No. 1018011

SUPREME COURT OF THE STATE OF WASHINGTON

Erin Bayne, an individual

Respondent/Plaintiff,

v.

CARLETON FARM INC., a Washington Corporation,

Appellant/Defendant.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

Michael David Myers, WSBA No. 22486
Patrick Clifford, WSBA No 56848
MYERS & COMPANY, P.L.L.C.
1530 Eastlake Avenue East
Seattle, WA 98102
206-398-1188
Attorneys for Respondent/Plaintiff

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I. INTRODUCTION

This is a premises liability case. Respondent Erin Bayne asks the Court to deny Appellant (Carleton Farms)'s petition for review of the Court of Appeal's decision affirming the trial court's order granting summary judgment.

Ms. Bayne was at Carleton Farms with her family. She accompanied her three-year-old stepson down a slide.

There was no transition zone at the bottom of the slide. The transition zone is the horizontal area designed to slow users down before they exit and help them go from sitting to standing.

The bottom of the slide was only six feet away from a fence post.

Ms. Bayne and her stepson reached the bottom of the slide. Momentum propelled Ms. Bayne and her stepson towards the fence post.

Ms. Bayne hit the fence post face-first. She suffered a brain injury.

Ms. Bayne filed suit. She moved for summary judgment on liability.

Ms. Bayne offered evidence (including expert testimony) showing that the absence of a transition zone and placement of the slide so close to the fence created an unreasonably dangerous condition.

Carleton Farms did not present any evidence in opposition.

The Superior Court granted Ms. Bayne's summary judgment motion.

The Court of Appeals agreed that Carleton Farms was negligent as a matter of law.

II. STATEMENT OF THE CASE

Ms. Bayne filed suit against Carleton Farms after being injured on its property. CP 249. She alleged that Carleton Farms breached its duty of care to her by having a dangerous roller slide on its property. *Id*. She alleged that the slide constituted an unreasonably dangerous condition and proximately caused her injuries. *Id*.

Ms. Bayne brought a motion for summary judgment. CP 223-241. She asked the Superior Court to find that Carleton Farms was liable for her injuries. *Id*. The Superior Court granted that motion. CP 28-29.

The Court of Appeals, Division I, agreed that Carleton Farms was liable as a matter of law because it failed to present any evidence that could raise a genuine issue of material fact.

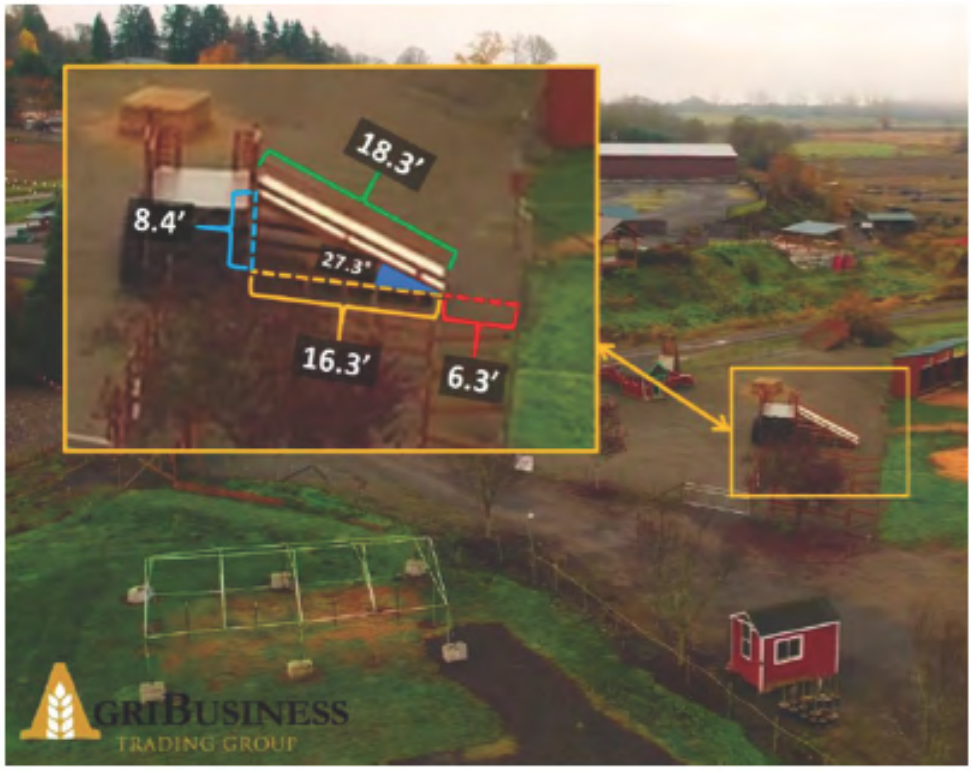
A. Factual Background

On October 19, 2019 Ms. Bayne and her family visited Carleton Farms. CP 253. Ms. Bayne and her three-year-old stepson Hudson went down a roller slide. CP 254.

There was a fence post right in front of the slide's exit zone (the area where a user regains their balance after exiting the slide). CP 255.

Ms. Bayne and her stepson reached the bottom of the slide. *Id*. Momentum carried them toward the fence post that was only six feet away from the bottom of the slide. *Id*.

Ms. Bayne covered her stepson's face with her arms. CP 248. She hit the wooden fence post face-first. CP 255.



CP 219.

Ms. Bayne broke her nose and suffered a Traumatic Brain Injury as a result. CP 249.

B. Ms. Bayne's Motion for Summary Judgment

On June 7, 2021 Ms. Bayne moved for summary judgment. She asked the Superior Court to determine that Carleton Farms was at fault for her injuries as a matter of law CP 223-241.

Ms. Bayne offered testimony describing the placement of slide and its lack of a transition. *Id*.

Plaintiff's expert Dr. Bauer offered expert testimony that the slide constituted an unreasonably dangerous condition:

> The as-built geometry of the slide did not allow for any speed reduction toward the bottom of the slide. The increased velocity at the bottom of the slide prevented Ms. Bayne from achieving a smooth transition from sitting to standing in violation of CPSC Section "5.3.6.4 Chute exit region"… As a result, Ms. Bayne's forward momentum prevented her from transitioning smoothly and required multiple steps to attempt to gain her balance. The lack of space between the bottom of the slide and the fence did not give Ms. Bayne adequate room to regain her balance before striking the fence post with her head and face.

CP 221. He also testified:

> Ms. Bayne should not have expected to encounter the hazard created by the dangerous slide geometry and placement with respect to the fence and fenceposts. Expectancy is one of the most relevant attentional factors that contribute to object or hazard detection/identification. Expectancy is the predisposition of individuals to believe that things will happen or be configured in certain ways. The availability of the slide for public use gave Ms. Bayne the expectation that the slide was safe for public use. However, the slide on Carleton Farms was unreasonably dangerous at the time of the incident. This dangerous condition caused Ms. Bayne's fall and subsequent injuries.

CP 222. Carleton Farms did not offer any evidence. It did not offer testimony that that the slide was not unreasonably dangerous. CP 5-7.

C. The Court Grants Ms. Bayne's Motion

The Superior Court heard oral argument on July 7, 2021. CP 28-29. The Superior Court determined that Ms. Bayne satisfied her burden of proof and noted that Carleton Farms did not present any evidence or argument creating a genuine issue of material fact concerning liability. CP 29.

D. Carleton Farms Motion for Reconsideration

Carleton Farms moved for reconsideration on July 16, 2021. CP 18-27.

It argued that negligence is a questions traditionally reserved for the jury and that the Superior Court failed to view the evidence in the light most favorable to it as the nonmoving party. *Id*.

E. The Court Denies Carleton Farms' Motion for Reconsideration

The Superior Court denied Carleton Farms' motion for reconsideration on July 30, 2021. CP 5-7. It issued a written opinion that explained its decision.

The Superior Court acknowledged that generally issues of negligence and causation involve questions of fact. *Id*. However, in this case Ms. Bayne presented lay and expert testimony establishing that the slide constituted an unreasonably hazardous condition and Carleton Farms presented no evidence that the slide was not unreasonably dangerous. *Id*.

F. Carleton Farms Moves for Discretionary Review

On August 27, 2021 Carleton Farms moved for discretionary review. CP 1-4.

Commissioner Koh granted discretionary review.

G. The Court Of Appeals Affirms That Carleton Farms Was Liable As A Matter of Law.

Division I agreed that Carleton Farms did not submit any declarations from lay or expert witnesses, deposition transcripts from any lay or expert witnesses or any other evidence controverting Ms. Bayne's proof regarding the dangerousness of the slide.[1] Petr's App. A at 002.

It agreed that Ms. Bayne had presented sufficient evidence to establish liability as a matter of law and Carleton Farms did not present any rebuttal evidence. *Id*.

III. ARGUMENT

The Court of Appeals opinion was based on established Washington law.

CR 56 lists the ways in which the non-moving party can present evidence to establish that there is some genuine issue of

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[1] The Court of Appeals Decision is attached as Appendix A to Petitioner's Petition for Review. Respondent cites to that decision as Petr's App. A.

material fact that needs to be decided by the jury. Carleton Farms presented nothing.

Carleton Farms offered no evidence that the slide was not dangerous. It argued only that reasonable minds could differ on the issue.

Carleton Farms did not offer declarations from its own employees. It did not take Ms. Bayne's deposition (or any deposition), hire an expert to evaluate the safety of the slide or hire an expert to analyze consumer expectations in terms of the slide on which Ms. Bayne was hurt.

Carleton Farms offered no evidence that it exercised reasonable care to protect Ms. Bayne or other visitors from the unreasonably dangerous condition. It produced no evidence of regarding safety measures taken before Ms. Bayne's injuries (or after).

A. RAP 13.4(b)(1) and (2) Do Not Provide Grounds For Review.

A petition for review will be accepted by the Supreme Court if the decision of the Court of Appeals is in conflict with existing Washington law.

The Court of Appeals agreed with Snohomish County Superior Court: Carleton Farms did not produce any evidence to rebut Ms. Bayne's evidence establishing that the slide was unreasonably dangerous.

Division I's decision that Carleton Farms breached its duty of care identified and tracked Washington law stating that when a party does not present any evidence sufficient to create a genuine dispute of material fact, summary judgment can (and should) be granted.

B. Division I's Decision was in Accord with Established Washington Law.

The Court of Appeals engaged in the same inquiry as the trial court. Syrovy v. Alpine Resources, Inc., 122 Wn.2d 544, 548 n.3 859 P.2d 51 (1993). Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); Young v. KeyPharm Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

When reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law on summary judgment. Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). Once the movant shows an absence of material fact, the nonmoving party has the burden to show the existence of a genuine issue of material fact. Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649,654, 869 P.2d 1014 (1994). A material fact is

one that affects the outcome of the litigation. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

A party opposing summary judgment must produce specific evidence that demonstrates a genuine dispute of material fact. Boguch v. Landover Corp., 153 Wn. App. 595, 610, 224 P.3d 795, 803 (2009). Conclusory allegations, speculative statements or argumentative assertions are not specific evidence through which a party can meet its burden of production. *Id*.

Opposing summary judgment requires setting forth evidentiary facts, information as to what took place versus a supposition or an opinion. Johnson v. Recreational Equip., Inc., 159 Wn. App. 939, 954, 247 P.3d 18 (2011) (citing Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002)).

C. Carleton Farms Created No Genuine Issues of Material Fact Regarding the Unreasonably Hazardous Nature of the Slide.

Carleton Farms breached its duty of care by designing an unreasonably dangerous slide and placing it in an unreasonably dangerous location.

Washington applies the principles of the Restatement (Second) of Torts §§ 343 and 343A (1965) to determine a landowner's duty to invitees with regard to conditions on the land:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Landowners have an affirmative duty to seek out all potentially dangerous conditions and make them safe or warn invitees. Egede-Nissan v. Crystal Mountain, 93 Wn. 2d 127 (1980).

To establish that a landowner has a duty to protect an invitee, the plaintiff must show the landowner had actual or constructive notice of the unsafe condition. Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994).

Actual notice does not need to be shown if the defendant created the dangerous condition. *See, e.g.*, Impero v. Whatcom County, 71 Wn.2d 438, 441–42, 445, 430 P.2d 173 (1967) (alteration of drainage sump by county caused lid to be insecure); Russell v. City of Grandview, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) (if the dangerous condition is created by the defendant then the plaintiff need not show notice).

Carleton Farms (or its agents) created the dangerous condition. It either constructed or had someone construct the slide and place it six feet from the fence. Notice does not need

to be shown and Carleton Farms' duty as a matter of law is established.

Carleton Farms does not dispute that it owed a duty to protect Ms. Bayne. It only argues that reasonable minds could differ about whether it breached that duty and that its breach caused Ms. Bayne's injuries.

1. The Slide's Design and Placement Created an Unreasonably Dangerous Condition

There were two things that were unsafe about the Slide.

First, the Slide didn't have an adequate (or any) transition at the bottom. A horizontal transition at the bottom of the slide helps users slow down and facilitates a smooth transition from sitting to standing when exiting. It's the part identified with the arrow:

The Slide did not have this. It had a constant slope all the way down to the ground.

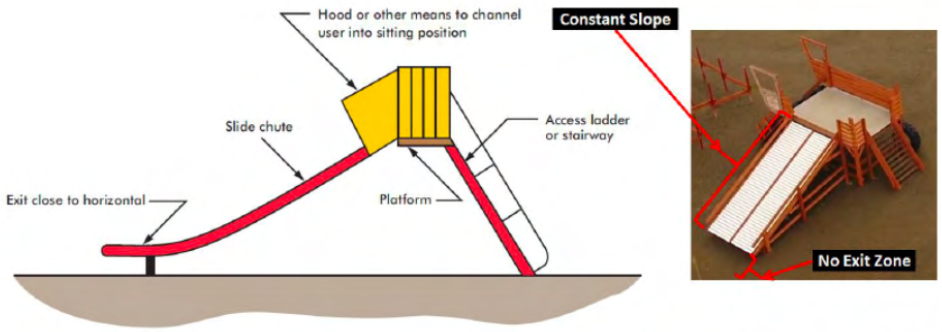
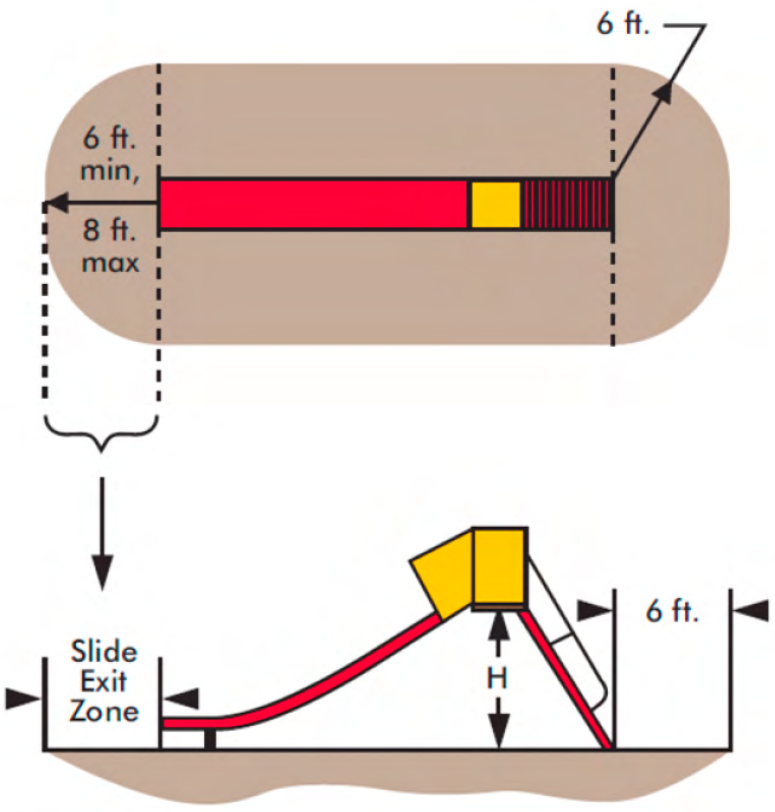


Figure 8. (LEFT) Illustration from the CPSC "*Public Playground Safety Handbook*" showing a typical slide configuration, where the exit is close to horizontal, consistent with ASTM F1487; and (RIGHT) Photograph of the subject slide at Carleton Farms showing that the chute has a constant slope and no exit zone. Instead users are directed into the ground and required to absorb all of the speed gained on the slide with their legs upon reaching the end of the slide.

CP 220.

The second reason the Slide was unsafe was because it was placed too close to the fence post. It did not have an adequate exit zone. The exit zone is an unobstructed area after a user exits the slide that gives the exiting user a chance to safely regain their footing.



CP 221.

The placement of the fence right in front of the slide mean that there was no unobstructed area for users to exit the slide and regain their feet. There was a six foot gap between where users would exit the slide and the fence. For context six feet is two big steps for most people.

The Slide failed to meet safety standards associated with playground equipment:

APPLICABLE CODE	CODE REQUIREMENT	THE SLIDE
Section 5.3.6.4 of the US Consumer Product Safety Commission Public Playground Safety Handbook	All slides should have [a transition zone] to help children maintain their balance and facilitate a smooth transition from sitting to standing when exiting. The chute [transition zone] should: Be between 0 and -4° as measured from a plane parallel to the ground…[and] at least 11 inches long.	No transition zone
Section 5.3.6.4 of the US Consumer Product Safety Commission Public Playground Safety Handbook	For slides less than or equal to 6 feet high, the use zone in front of the exit should be at least 6 feet. For slides greater than 6 feet high, the use zone in	[Exit zone] was 6.3 feet and contained no

	front of the exit should be at least as long as the slide is high up to a maximum of 8 feet.	transition to an angle less than 5 degrees.

CP 219.

Carleton Farms rebuttal is that expert testimony is not automatically dispositive because this isn't the type of case that requires expert testimony.

But there was no evidence that the design of the slide was reasonably safe. Or that the proximity of it to the fence post was reasonably safe. There was no issue for a jury to decide or competing evidence for it to weigh.

Expert testimony isn't automatically dispositive in a case like this. But expert testimony is permissible to establish the elements of negligence. Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007).

Carleton Farms argues that the safety standards in the Consumer Product Safety Commission Public Playground Safety Handbook are "voluntary." CP 22.

Voluntary standards are not a basis for establishing negligence per se; but they are relevant to determine whether conduct is reasonable or something is reasonably safe. Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wn.2d 629, 453 P.2d 619 (1969).

That's important because Ms. Bayne does not claim Carleton Farms was negligent per se because the slide violated CPSC Playground Safety Handbook § 5.3.6.4. She contends only that the slide's failure to comply with CPSC guidelines is evidence of negligence. And that evidence—plus the other evidence offered of negligence—was unrebutted.

2. Carleton Farms' Failure to Offer Evidence

Carleton Farms did not present any evidence contradicting the testimony from Ms. Bayne and Dr. Bauer that the fence was unreasonably dangerous.

D. Summary Judgment on Liability is Proper When Evidence is Uncontroverted

Issues of breach and causation are generally left to the trier of fact. Moore v. Hagge, 158 Wash.App. 137, 148, 241 P.3d 787 (2010), review denied, 171 Wash.2d 1004, 249 P.3d 181 (2011). But when the evidence presented means that reasonable minds could only reach but one conclusion, summary judgment is appropriate. *Id*.

That is the case here.

It does not contradict existing Washington law that Carleton Farms failed to present any evidence to oppose summary judgment.

IV. CONCLUSION

Ms. Bayne offered documentary evidence along with lay and expert testimony proving that the Slide was an unreasonably dangerous condition.

Carleton Farms failed to present any factual or evidentiary support sufficient to create a genuine dispute of material fact.

The trial court agreed. The Court of Appeals agreed.

This Court should deny Petitioner Carlton Farms' petition for review.

DATED this 12th day of May, 2022

I certify that this memorandum contains 3278 words in compliance with RAP 18.17

MYERS & COMPANY P.L.L.C.

s/ Patrick Clifford

Michael David Myers, WSBA No. 26848
Patrick Clifford, WSBA No. 56848
Attorneys for Respondent Ms. Bayne Bayne

1530 Eastlake Avenue East
Seattle, WA 98102
206-398-1188
mmyers@myers-company.com
pclifford@myers-company.com

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Response to be served on counsel for Appellant electronically and pursuant to agreement between the parties regarding electronic service.

DATED this 12th day of April, 2023.

By: *s/ Patrick Clifford*

Myers & Company, P.L.L.C
1530 Eastlake Avenue East
Seattle, WA 98102
206-398-1188
mmyers@myers-company.com
pclifford@myers-company.com

MYERS & COMPANY

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