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Division II
State of Washington
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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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In his response, Charles Giefer misstates Sharon Maples' theory of liability, invites the court to improperly weigh the evidence presented in a summary judgment proceeding, and argues in favor of an affirmative defense for which he has failed to meet his initial burden of proof.

Maples does not contend that Giefer owed her a duty "to refrain from walking next to her." She asserts that Giefer had a duty to walk in a manner that does not endanger others, or, put another way, the duty to avoid tripping her.

Assuming *arguendo* that Maples alleged statements to her physicians 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 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. Thus, Giefer failed to meet his initial burden as to this affirmative defense.

Even if Giefer had met his initial burden as to his assumption of risk defense, summary judgment could not be granted on this basis because Maples did not have a full subjective understanding of the risk.

II. 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). 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). Negligence and proximate cause are ordinarily factual issues, precluding summary judgment. *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn.App. 326, 330, 966 P.2d 351 (1998).

B. Throughout the Summary Judgment Proceeding, Maples' Clearly Stated Theory of Liability Has Been That Giefer Breached His Duty to Walk in a Manner that Does Not Endanger Others.

Giefer incorrectly asserts that Maples “had a difficult time describing the duty owed” and then misrepresents Maples' theory of liability. Maples does not contend that Giefer owed a duty “to refrain from walking next to her.” She has consistently argued that the general

duty of ordinary care includes the obligation to walk in a manner that does not endanger other people.

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].

Giefer’s reliance on *Suriano v. Sears, Roebuck & Co.*, 117 Wn.App. 819, 72 P.3d 1097 (2003) is misplaced because that decision involves a dispute about jury instructions following a defense verdict and did not arise out of a motion for summary judgment. *Id.* at 825-830.

C. Giefer's Abrupt Movement into Maples' Path Proximately Caused Her to Trip, Fall and Be Injured.

Giefer's argument on proximate cause is entirely spurious. The evidence presented 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 plaintiff's damages. The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter. *Taggart v. State*, 118 Wn.2d 195, 225-26, 822 P.2d 243 (1992) (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.

D. 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.

E. 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 therefore not be granted on this basis.

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

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*.

III. 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.

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.

This case presents a classic “he said, she said” question of fact. Maples contends Giefer abruptly changed directions, tripped her and caused her to fall. Giefer claims Maples “inexplicably” fell. This factual issue cannot be decided in a motion for summary judgment. The trial court should be reversed, and the matter remanded for trial.

Dated this 2nd day of January, 2020

/s/ Daniel R. Whitmore

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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 Reply Brief of Appellants on the below-listed attorneys of record for respondent on January 2, 2020.

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