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No. 53738-9 II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHARON MAPLES, a single woman

Appellant,

v.

CHARLES GIEFER, a single man

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

At issue in this case is: 1) whether the general duty of ordinary care includes the duty to walk in a manner that does not endanger others, or, put another way, the duty to avoid tripping other people: 2) whether a volitional act by a defendant can be considered to be not foreseeable to the defendant.

This lawsuit arises out of a February 10, 2016 incident in which Charles Giefer accidentally tripped Sharon Maples as they were walking next to each other in a parking lot. Maples fell to the ground and sustained severe personal injuries.

Maples filed suit in Clallam County Superior Court, and Giefer moved for summary judgment. The trial court granted Giefer's motion, finding that he did not have a duty to not walk side by side with Maples and did not have a duty to warn her of a balance problem.

Maples moved for reconsideration, calling attention to the fact that she did not argue in favor of either of the two liability theories that formed the bases of the court's decision. She restated her contention that the general duty of care includes the duty to walk in a manner that does not endanger others.

The trial court denied the motion, finding that "it was not foreseeable to the defendant that he would suddenly veer to the left and cause the plaintiff to trip." Since it is Maples' contention that Giefer's

actions were volitional and therefore entirely foreseeable, the trial court's analysis is flawed, and the order granting Giefer's motion for summary judgment should be reversed.

II. ASSIGNMENTS OF ERROR

The trial court committed the following errors:

1. The trial court erred by granting summary judgment to Charles Giefer, thereby dismissing all claims against him.

Issues Pertaining to Assignments of Error

1. Does the duty of ordinary care include the obligation to walk in a manner that does not endanger other pedestrians?
2. Can summary judgment be granted when there is substantial evidence showing the plaintiff's damages were caused by the defendant's breach of the duty of ordinary care?
3. Can a volitional act by a defendant be considered to be not foreseeable to that defendant?
4. Is implied primary assumption of risk a complete bar to recovery when there is no evidence that the risk allegedly assumed caused the plaintiff's injuries?
5. Is a personal injury plaintiff bound by statements of questionable accuracy in post-accident medical records?

III. STATEMENT OF THE CASE

On February 10, 2016 at approximately 8 p.m., Sharon Maples had just finished having dinner with Charles Giefer at the Dynasty Chinese Restaurant located at 380 East Washington Street in Sequim, Washington. *CP at 55-56.*

Giefer and Maples had driven to this location in Maples' car. After dinner, they exited the restaurant, and began walking side by side across the asphalt parking lot toward Maples' vehicle. Giefer was to the right of Maples. *CP at 56.*

When the two were approximately 28-30 feet from the car, Giefer suddenly veered to the left, and stepped in front of Maples. He placed his left foot in Maples' path, directly in front of her right foot. She then tripped over Giefer's left foot, and fell to the ground. *Id.*

As a result of this fall, Maples sustained serious injuries including a fractured elbow, a head contusion, a broken wrist, torn meniscus in her right knee, a fractured rib, and displaced pelvis. *Id.*

Maples filed suit in Clallam County Superior Court on August 6, 2018, alleging two negligence theories. First, that she was injured because Giefer "negligently and without warning, veered into the pathway of Ms. Maples, causing her to trip and fall onto her left elbow, shattering it." *Id. at 133.* Second, that she was injured because Giefer failed to disclose that "he had balance issues, vision issues, and memory issues." *Id.*

Focusing on the second theory of liability, Giefer moved for summary judgment, claiming that he did not owe a duty not to walk side by side with Maples, that his actions were not the proximate cause of Maples' injuries, and that Maples assumed the risk of her injuries because she had knowledge of Giefer's medical condition. *Id. at 107-123.*

In her response and during oral argument, Maples attempted to clarify that her cause of action arose out of Giefer's negligence in suddenly stepping in front of her and tripping her, and that she had abandoned the alternative theories pleaded pertaining to medical conditions he may or may not have had at the time. *Id. at 58-67; RP at 8.*

Notwithstanding this clarification, the trial court granted Giefer's motion finding that Giefer did not have a duty to not walk side by side with Maples and did not have a duty to warn her of a balance problem. *CP at 17-21.*

Maples moved for reconsideration, calling attention to the fact that she did not argue in favor of either of the two liability theories that formed the bases of the court's decision. *Id. at 14.* She restated her contention that the general duty of care includes the duty to walk in a manner that does not endanger others. *Id.*

The trial court denied the motion, finding that "it was not foreseeable to the defendant that he would suddenly veer to the left and cause the plaintiff to trip." *Id. at 10.*

It is Maples' contention that Giefer's actions were volitional and therefore entirely foreseeable.

Following this decision, a notice of appeal was timely filed. *Id. at* 5-6.

IV. ARGUMENT

A. Standard Of Review

The standard of review of a trial court's order granting summary judgment is de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate where the parties' pleadings, affidavits, and depositions establish that there are no genuine issues of material fact and that the movant is entitled to a judgment as a matter of law. *Id.* "In deciding a motion for summary judgment, the court must construe all the facts and reasonable inferences in favor of the nonmoving party; the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Snohomish County v. Anderson*, 124 Wn.2d 834, 843, 881 P.2d 240 (1994).

B. Giefer Negligently Tripped Plaintiff Maples, Causing Her to Fall and Sustain Serious Injuries.

To prove negligence, the plaintiff must establish (1) the existence of a duty owed to the complaining party, (2) a breach of that duty, (3) a

resulting injury, and (4) a proximate cause between the breach and the injury. *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989).

1. Giefer had a duty to walk in a manner that did not endanger others.

The existence of duty is a question of law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

Most tort liability arises from conduct that imposes a risk of harm to other people. For example, when a person drives a car, operates a train, or distributes flammable gas, the defendant's conduct has created a risk of harm to others. By creating the risk of harm to others, the defendant is charged with a duty to use reasonable care to see that injury to others does not occur. This principle encompasses the vast majority of tort cases, and because of its intuitive simplicity, no one gives a second thought to whether the defendant owed a duty to use reasonable care. In other words, before the defendant can be made liable for the plaintiff's injury, the defendant must have contributed in some way to making the plaintiff's injury more likely.

16 Wash. Prac., Tort Law and Practice § 2:4 (4th ed.)

These general principles are set out in both the Washington pattern jury instructions, and their supporting appellate decisions.

Washington Pattern Instruction 10.01 provides the following definition of negligence.

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

WPI 10.01; System Tank Lines v. Dixon, 47 Wn.2d 147, 151, 286 P.2d 704 (1955).

“Ordinary care” means the care a reasonably careful person would exercise under the same or similar circumstances. *WPI 10.02; La Moreaux v. Fosket*, 45 Wn.2d 249, 255, 273 P.2d 795 (1954).

WPI 70.01 specifically requires pedestrians, such as Giefer, to “exercise ordinary care to avoid placing others in danger and to exercise ordinary care to avoid a collision.” *WPI 70.01*. Pedestrians must also exercise a degree of care that a reasonably prudent person would have exercised under the same or similar circumstances. *Hanson v. Anderson*, 53 Wn.2d 601, 603, 335 P.2d 581 (1959).

Giefer argued to the trial court that he owed no duty to Maples because “there is no affirmative act committed by Charles Giefer which created an unreasonable risk of harm to anyone.” This is clearly not accurate. In fact, Giefer performed the affirmative acts of changing directions abruptly, stepping in front of Ms. Maples, and tripping her with his foot. These actions created the risk that Ms. Maples would fall to the ground and sustain injuries.

2. Mr. Giefer breached his duty of care to Maples.

The duty of ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances. A

reasonably careful pedestrian would not abruptly change directions and step in front of another person because such an action can – and in this case did – cause the other person to trip and fall.

Maples was the nonmoving party, and the Court must construe all facts and reasonable inferences in her favor. It is entirely reasonable to infer that Giefer’s abrupt movement into Maples’ pathway was due to Giefer’s inattention and carelessness. Giefer did not offer an alternative theory for his actions, stating, “As we exited the restaurant, walking arm-in-arm, Sharon Maples inexplicably tripped and fell on her elbow and head.” *CP at 53*. [emphasis added].

3. Maples was injured in the February 10, 2016 incident.

Maples set forth to the trial court a list of the injuries she sustained in the fall including a fractured elbow, a head contusion, a broken wrist, torn meniscus in her right knee, a fractured rib, and displaced pelvis. *CP at 56*. Giefer does not dispute that Maples was injured in the subject incident.

4. Giefer’s breach of his duty of care proximately caused Maples’ fall and resulting injuries.

There are two elements to proximate causation – cause in fact and legal causation. *Ang v. Martin*, 154 Wn.2d 477, 482, 114 P.32d 637 (2005). To establish the cause in fact element, the plaintiff must show by a preponderance of the evidence that, without the defendant’s conduct, the

plaintiff would not have been injured. *Mohr v. Grantham*, 172 Wn.2d 844, 850-51, 262 P.3d 490 (2011). Questions of cause in fact are issues of fact to be decided by the jury, and are not subject to summary adjudication unless “the causal connection is so speculative and indirect that reasonable minds could not differ.” *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn.App. 464, 469, 921 P.2d 1098 (1996).

In this case, the evidence shows that Maples tripped, fell and was injured because Giefer abruptly changed directions and stepped in front of her. His actions were unquestionably the cause in fact of the plaintiff’s damages.

Legal causation rests on considerations of policy and common sense as to how far the defendant’s responsibility for the consequences of its actions should extend. *Taggart v. State*, 118 Wn.2d 195, 225-26, 822 P.2d 243 (1992). The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter. *Id.* (quoting W. Prosser, *Torts* 244–45 (4th ed. 1971)). Giefer had a duty to use ordinary care and walk in a manner that did not endanger others, and the existence of this duty establishes that his careless actions were the legal cause of Maples’ injuries.

C. The Trial Court's Reliance on *Rose v. Nevitt* is Misplaced Because There is Nothing More Foreseeable to a Defendant than the Defendant's Own Volitional Acts.

In both memorandum opinions authored by the trial court, the judge appears to have relied heavily on *Rose v. Nevitt*, 56 Wn.2d 882, 355 P.2d 778 (1960) in which the Washington State Supreme Court analyzed the duty issue by posing the question, could the defendant have reasonably anticipated the presence of the child under his automobile, and then quoting a similar case, asked, "Should he have had reason to anticipate that such a thing might happen?" *Id. at 886*.

Since Giefer was walking next to Maples and was well-aware of her presence, *Rose* does not appear to have much application to this case. To answer the question posed in the decision, however, Giefer clearly had reason to anticipate that abruptly changing direction and stepping in front of Maples might cause her to trip and fall.

However, the trial court concluded that Giefer's act was not foreseeable to Giefer:

Here, under the circumstances surrounding this particular occasion, should Mr. Giefer have been on the lookout for the possibility that while walking side by side he might suddenly veer to the left? Should he have reason to anticipate such a thing might happen. The court concludes Mr. Giefer did not have reason to anticipate such a thing might happen...[I]t was not foreseeable by the defendant that he would suddenly veer to the left and cause the plaintiff to trip.

CP at 9-10.

Given the trial court's analysis, one can surmise that the judge assumed Giefer's abrupt movement to the left was involuntary, possibly due to a medical condition. However, there is no evidence supporting this premise. Giefer testified that Maples "inexplicably" fell as they were walking across the parking lot, and contends that his "medical conditions are not at issue in this case." *CP at 53.* It is Maples' contention that Giefer's actions were inattentive, but voluntary.

It is difficult to imagine anything more foreseeable to a defendant than the defendant's own actions. The trial court's analysis is akin to a left-turning driver arguing he is not at-fault for colliding into an oncoming car because it was not foreseeable that he would turn left. It was entirely foreseeable to the left- turning driver that he would turn left because his mind directed his body to perform the movements necessary to turn left. Similarly, it was entirely foreseeable to Giefer that he would veer to the left because his mind directed his body to perform the movements necessary to veer to the left.

D. Giefer Failed to Meet His Initial Burden of Proof as to His Assumption of Risk Defense.

On a motion for summary judgment, the burden is on the moving party to show there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). One who moves for summary judgment has this burden of proof irrespective of whether he or his opponent has the burden of proof at trial. *Id.* Upon the moving party's failure, however, to meet its initial burden of proof, it is unnecessary for the nonmovant to submit any evidence and the motion must be denied. *Jacobsen v. State*, 89 Wn.2d 104, 110, 569 P.2d 1152 (1977); *Preston v. Duncan*, 55 Wn.2d 678, 682-83, 349 P.2d 605 (1960).

Giefer offered no evidence in support of his assumption of the risk defense other than some documents showing that Maples had some awareness of Giefer's medical history. No evidence whatsoever was presented indicating Giefer's medical condition at the time of the incident had anything to do with the incident occurring. Giefer himself admits that his "medical conditions are not at issue in this case." *CP at 53*. Further, Giefer has denied any involvement in Ms. Maples' fall. In his answers to Plaintiff's Interrogatories, he wrote, "As we exited the restaurant, walking arm-in-arm, Sharon Maples inexplicably tripped and fell on her elbow and head." *Id.* [emphasis added].

If Giefer's medical conditions are "not at issue" in this case and Giefer alleges that Ms. Maples "inexplicably" fell, then there is no basis

for defendant's assumption of risk defense. Summary judgment can therefor not be granted on this basis.

E. Even If He Had Met His Initial Burden, Giefer's Assumption of the Risk Fails Because Maples Did Not Have A Full Subjective Understanding of the Presence of the Risk.

In Washington, there are four kinds of assumption of risk: (1) express assumption of risk; (2) implied primary assumption of risk; (3) implied reasonable assumption of risk; and (4) implied unreasonable assumption of risk. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 496, 834 P.2d 6 (1992). Implied primary assumption of risk is construed "narrowly because [it] is a complete bar to recovery." *Dorr v. Big Creek Wood Prods., Inc.*, 84 Wn.App. 420, 425, 927 P.2d 1148 (1996). It is applied only when the plaintiff consents – before any act by the defendant – to relieve the defendant of any duty regarding a specific known hazard. *Id.* at 426-27.

To invoke assumption of risk, a defendant must show that the plaintiff knowingly and voluntarily chose to encounter the risk. The evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk. *Kirk v. Washington State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987).

“A plaintiff appreciates the specific hazard only if he or she actually and subjectively knows all facts that a reasonable person in the defendant’s shoes would know and disclose, or, concomitantly, all facts that a reasonable person in the plaintiff’s shoes would want to know and consider when making the decision at issue.” *Home v. North Kitsap School Dist.*, 92 Wn.App. 709, 721, 965 P.2d 1112 (1998).

Here, Maples had some knowledge of Mr. Giefer’s medical history, but, prior to the February 10, 2016 incident, was not aware of any medical conditions that would make him unsteady on his feet or that impaired his vision. *CP at 57.*

Further, as explained above, no evidence has been offered showing Giefer’s medical conditions caused the subject incident. Maples was injured because Giefer was careless and stepped in front of her.

F. Maples’ Alleged Statements to Medical Providers Regarding the Incident at Most Raise Issues Regarding Her Credibility that Cannot Be Summarily Adjudicated.

The court is not allowed to weigh credibility in deciding a motion for summary judgment. If the facts as presented by the parties would require the court to weigh credibility on any material issue, a genuine issue of fact exists and summary judgment will normally be denied.

4 Wash. Prac., Rules Practice CR 56 (6th ed.).

If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied. *Riley v. Andres*, 107 Wn. App. 391, 398, 27 P.3d 618 (2001); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn. 2d 874, 881, 431 P.2d 216 (1967).

Maples objected to the admissibility of the medical record excerpts offered by Giefer. Assuming *arguendo* that they are admissible, the most that be said is that they are mildly inconsistent with Maples' declaration. While this may raise an issue of the credibility of Maples' testimony, this issue of fact cannot be decided at a summary judgment proceeding.

Giefer incorrectly asserts that Maples is precluded from offering declaration testimony inconsistent with statements contained in her medical records. Case law in support of this theory concern prior, inconsistent deposition testimony, not the second-hand recollections of medical personnel recording the history of an injury some period of time after speaking to the patient.

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

Marshall v. AC & S, Inc., 56 Wn.App. 181, 185, 782 P.2d 1107 (1989).
McCormick v. Lake Washington Sch. Dist., 99 Wn. App. 107, 111, 992 P.2d 511, 513–14 (1999).

Maples has not given a deposition in this case, and there appears to be no authority for the notion that a party is bound by statements of questionable accuracy in post-accident medical records.

V. CONCLUSION

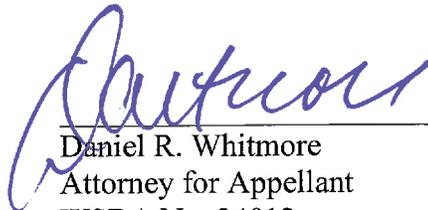
Sharon Maples sustained severe and debilitating injuries when she tripped and fell to the ground due to the carelessness of Charles Giefer. The general duty of ordinary care clearly includes the duty to walk in a manner that does not endanger others. Giefer breached this duty when he abruptly stepped into Maples path and tripped her. The trial court's "foreseeability" analysis is flawed because no evidence was presented indicating Giefer's actions were involuntary and there is nothing more foreseeable to a defendant that the defendant's own volitional acts.

There is no evidence supporting Giefer's assumption of the risk defense, and Maples alleged statements to physicians regarding the

incident at most raise an issue of her credibility which cannot be summarily adjudicated.

The trial court should be reversed, and the matter remanded for trial.

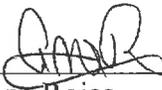
Dated this 10 day of October, 2019



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CERTIFICATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I arranged for service of a copy of the above Brief of Appellants on the below-listed attorneys of record for respondent on October 2nd, 2019.



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