump than that an alternative theory was the sole cause of the decision.

Accordingly, we should limit *Osborne* to the facts of that case, rather than repeat a misapplication of the rule from *E.H. Renner & Sons* and undercut the very purpose for which our rule relating to circumstantial evidence developed, specifically, to prevent juries from making awards based on pure speculation. *See E.H. Renner & Sons*, 203 N.W.2d at 834 ("This court has repeatedly held that verdicts cannot be based on mere speculation or conjecture."); *Smock*, 280 N.W. at 852 ("[A] jury may not be permitted to guess as between two equally persuasive theories consistent with the circumstantial evidence.").

her theory of causation preponderates over alternative explanations. Because the court's decision is a departure from the weight of our precedent, invites the jury to speculate as to the cause of Joyce's tragic fall, and opens the door for claims based on mere conjecture, I respectfully dissent.

GILDEA, C.J. (dissenting).

I join in the dissent of Justice Anderson.