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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAXENE BLOOD, a married woman,

Appellant,

v.

WILLOW-WIST FARM, INC., VIKING FEAST ICE CREAM, and
"JANE DOE", an individual,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Maxene Blood respectfully requests that this Court reverse the summary judgment dismissal of her claim against Willow-Wist Farm, Inc. (“Willow-Wist”). In 2014 Ms. Blood visited Willow-Wist to pick up milk for her grandson from the farm store. The store was extremely crowded that day due to a festival taking place at the farm.

Amber Golding was working at the festival for a third-party ice cream vendor, Viking Feast Ice Cream (“Viking Feast”). Viking Feast is a sole proprietorship owned by Thormod Skald. Viking Feast had set up a booth outside the farm store to sell ice cream cones. Ms. Golding went into the store to get more ice cream when the ice cream stand started running low. After grabbing ice cream from the freezer, Ms. Golding turned and collided with Ms. Blood causing Ms. Blood to fall and break her right femur. Ms. Blood had surgery the next day and was required to spend two months at an in-patient rehabilitation center as part of her recovery.

Ms. Blood brought negligence claims against Viking Feast and also against Willow-Wist for premises liability on the basis that the overcrowded farm store posed a foreseeable danger to Ms. Blood and the other business invitees. Willow-Wist knew that the farm store would be

crowded that day but took no safety precautions to control or limit the number of patrons in the store at any given time.

Willow-Wist brought a motion for summary judgment dismissal of this claim. The trial court granted Willow-Wist's motion, finding that although the farm store was crowded, the store was not crowded in the specific area where the injury occurred.

The trial court's factual finding ignored the evidence presented and the requirement that evidence must be viewed in the light most favorable to the non-moving party. Multiple witnesses testified that the farm store was extremely crowded that day, and Ms. Golding, the woman who collided with Ms. Blood, specifically testified that it was crowded in the area of the store where the incident occurred. Nonetheless, the trial court found "uncontroverted evidence shows that, in the vicinity of the freezer where the collision between Ms. Golding and Ms. Blood occurred, the area was lightly populated, regardless of what conditions may have existed elsewhere in the store."

Whether or not the store was crowded in the vicinity of the freezer is a question of fact. It was error for the trial court to make a dispositive factual finding on a summary judgment motion when firsthand testimony was given stating that the store was crowded in the area where Ms. Blood's injury occurred. This issue should be resolved by a jury. The

order granting summary judgment should be reversed, and this case should be remanded for trial.

II. ASSIGNMENTS OF ERROR

A. **The trial court erred in entering its Order Granting Willow-Wist Farm Inc.'s Motion for Summary Judgment Dismissal of Plaintiff's Claim on September 2, 2016.**

Issue Presented: Whether the trial court erred in granting summary judgment when (i) a genuine issue of material fact exists as to whether the store was crowded in the particular area where the injury to Ms. Blood occurred and (ii) Willow-Wist was negligent in allowing its store to become overcrowded thereby posing an unreasonable risk of harm to Ms. Blood and the other business invitees?

B. **The trial court erred in entering its Memorandum Opinion on October 10, 2016, denying Ms. Blood's motion for reconsideration.**

Issue Presented: Whether the trial court erred in granting summary judgment when (i) a genuine issue of material fact exists as to whether the store was crowded in the particular area where the injury to Ms. Blood occurred and (ii) Willow-Wist was negligent in allowing its store to become overcrowded thereby posing an unreasonable risk of harm to Ms. Blood and the other business invitees?

III. STATEMENT OF THE CASE

Maxene Blood is a resident of Port Angeles, Washington. CP 190. She is married with two sons and one grandson. *Id.* On October 4, 2014, Ms. Blood, who was then 79 years old, visited Willow-Wist in the afternoon to pick up milk for her grandson. *Id.*

Willow-Wist is a dairy farm in Sequim that raises cows and bottles and sells their milk. CP 230. The farm consists of 40 acres of farmland and pasture, with three structures: a home where the owners of Willow-Wist reside, a barn, and a bottling facility and small farm store that are located in one building but separated by a wall. *Id.* In the farm store there is a refrigerator where customers can select milk, and a cash register and counter where purchases are made. CP 233-35. There is also a stand up freezer where Viking Feast ice cream and other frozen goods are available for purchase. *Id.*

Viking Feast is a sole proprietorship located in Poulsbo that is owned and operated by Thormod Skald. CP 251. Viking Feast makes its ice cream using Willow-Wist's milk. CP 252. Viking Feast does not have any contract with Willow-Wist; its milk orders are placed on an as-needed basis. *Id.* Willow-Wist does not have any ownership interest in, or control over, Viking Feast. CP 311.

On October 4, 2014, Willow-Wist participated in the Clallam County Farm Tour, which is a yearly event promoted by the North Olympic Land Trust and Washington State University. CP 145, 243-44. At the event, Willow-Wist was open to the public, and there were different events and attractions for the attendees. *Id.* Viking Feast attended the event and set up a stand to sell ice cream. CP 254-55. Mr. Skald ran the Viking Feast stand, and Amber Golding assisted him with scooping ice cream and serving customers. *Id.*

At some point in the late afternoon of October 4, 2014, Viking Feast ran out of its ice cream supply and arranged to use pints from the stand up freezer located inside the Willow-Wist farm store. CP 261. Mr. Skald sent Ms. Golding into the store to get the ice cream. CP 286. Ms. Blood was in the store at this time picking up milk for her grandson. CP 199. From here, the facts of the case become disputed.

Ms. Blood stated in her declaration as follows:

I parked my car at the farm and then entered the farm store. The farm store was crowded, but I did not see any employees working in the store. I walked over to the dairy case to obtain a one half-pint of milk for my grandson. I grabbed the one-half pint of milk from the dairy case and stood facing the general direction of the dairy case. Around this time, an unknown larger woman who I later found out to be Amber Golding hurriedly entered the farm store. Ms.

Golding asked a woman with a baby who I later found out to be Sara McCarthy if she could borrow some ice cream. Ms. McCarthy told Ms. Golding that she could borrow the ice cream. Ms. Golding hurriedly gathered the ice cream from the freezer. She then quickly turned around in the crowded farm store and collided with me. I fell hard to the ground.

CP 200. The fall badly broke Ms. Blood's right femur, which required critical early-morning surgery the next day at Olympic Medical Center to repair. *Id.* Her injuries required many months of treatment, including a two-month stay at an in-patient rehabilitation center. *Id.* Ms. Blood has still not completely recovered from her injuries. *Id.*

Amber Golding, the woman who allegedly collided with Ms. Blood, denied that she ever made contact with Ms. Blood or caused her injuries. CP 224. Ms. Golding stated that "there was a sea of people in there" and that "[t]here was like 30 people or more" inside the small store at the time of the incident. CP 125, 127. Ms. Golding also offered the following testimony:

- Q Describe how the movement was inside the store when you actually entered.
- A Very slow. Like I stated before, you were like shuffling your feet trying to go around people, or through people, or in between people.
- Q Would you say that people were pretty much shoulder to shoulder inside the store?

A Almost, yes.

Q You also stated, when you were being asked questions by Mr. Western, that there was no room for you to collide with my client, Maxene Blood; is that correct?

A Yeah, there wasn't really room to like -- I don't know. When you think of the word "collide," you think of like two cars colliding, so, for me, that's what I would think of when I hear the word "collide." There was no room for me to be able to actually do something like that.

CP 132.

Shauntel Hart was a customer shopping in the farm store that day, and she testified that Ms. Golding "came in to get ice cream from the case and seemed to be very rushed and in a hurry, not really paying attention to what was going on." CP 157. Ms. Hart further testified that Ms. Golding "grabbed her ice cream, turned around, and ran into the elderly lady [Ms. Blood] that was behind me." *Id.* Ms. Hart could only recall there being five adults and a baby in the store when the injury occurred. CP 158-59.

Thormod Skald, the ice cream vendor who employed Ms. Golding, also stated that the store "was packed," "incredibly crowded," and "it was wall-to-wall people." CP 139, 143. Mr. Skald went into the store several times that day to get ice cream and testified that he "had trouble maneuvering out without dropping everything." CP 139.

Sara McCarthy owns Willow-Wist along with her husband, Ryan McCarthy. CP 163. Ms. McCarthy was in the farm store when Ms. Blood's injury occurred. CP 148-49. Ms. McCarthy testified that Ms. Golding did collide with Ms. Blood, causing Ms. Blood to fall to the ground. *Id.* Ms. McCarthy estimated there were six or seven people inside the store at the time of the incident. CP 150-51.

Ryan McCarthy, the President of Willow-Wist, offered the following testimony at his deposition:

Q Do you agree that the more people in a store the greater chance of customer injury?

A Yes.

Q Do you agree that the more people in the store the greater chance of customer falls?

A Yes.

Q Do you agree that the more people in the store the greater chance of people colliding with each other?

A Yes.

Q Do you agree that limiting the amount of people in a store helps keeps [sic] customers safe?

A Yes.

Q Do you agree that a crowded store is not safe?

A Yes.

Q Do you agree that a storeowner should require that their store is not crowded?

A Yes.

Q Do you agree that a storeowner should intervene when his or her store becomes crowded?

A Yes.

Q Do you agree that a storeowner should train their staff to intervene when their store becomes crowded?

A Yes.

Q Do you agree that a storeowner should have written policies to prevent crowding?

A Yes.

Q Do you agree that a storeowner should take steps to protect his customers when he expects his store will be crowded?

A Yes.

Q Do you agree that a storeowner should take steps to prevent crowding when he expects the store will be busy?

A Yes.

Q Do you agree that a storeowner should schedule extra staff when he expects that his store will be busy to prevent crowding?

A Yes.

CP 171-72.

On March 7, 2016, Ms. Blood filed her Complaint alleging negligence against Willow-Wist, Viking Feast, and “Jane Doe” who was later discovered to be Amber Golding. CP 341-49. Ms. Blood alleged that the overcrowded farm store posed a foreseeable danger to its business invitees and that Willow-Wist breached its duty of care to its business invitees by failing to maintain the premises in a safe condition and exercise reasonable care under the circumstances. *Id.*

On August 1, 2016, Willow-Wist filed a motion for summary judgment. CP 315-31. Willow-Wist made the following arguments for why it was not liable for Ms. Blood’s injuries: (1) a busy farm store does not amount to a “condition on the land” with respect to establishing premises liability; (2) assuming a crowd is a condition on the land, the crowd did not pose an unreasonable risk of harm; (3) the crowd was an open and obvious condition of which Ms. Blood was aware; (4) Willow-Wist could not have foreseen that Ms. Golding would collide with Ms. Blood; and (5) Ms. Golding had enough space to avoid the collision if she had been paying attention so the crowded store was not a cause-in-fact of Ms. Blood’s injuries. *Id.*

Ms. Blood filed a brief in response which included, among other evidence, the declaration of Joellen Gill, a Human Factors expert qualified to testify regarding workplace safety standards. CP 201-05. Ms. Gill

testified on a more probable than not basis that “[t]he conditions of the inside of the farm store, if indeed it was overcrowded, were a contributing cause to this incident.” CP 202.

A hearing was held on September 2, 2016, and Judge Christopher Melly granted Willow-Wist’s motion for summary judgment. CP 78. Ms. Blood filed a motion for reconsideration, and Judge Melly requested a written response from Willow-Wist, which was filed. CP 19-77. Judge Melly issued a memorandum opinion on October 10, 2016, denying the motion for reconsideration. CP 8-13. Judge Melly’s opinion states, in part, as follows:

The uncontroverted evidence shows that, in the vicinity of the freezer where the collision between Ms. Golding and Ms. Blood occurred, the area was lightly populated, regardless of what conditions may have existed elsewhere in the store. Even if the store were packed with people, standing shoulder to shoulder, or shuffling along, as suggested by the plaintiff, it appears to the court that space was *not* at a premium at the freezer.

CP 9. (emphasis in original).

After the claim against Willow-Wist was dismissed, Ms. Blood proceeded with the case, and judgment was entered against Viking Feast for \$628,523.64 on October 18, 2019. CP 6-7. Ms. Blood then filed the Notice of Appeal in this matter on November 12, 2019.

IV. ARGUMENT

A. **The trial court erred in granting summary judgment because there was a genuine issue of material fact as to whether the farm store was crowded in the area where Ms. Blood was injured.**

Summary judgment is only properly granted when 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). “In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). Further, summary judgment is appropriate “only if, from all the evidence, a reasonable person could reach only one conclusion,” *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998).

To prove negligence, a 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) that the claimed breach was a proximate cause of the injury.” *Millson v. City of Lynden*, 174 Wn. App. 303, 309, 298 P.3d 141 (2013) (reversing trial court’s grant of summary judgment to the defendant). “Negligence is generally a question of fact for the jury, and should be decided as a matter of law only in the clearest of cases and when reasonable minds could not have differed in their interpretation of the

facts.” *Id.* at 312. Furthermore, where fulfillment of a duty “depends on proof of certain facts that may be disputed, summary judgment is inappropriate.” *Id.* “An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

Here, it is undisputed that Plaintiff fell inside Willow-Wist’s farm store. However, this is one of the few material facts that is undisputed. The number of people inside the farm at the time of the incident is highly disputed. Ms. McCarthy and Ms. Hart testified that there were only six or seven people inside the store whereas Amber Golding testified that the farm store was “extremely” crowded, with 30 or more people inside the store at the time of the incident. CP 125, 150-51, 158-59. Ms. Golding stated that “there was nowhere for people to go, other than towards the door” and that it was “a sea of people” and that people were pretty much “shoulder to shoulder” inside of the farm store. CP 124, 126-28. Ms. Blood testified that the store was crowded at the time of the incident. CP 200. Mr. Skald testified that it was one of the busiest events that he had ever worked, and the farm store had “wall-to-wall people” when he went inside before the subject incident. CP 139, 143.

The trial court judge acknowledged that evidence must be viewed in the light most favorable to the non-moving party, and under this standard the judge found that “the store was crowded.” CP 8. Nonetheless, the trial judge determined that the store was *not* crowded in the area where Ms. Blood was injured: “uncontroverted evidence shows that, in the vicinity of the freezer where the collision between Ms. Golding and Ms. Blood occurred, the area was lightly populated[.]” CP 9. In reaching this conclusion, the judge appears to have focused on certain evidence while disregarding other evidence.

The trial court judge gave great weight to Ms. Blood’s testimony that she saw Ms. Golding walking toward the freezer:

Significantly, the plaintiff testified that Ms. Golding, with whom physical contact was allegedly made, “was walking toward the freezer.” While other parts of the store may have had customers shoulder to shoulder and required customers to shuffle along as suggested by the plaintiff, the freezer area was open enough to permit Ms. Golding to walk.

CP 8-9. However, whether someone is able to “walk” is hardly a barometer for whether a store is overly crowded. There are many ways in which a person can walk, and shuffling through a crowd is certainly one form of walking. The most important factor for a jury to consider is whether patrons could walk through the store without bumping into one another and potentially causing injury due to overcrowding.

The trial court overlooked substantial evidence that directly controverted the court's finding that the store was not crowded in the specific area near the freezer where the injury occurred. Ms. Golding offered the following testimony regarding her ability to move inside the store:

Q Were you in a hurry going into the farm store?

A You couldn't be in a hurry to go in the farm store; you had to wait to get into the farm store. You basically shuffled into the farm store, and then shuffled to the line at the freezer, and then I waited in line.

CP 123. Later in her deposition, Ms. Golding continued describing her ability to move inside the store:

Q Describe how the movement was inside the store when you actually entered.

A Very slow. Like I stated before, you were like shuffling your feet trying to go around people, or through people, or in between people.

Q Would you say that people were pretty much shoulder to shoulder inside the store?

A Almost, yes.

CP 128. Ms. Golding also provided the following testimony:

Q From where you were working, could you see the number of people going into the store?

A Yes.

Q You knew it was crowded in there?

A Yes.

Q And was it such that you were not able to like hustle in there fast?

A Yeah, you can't hustle in there.

Q You were just shuffling along really?

A Yes; they had both doors open for people.

Q But you had to move slowly in there.

A You had to move slowly.

Q In terms of once you got the ice cream, you had to move slowly going out as well?

A Yes.

CP 298. In other words, the store in general was crowded, and the area by the freezer was also crowded. Ms. Golding had to shuffle in and shuffle out. In fact, it was so crowded by the freezer that Ms. Golding had to wait in line to get there. CP 123. Ms. Golding also offered the following testimony regarding whether the crowded conditions contributed to Ms. Blood's fall:

Q Do you think you had anything to do with her falling?

A I don't think I had necessarily anything to do [with her fall]. I think the store was crowded, there was nowhere for people to go, other than towards the

door. They had tables and things set so it was just very hard to negotiate, navigate.

CP 124. Ms. Golding opined that conditions other than the farm tour also caused the store to be overly crowded at the time of Ms. Blood's fall, stating that Willow-Wist "had just finished teaching a fermenting, butter-making, and yogurt-making class." *Id.*

The trial court judge also gave weight to Ms. Blood's testimony "that she did not crowd Ms. Golding and that there was adequate space for Ms. Golding to avoid contact with her." CP 9. However, Ms. Blood gave this testimony in response to a question where it appeared that defense counsel was implying that Ms. Blood was the cause of the incident:

Q Did you crowd up on [Ms. Golding]?

A No, I did not crowd up on her.

Q Did you give her enough space so that if she had been paying attention, she could have avoided you?

A Yes.

CP 273. Ms. Blood simply testified that she did not intentionally crowd Ms. Golding. In response to a less pointed question, Ms. Golding testified that Ms. Blood must have been standing very close to her:

Q Do you think she came up on you, came up too close to you?

A I feel like I could not have seen her out of my peripheral vision so she had to have been standing

too close, like directly behind me. I didn't know she was there until I turned.

CP 122-23.

The trial judge erred in determining a genuine issue of material fact on a summary judgment motion. Contrary to the court's opinion, "uncontroverted evidence" did not establish that the store was "lightly populated" in the area where the injury to Ms. Blood occurred. As discussed above, Ms. Blood presented substantial evidence that could lead a jury to conclude that the store was crowded in this particular area. The trial judge had a duty to consider the facts and all reasonable inferences therefrom in the light most favorable to Ms. Blood, the non-moving party. Ms. Blood did not simply rely on allegations set forth in her pleadings. She provided sworn deposition testimony from Amber Golding, who is undoubtedly one of the most important witnesses in this case. Ms. Golding is alleged to have collided with Ms. Blood, and therefore she has firsthand knowledge of the conditions that existed inside the store at the exact time and location where Ms. Blood fell and was injured. A jury should be permitted to hear Ms. Golding's testimony, along with all other evidence that may be presented, and determine whether overly crowded conditions in the store contributed to Ms. Blood's injury.

Moreover, Ms. Blood does not bear the burden of showing a genuine issue of material fact. “In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.” *Young v. Key Pharm., Inc.*, 112 Wn.2d at 225. Here, Willow-Wist did not meet this initial burden, nor could it, as there is conflicting evidence regarding the crowded conditions inside the store. Because a genuine issue of material fact is present in this case, summary judgment was not appropriate.

B. Joellen Gill’s expert testimony further establishes a genuine issue of material fact.

Although there are genuine issues of material fact, an affidavit containing admissible expert opinion on the ultimate issue of fact is also sufficient to create genuine issue as to that fact, precluding summary judgment. *J.N. By and Through Hager v. Bellingham School Dist. No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994); *Owen v. Burlington Northern Santa Fe Railroad, Inc.*, 114 Wn. App. 227, 56 P.3d 1006 (2005). The court commits reversible error by disregarding expert testimony submitted by the nonmoving party. *J.N. By and Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. at 60-61 (reversing trial court’s grant of summary judgment where court failed to consider nonmoving party’s expert testimony and reiterating that an expert declaration on an ultimate

factual issue is sufficient to create a genuine issue of fact mandating denial of summary judgment).

Here, Ms. Blood retained highly experienced and trained human factors expert Joellen Gill to evaluate her personal injury claim. After evaluating the facts and witness testimony, Ms. Gill opined on a more probable than not basis with respect to the following facts:

- Viking Feast Ice Cream failed to take appropriate action in consideration of customer safety on the day of this incident; this was an underlying root cause of this incident;
- The actions of Ms. Golding at the time of this incident were negligent; this was an underlying root cause of this incident;
- The conditions of the inside of the farm store, if indeed it was overcrowded, were a contributing cause to this incident; and
- There is no basis to place blame on Ms. Blood for her injury incident.

CP 191.

Furthermore, Ms. Gill explained why crowded stores are dangerous, and thus, should be controlled:

Addressing the condition of the farm store, as discussed above, there is a factual dispute as to the number of people occupying the farm store at the time of this incident. Notwithstanding, crowded conditions can increase the potential for contact between patrons, and as such should be controlled. In fact, Mr. McCarthy testified that he agreed the store would be less safe under crowded conditions, that such conditions should be controlled and that staff should be trained on how to deal with and prevent this condition. To the extent the store was overcrowded at

the time of this incident, this would be a contributing cause to Ms. Blood's injury incident.

CP 192.

Finally, in her declaration and expert report, Ms. Gill also recognized the genuine issues of material fact regarding the number of people in the store at the time of the incident and whether or not Ms. Golding collided with Plaintiff:

- Based on my evaluation of Ms. Blood's incident, I determined that there is a factual dispute as to the number of people that were in the farm store at the time of this incident from witness deposition testimony; and
- Based on my evaluation of Ms. Blood's incident, I determined that there is a factual dispute regarding the contact between Ms. Golding and Ms. Blood.

CP 191.

Once again, the above-referenced genuine issues of material fact preclude summary judgment. Ms. Gill's expert testimony, which was uncontroverted by any expert testimony offered by Willow-Wist, establishes that Willow-Wist's summary judgment motion should have been denied because crowded stores are dangerous and need to be controlled, which Willow-Wist did not achieve in the current case. This lack of control partially contributed to Ms. Blood's fall and injuries.

C. **The overcrowded store was a “condition on the land” that posed an unreasonable risk of harm and Ms. Blood did not assume the risk of injury.**

Although the trial court based its ruling entirely upon its finding that the store was not crowded in the area where Ms. Blood’s injury occurred, there were other arguments made by Willow-Wist that will also be addressed here. Willow-Wist argued that (i) overcrowding does not constitute a “condition on the land”; (ii) even if it is a condition on the land, a crowded store does not pose an unreasonable risk of harm; and (iii) even if a crowded store is a condition on the land that poses an unreasonable risk of harm, Ms. Blood assumed that risk.

A landowner owes the following duty to its business invitees:

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.

McDonald v. Cove to Clover, 180 Wn. App. 1, 4-5, 321 P.3d 259

(2014).

1. An overcrowded store is a condition on the land.

Willow-Wist argued that a crowded store it is not a condition of the land because it could not locate a single case where a merchant was held liable to an invitee under this theory. Willow-Wist's argument fails because the Washington State Supreme Court has recognized negligent overcrowding as a potential cause of action:

In so holding we hasten to point out that this is not a case where negligent overcrowding was the cause of the injuries. *See O'Bauer v. Katz Drug Co.*, 49 S.W.2d 1065 (Mo.Ct.App. 1932); *Hodge v. Weinstock Lubin & Co.*, 109 Cal.App. 393, 293 P. 80 (1930). Even if we were to assume that such overcrowding did exist and that such a condition was somehow a breach of the proprietor's duty of care, there was no causal relationship between that condition and the plaintiff's injuries. The chair involved here was the end chair which had been vacated and positioned by a departing guest.

Hemmen v. Clark's Restaurant Enterprises, 72 Wn.2d 690, 694, 434 P.2d 729 (1967). In *Hemmen*, the Court established negligent overcrowding as a viable theory of liability in Washington State.

In addition, overcrowding has been recognized as the basis for a negligence claim by many other states as well. *See, e.g., Superskate, Inc. v. Nolen by Miller*, 641 So. 2d 231, 235, 38 A.L.R.5th 855 (Ala. 1994) ("At some stage of crowding, those managing a skating rink would have a duty to prevent more people from coming onto the rink or to remove some from the rink so that the skaters might skate safely."); *Williams v. Essex*

Amusement Corp., 133 N.J.L. 218, 219, 43 A.2d 828, 829, 8 Abbots 218 (N.J. Sup. Ct. 1945) (“While overcrowding or a crowd in theatres does not, in itself, constitute negligence, it may become so when the actions of the crowd are out of the ordinary character or such as to endanger the safety of the theatre patrons while seeking to procure seats.”); *Lutz v. Chicago Transit Auth.*, 36 Ill. App. 2d 79, 85, 183 N.E.2d 579, 582 (Ill. App. Ct. 1962) (“The evidence of the plaintiff was sufficient to raise the factual questions of whether the bus was overcrowded, whether the defendant observed the degree of care and caution imposed on it by law in permitting it to be overcrowded and whether this overcrowding was a proximate cause of plaintiff’s injury.”); *Walker v. Connecticut Co.*, 91 Conn. 606, 100 A. 1063, 1063 (Conn. 1917) (“The negligence alleged was the overcrowding of the aisle by hand luggage and passengers, and the jostling to which the plaintiff was subjected was a natural incident of the overcrowding.”); *Lobner v. Metro. St. Ry. Co.*, 79 Kan. 811, 101 P. 463, 464, 21 L.R.A.N.S. 972 (1909) (“The overcrowding of the car in this case is not held to be culpable negligence as a matter of law, but only that there is testimony tending to show negligence which is deemed sufficient to take the case to the jury.”); *Shields v. Minneapolis, St. P., R. & D. Elec. Traction Co.*, 124 Minn. 327, 329, 144 N.W. 1092, 1093, 50 L.R.A.N.S. 49 (1914) (“It is the carrier’s duty to provide its passengers with a seat and

with a safe place to ride, and when it overcrowds a train beyond seating capacity, it is bound to exercise care proportioned to the increased danger caused by such overcrowding.”); *Burch v. SMG, Schindler Elevator Corp.*, 2014-1356 (La. App. 4 Cir. 4/7/16), 191 So. 3d 652 (La. Ct. App. 2016) (stadium management company’s negligence in failing to protect patrons by properly controlling operation of elevators and number of persons accessing elevators after event was cause-in-fact of patrons’ injuries suffered when overcrowded elevator malfunctioned following professional football game).

Here, Ms. Blood’s injuries were directly caused – at least in part – by the overcrowding of Willow-Wist’s farm store. This theory is supported by the expert testimony of Joellen Gill. Willow-Wist cited no cases that support the position that a crowded store cannot be a condition of the land or a theory of liability. Likewise, Ms. Blood has found no cases where a court of any state has held that overcrowding, as a matter of law, cannot be the basis for a negligence claim.

2. The overcrowded store created an unreasonable risk of harm.

Willow-Wist erroneously argued that a crowded store does not pose an unreasonable risk of harm or constitute a dangerous condition. Willow-Wist’s position is contrary to the substantial evidence, Ryan

McCarthy's own admissions, and Joellen Gill's expert opinions. A crowded store is dangerous. It hazardously packs people together, which makes it difficult for patrons to move around and increases the chance of collisions between patrons.

Here, an overcrowded farm store along with Willow-Wist's lack of control over that crowd contributed to a collision between patrons. On October 4, 2014, the Clallam County WSU Extension held its annual farm tour. Mr. McCarthy, president of Willow-Wist, knew that the farm tour would attract a large crowd, and he estimated that 700 people visited the farm on October 4, 2014. CP 167. However, Mr. McCarthy did not properly staff or supervise the inside of the farm store. He stated that Jane Bultetedaob was the employee responsible for working the inside of the store on the incident date. CP 168. However, Ms. Bultetedaob was not present during the incident. CP 153-54. Looking at logical interferences in a light most favorable to Ms. Blood, there were no employees present when the store was crowded and the incident occurred. The proper staffing and supervisor could have prevented the unreasonable risk of harm of a crowded store by managing and correcting this dangerous situation. An employee or supervisor could also have stopped Ms. Golding from hurrying around the store in an unsafe manner or offered to help her with the ice cream, which could have prevented Ms. Blood's injuries.

Furthermore, Mr. McCarthy admitted that a crowded store is dangerous, increases the risk of harm to his patrons, and a storeowner has a duty to take affirmative steps to control the inside of his store. In his deposition, Mr. McCarthy agreed to the following statements:

- The more people in a store the greater chance of customer injury;
- The more people in the store the greater chance of customer falls;
- The more people in the store the greater chance of people colliding with each other;
- Limiting the amount of people in a store helps keep the customers safe;
- A crowded store is not safe;
- A storeowner should require that their store is not crowded;
- A storeowner should intervene when his or her store becomes crowded;
- A storeowner should train their staff to intervene when their store becomes crowded;
- A storeowner should have written policies to prevent crowding;
- A storeowner should take steps to protect his customers when he expects his store will be crowded;
- A storeowner should take steps to prevent crowding when he expects the store will be busy; and
- A storeowner should schedule extra staff when he expects that his store will be busy to prevent crowding.

CP 171-72.

There is no evidence that Mr. McCarthy took any steps to address the above-listed 12 guidelines, which directly caused – at least in part – Ms. Blood’s injuries on October 4, 2014. He did not have the employees,

training programs, written rules, or any other type of procedure in place to control the dangerous condition of a crowded store.

Finally, human factors expert, Joellen Gill, supports Ms. Blood's case that the crowded store and Willow Wist's lack of control over that crowded store partially contributed to Ms. Blood's injuries. Her expert testimony is not contradicted by Willow-Wist's expert testimony as Willow-Wist offered no expert testimony.

3. Ms. Blood did not assume the risk of the dangerous condition on the land.

Willow-Wist also argued that the overcrowded store was an open and obvious condition that Ms. Blood assumed the risk of encountering. "A possessor of land is not liable to invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (quoting Restatement (Second) of Torts § 343A). As stated in the above rule, an owner still has a duty to protect invitees, even from known or obvious dangers, when an owner "should anticipate the harm despite such knowledge or obviousness." Restatement (Second) of Torts § 343A(1).

Here, Willow-Wist knew the farm store would be unusually crowded that day, and the owner of Willow-Wist admitted that a crowded store is not safe and increases the risk of injury to customers and that measures should be taken by the store to protect against overcrowding. Although the existence of a crowd inside the store could be apparent to a patron upon entering, a store owner should anticipate that patrons will enter the store nonetheless. If the average patron refused to enter a crowded store, then stores could never become crowded in the first place. In addition, a store owner has a vested interest in having as many patrons as possible inside the store to maximize profits.

Ms. Blood did not assume the risk of injury by entering the farm store and encountering the crowd. The assumption of risk doctrine is divided into four classifications: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. *Tincani*, 124 Wn.2d at 143. Express assumption of risk and implied primary assumption of risk operate the same way and arise when a plaintiff has consented to relieve the defendant of a duty owed by the defendant to the plaintiff regarding specific known risks. *Hvolboll v. Wolff Co.*, 187 Wn. App. 37, 47-48, 347 P.3d 476 (2015). The last two types, implied reasonable and implied unreasonable assumption of risk, are nothing but alternative names for contributory negligence. *Id.* at 47. Therefore, if either of the

last two types apply here, this case must be remanded for a jury to determine what liability, if any, Ms. Blood bears for contributory negligence.

With respect to the first two types of assumption of risk, Ms. Blood did not expressly assume the risk, nor did she impliedly consent to the risk of becoming injured by entering the store. A classic example of implied primary assumption of risk occurs in sports-related cases: “One who participates in sports ‘assumes the risks’ which are inherent in the sport.” *Tincani*, 124 Wn.2d at 144. By contrast, the court has held that implied primary assumption of risk did not apply in a case with facts that are relevant here. In *Tincani*, a 14-year-old boy took a school field trip to the zoo. *Id.* at 125. While exploring the trails in the zoo, the boy attempted to climb down a rock wall, lost his footing, and fell approximately 20 feet suffering serious injuries. *Id.* at 126. The court held as a matter of law that the boy’s act of climbing down the wall constituted an unreasonable assumption of risk, and therefore it was up to the jury to apportion the percentage of fault attributable to each party:

Tincani did not enter the Zoo to engage in the activity or sport of “rock climbing”. Tincani visited the Zoo as part of a school field trip. Entrance and exploration of the Zoo was encouraged. The activity in which the students engaged was intended to be a “walk in the wild”. The risk of serious injury while visiting a zoo should not be a risk inherent in and necessary to such an activity. In *Scott*, we

concluded while the plaintiff assumed the risks inherent in the sport of skiing, he did not assume the risks created by the defendant's failure to provide reasonably safe facilities. Similarly, Tincani did not assume the risks created by the Zoo's failure to provide reasonably safe facilities. To the extent the Zoo encouraged visitors, especially children, to explore the grounds without adequate warnings, physical restrictions, or supervision, the jury could have concluded the Zoo increased the foreseeable risk that patrons would exceed the area of invitation, thereby exposing themselves to dangerous conditions. The jury's conclusion Tincani "assumed the risk or was negligent" acts as a damage-reducing factor; it does not obviate the Zoo's duty to Tincani while he was on its premises.

Id. at 144-45 (internal citation omitted).

Likewise here, neither Ms. Blood nor any reasonable person would believe that entering a farm store to buy milk would present an obvious risk of harm. The risk of serious injury while visiting a store to buy milk should not be a risk inherent in and necessary to such an activity. Ms. Blood did not know or have any warning the store would be overcrowded. Ms. Blood did not know or have any warning that the store would be understaffed and unsupervised. Ms. Blood did not know or have any warning that the uncontrolled and crowded store presented an obvious risk of danger to her. In other words, Ms. Blood did not assume a risk of harm when entering the farm store to buy milk.

As in any other personal injury matter, Ms. Blood had the duty to use reasonable care under the circumstances. However, this is an issue of

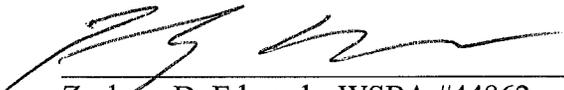
comparative fault for the jury to decide. It does not bar recovery from Willow-Wist as a matter of law. Ultimately, Ms. Blood's liability may not be an issue at trial since Willow-Wist stated that Ms. Blood was not negligent or otherwise at fault in their interrogatory responses. CP 187.

V. CONCLUSION

On the basis of the foregoing, Maxene Blood respectfully requests that the Court of Appeals reverse the trial court's Order Granting Willow-Wist Farm Inc.'s Motion for Summary Judgment Dismissal of Plaintiff's Claim and remand for further proceedings.

Respectfully submitted this 23rd day of January, 2020.

INGRAM, ZELASKO & GOODWIN, LLP
Attorneys for Petitioner



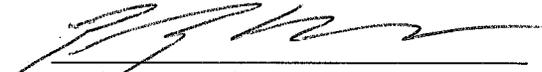
Zachary D. Edwards, WSBA #44862

CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury under the laws of the State of Washington that on January 23, 2020, I sent the foregoing document to the following persons via the method indicated below:

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DATED: January 23, 2020.


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