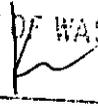


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 49540-6-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

MARK HAUBRICH

Appellant,

v.

THE PIZZA SPECIALISTS, INC.

Respondent.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Summary Judgment Standard

There is a strong presumption that juries, not judges, will decide issues of fact, as the right to jury trial, even in civil cases, is established in the Washington State Constitution, Article 1 § 21:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The Washington State Supreme Court reaffirmed this principle in *Davis. et al. v. Cox. et al*, 183 Wn.2d 269, 351 P.3d 862 (2015), when they declared unconstitutional RCW 4.24.525, which required trial courts to weigh evidence in deciding an anti-SLAPP motion to dismiss, similar to a summary judgment motion, yet requiring more intensive proof to withstand dismissal.

Still, summary judgment is constitutionally permissible “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. *LaMon v. Butler*, 112 Wn.2d 193, n. 5, 770 P.2d 1027

(1989); *Sanders v. City of Seattle*, 160 Wn.2d 198, 207, 156 P.3d 874 (2007).

While, generally, issues of fact are for trial, *Petersen v. State*, 100 Wn.2d 421, 436, 671 P.2d 230 (1983), a court may determine an issue of fact if reasonable minds could not differ on the outcome, and could reach but one conclusion. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007); *Dutton v. Washington Physicians*, 87 Wn. App. 614, 943 P.2d 298 (1997); *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). If, however, reasonable minds could differ, then summary judgment is not appropriate. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003).

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. CR 56(c); *Public Employces Mutual Ins. Co. v. Fitzgerald*, 65 Wn. App. 307, 828 P.2d 63 (1992). In determining if summary judgment is appropriate, the court must consider all evidence and inferences in a light most favorable to the non-moving party. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007), *Davis v. Niagara Mach. Co.*, 90 Wn.2d 342, 581 P.2d 1344 (1978).

Review of a grant of summary judgment is de novo. *Bank of Am. v. David W. Hubert, P.C.*, 153 Wash.2d 102, 111, 101 P.3d 409 (2004). The reviewing court is to engage in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *State v. Kaiser*, 161 Wash. App. 705, 718, 254 P.3d 850, 857 (2011), *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 501, 115 P.3d 262 (2005). No deference is to be given to the trial court's findings and determinations. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978). Trial court findings are superfluous and need not to be considered on appeal. *Hubbard v. Spokane County*, 146 Wn. 2d 699, n 14, 50 P.3d 602 (2002). Accordingly, there are no verities on appeal.

B. The Baird Report

Respondent's reliance on *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008), is misplaced. In *Southwick*, the trial court had granted the Motion to Strike when considering the summary judgment motion. In that instance, it was appropriate to consider the Motion to Strike on appeal. In the present appeal, the trial court did not rule on the Motion to Strike. Instead, the

trial court specifically reviewed and considered the Declaration of Tom Baird in the summary judgment proceeding.

Respondent's did not move for reconsideration of the Motion to Strike, and did not file a cross appeal on this issue of striking the Baird Declaration. The Appellate Court engages in the same inquiry as the trial court. *Millson v. City of Lynden*, 174 Wn.App. 303, 298 P.3d 141(2013). The Baird Declaration should be considered, and does provide the basis to create a genuine issue of material fact in this case.

Tom Baird's Curriculum Vitae is attached to his report as Exhibit 3, CP 49-86. He is certainly qualified to offer opinions on the inspection procedures that should have been in place and on the "useful life" of the chairs being utilized by the restaurant. He is a Certified Safety Manager and a Certified Forensic Consultant. He has investigated and consulted on nearly 1300 injury cases since 1994. He has also owned and operated two different restaurants. *Id.* It is important to note, the Respondent offered no expert testimony in support of the Motion for Summary Judgment. Mr. Baird's expert opinions are unchallenged.

As stated in *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash. 2d 593, 600, 260 P.3d 857, 860, 61 (2011), trial judges perform an important gate keeping function when determining the admissibility of evidence

under ER 104. Further, courts must interpret evidence rules mindful of their purpose: “that the truth may be ascertained and proceedings justly determined” under ER 102.

ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Helpfulness to the trier of fact is to be construed broadly, *Philippides v. Bernard*, 151 Wash.2d 376, 88 P.3d 939 (2004), and will favor admissibility in doubtful cases. *Miller v. Likins*, 109 Wash. App. 140, 148, 34 P.3d 835, 839 (2001), citing *Linkstrom v. Golden T. Farms*, 883 F.2d 269 (3rd Cir., 1989), reversing exclusion of a farm safety expert in a wrongful death case). It is important to note, Mr. Baird did inspect the broken chair itself personally. CP 98. The respondent’s contention the chair was not inspected is simply incorrect.

The foundation for Mr. Baird’s opinions are based on his education, training and experience. Further his opinions are based on extensive review of documents, deposition transcripts and examination of the broken chair itself and the patio where chars were stored outdoors for much of the calendar year over seven or more years. CP 193-197.

C. Expert Opinions

Tom Baird has offered two distinct, unchallenged opinions. Either of his opinions, independently, are a basis to reverse the summary judgment order in this matter. His first opinion, “the chair that collapsed was in an unreasonably hazardous and dangerous condition at the time of the incident and had exceeded its useful life.” CP 195. Mr. Baird outlines specifically the basis of his opinion in his report. *Id.* The chair had been used for nearly three times longer than the warranty period. It had been stored outdoors for much of the year, thus being exposed to weather conditions. This exposure caused the chairs to deteriorate. This is evidenced by the testimony of the owner, Dennis Gard, who confirmed chairs had broken previously. CP 101.

Tom Baird’s second opinion is, “the restaurant did not have an effective chair inspection program in place to assure that the chairs were safe for customers.” CP 195. He also specifically outlines the basis for this opinion in his report. The restaurant did not have any written policy or procedure for inspection of the chairs. The manufacturer instructs commercial users to “carefully inspect the chair”, CP 196. The word “carefully” is not a term simply inserted by Mr. Baird. As a Certified Safety Manager, he certainly has the education, training, and experience

necessary to determine whether these chairs were “carefully” inspected on a regular basis or not.

Fredrickson v. Bertolino’s Tacoma, Inc., 131 Wn. App. 183, 127 P. 3d 5 (2006), is directly on point. The Court upheld the summary judgment dismissal because the plaintiff failed to present any expert testimony the inspection procedures were inadequate or the chairs posed an unreasonable risk to the customers. In the present case, Appellant has provided unchallenged expert testimony both of those contentions are in fact present. The *Fredrickson* decision provides appropriate guidance to reverse the summary judgment decision in this matter.

II. CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests this Court reverse the order granting summary judgment for Respondent and remand the case for further proceedings in the trial court.

DATED: April 27, 2017

RON MEYERS & ASSOCIATES PLLC

By: _____

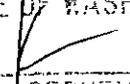
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DECLARATION OF SERVICES
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS: 1. APPELLANT'S REPLY BRIEF
 2. DECLARATION OF SERVICE

ORIGINALS TO:
David C. Ponzoha, Court Clerk
Washington State Court of Appeals Division II

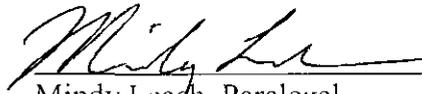
Via ABC Legal Messenger

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Via ABC Legal Messenger

DATED this 27th day of April, 2017, at Olympia, Washington.


Mindy Leach, Paralegal