

FILED
Court of Appeals
Division II
State of Washington
3/13/2020 10:11 AM

NO. 54012-6-II

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.

APPELLANT’S REPLY BRIEF

Zachary D. Edwards, WSBA #44862
Ingram, Zelasko & Goodwin, LLP
120 East First Street
Aberdeen, Washington 98520
Phone: (360) 533-2865
Email: zedwards@izglaw.com

Attorney for Appellant
Maxene Blood

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT..... 1

A. Standard of Review..... 1

**B. There is a genuine issue of material fact as to
 whether the crowded conditions in the store were
 a contributing cause to Plaintiff's injury..... 2**

III. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Attwood v. Albertson’s Food Centers, Inc., 92 Wn. App. 326, 330, 966 P.2d 351 (1998)..... 2, 8

Behla v. R.J. Jung, LLC, 453 P.3d 729, 736 (Wash. Ct. App. 2019)..... 7

Estate of Bordon ex rel. Anderson v. State, Department of Corrections, 122 Wn. App. 227, 242, 95 P.3d 764 (2004)..... 3

Estate of Keck By & Through Cabe v. Blair, 71 Wn. App. 105, 111, 856 P.2d 740 (1993)..... 2

Impero v. Whatcom Cty., 71 Wn.2d 438, 447, 430 P.2d 173 (1967)..... 3

J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994)..... 6

Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015) 1

Ringaard v. Allen Lubricating Co., 147 Wash. 653, 655-56, 267 P. 43 (1928)..... 3

Snohomish County v. Anderson, 124 Wn.2d 834, 843, 881 P.2d 240 (1994)..... 2

Theonnes v. Hazen, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984)..... 6

I. INTRODUCTION

In its response brief, Willow-Wist Farm, Inc. (“Willow-Wist”) improperly invites the court to weigh the evidence presented in a summary judgment proceeding. Willow-Wist urges the court to consider only the evidence that it finds favorable to its case, while characterizing such evidence as uncontroverted despite the fact that such evidence is highly disputed. It is the function of the jury to weigh the evidence, and Willow-Wist’s argument only serves to further illustrate why summary judgment was improper in this case.

Despite Willow-Wist’s self-serving conclusion that the crowded store did not cause Ms. Blood’s injury, Maxene Blood offered substantial evidence that the farm store was extremely crowded when her injury occurred and that the crowded conditions, at least in part, contributed to her injury.

II. ARGUMENT

A. Standard of Review

The standard of review of a trial court’s order granting summary judgment is de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). “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). “Because the question of proximate cause is for the jury, it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.” *Id.*

B. There is a genuine issue of material fact as to whether the crowded conditions in the store were a contributing cause to Plaintiff’s injury.

The primary argument set forth by Willow-Wist is that Amber Golding’s haste and inattention were the proximate cause of Ms. Blood’s injury, as opposed to the crowded conditions in the farm store. In other words, Willow-Wist attempts to use the fact that Amber Golding was negligent as evidence that it was not negligent. However, “[d]epending upon the circumstances in a particular case, there may be more than one proximate cause of an injury because the acts of different people combine to cause the injury.” *Estate of Keck By & Through Cabe v. Blair*, 71 Wn. App. 105, 111, 856 P.2d 740 (1993). It is well established under Washington law that two or more parties may be liable for causing a single injury:

[W]e have uniformly held that where the concurrent or successive negligence of two or more persons combined together results in an injury or loss to a third person, and the negligence of the one without the concurring negligence of the other would not have caused the injury or loss, the third person may recover from either or both for the damages suffered.

Ringgaard v. Allen Lubricating Co., 147 Wash. 653, 655-56, 267 P. 43 (1928); *see also Impero v. Whatcom Cty.*, 71 Wn.2d 438, 447, 430 P.2d 173 (1967) (“When the concurrent or successive negligence of two defendants is a proximate cause of an injury, each is liable regardless of the relative degree to which each contributes to the injury.”)

Therefore, it was not Ms. Blood’s burden to show that Willow-Wist’s negligence was the *sole* proximate cause of her injuries or even that Willow-Wist was the primary cause of the injury. Ms. Blood needed only to present “some competent evidence of factual causation” that Willow-Wist’s negligence contributed to her injury. *Estate of Bordon ex rel. Anderson v. State, Department of Corrections*, 122 Wn. App. 227, 242, 95 P.3d 764 (2004). A jury could find that Willow-Wist was only one percent at fault, but the degree of comparative fault is not an issue for summary judgment.

Here, Ms. Blood presented competent evidence that the store was crowded and that the crowded conditions partially contributed to causing her injury. Willow-Wist’s argues that the crowd is a red herring because

there is no evidence that the crowd surged or that Golding was pushed by the crowd into Blood. However, this version of events was directly controverted by the testimony of Amber Golding:

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.

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.

Q That was because of all the people inside the store at that time?

A Yes, because of how crowded it was.

CP 69-70, 124.

Ms. Blood also presented uncontradicted expert testimony from Joellen Gill that overcrowded conditions in the store were a contributing cause to Ms. Blood's injury. Willow-Wist repeatedly mischaracterizes her expert testimony in its response brief, claiming that Ms. Gill's opinion was

that Ms. Golding was the sole proximate cause. Ms. Gill plainly states her opinions regarding causation in her report:

1. 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.
2. The actions of Ms. Golding at the time of this incident were reckless; this was an underlying root cause of this incident.
3. **The conditions of the inside of the farm store, if indeed it was overcrowded, were a contributing cause to this incident.**
4. There is no basis to place blame on Ms. Blood for her injury incident.

CP 191 (emphasis added). She clearly states that the actions of Ms. Golding and the overcrowded store were *both* contributing causes to the incident. Ms. Gill discussed her opinion in greater detail as follows:

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 193.

Willow-Wist further argues that Ms. Gill's opinion should be disregarded because it was not based on the facts of the case. *Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984) ("The opinion of an expert must be based on facts."). However, Ms. Gill's opinions were directly based on the facts of the case. It is just that many of those facts happen to be disputed. Ms. Gill expressly recognized that there was a dispute regarding the number of people in the store:

There is a factual dispute as to the number of people that were in the farm store at the time of this incident:

- Ms. Blood: The store was fairly crowded; quite a few people;
- Ms. Golding: Extremely crowded, 30 people or more, too many people in the store;
- Ms. Hart: Store not very busy, they may have been the only people in the store;
- Ms. McCarthy: Six to seven people in the store at the time of the incident.

I cannot resolve this factual dispute; my Opinion 3 as expressed below applies only if the store was overcrowded.

CP 192. Because this matter was decided on summary judgment, it is a fact that the store was overcrowded. Therefore, Ms. Gill's opinion is unequivocal that the conditions of the inside of the farm store were a contributing cause to this incident, and it was error for the trial court to grant summary judgment. *J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994) ("In general,

an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.”)

Regardless, Ms. Blood was not required to provide evidence conclusively proving causation if causation can be reasonably inferred. “Precise knowledge of how an accident occurred is not required to prove cause in fact.” *Behla v. R.J. Jung, LLC*, 453 P.3d 729, 736 (Wash. Ct. App. 2019). “The plaintiff need not establish causation by direct and positive evidence.” *Id.* “The claimant can establish causation by inferences arising from circumstantial evidence.” *Id.* “He or she need only show by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable.” *Id.* “Plaintiff need not negate every possible cause.” *Id.* Jury speculation is precluded if the plaintiff presents evidence that the defendant’s actions could have caused the injury. *Id.* at 736 (“If the court concludes that plaintiff’s proffered cause ‘could have’ been the likely cause, the court should allow the jury to decide the likely cause.”)

Here, the court should have allowed the jury to decide whether Ms. Golding alone caused the injury or whether the concurrent negligence of Willow-Wist was also a contributing cause. Proximate cause is ordinarily a factual question for the jury, and summary judgment is only proper when

the facts are undisputed. *Attwood*, 92 Wn. App. at 330. The facts in this case were disputed, and Ms. Blood presented the trial court with substantial evidence that the overcrowded store was a contributing proximate cause to her injury:

- Willow-Wist's owners knew that the farm store would be much more crowded than usual on the date of the incident. CP 169.
- Willow-Wist's owners knew that a crowded store increases the risk of customers colliding with each other resulting in injury. CP 170-71.
- Willow-Wist's owners knew that a storeowner should have written policies to prevent crowding, should take steps to prevent crowding when the store is expected to be busy, and should schedule extra staff when the store is expected to be busy to prevent crowding. CP 171.
- Willow-Wist had no employees in the store at the time of the incident and took no steps to prevent the store from becoming overcrowded. CP 200.
- Multiple witnesses testified that the store was extremely crowded at the time of the incident. CP 125, 127, 139, 143.
- Patrons were shoulder to shoulder inside the store and had to shuffle their way through the crowd while moving within the store. CP 132.
- Multiple witnesses testified that the collision occurred just as Ms. Golding was turning from the freezer toward the cash register. CP 148-49, 157, 200.
- Ms. Blood hired a human factors expert who testified on a more probable than not basis that the conditions of the inside of the farm store, if indeed it was overcrowded, were a contributing cause to this incident. CP 191. No expert opinion was offered by Willow-Wist rebutting this conclusion.

Construing all facts and reasonable inferences in the light most favorable to Ms. Blood, as the court must, the store was extremely crowded forcing Ms. Blood and Ms. Golding into close proximity just before the collision occurred. Ms. Golding did not “barrel” into Ms. Blood after gaining a head of steam as suggested by Willow-Wist. Patrons were packed together and when Ms. Golding turned from the freezer, she collided with Ms. Blood causing Ms. Blood to fall and become injured. Had the store been less crowded, then patrons would have had more room to navigate and the collision would have been avoided. It was error for the trial court to decide on summary judgment that uncontroverted evidence showed that the store was not crowded in the area where the injury occurred. Construing the evidence in the light most favorable to Ms. Blood, it is a fact that the store was overcrowded. Whether the overcrowded store contributed to Ms. Blood’s fall is a genuine issue of material fact that must be decided by a jury.

III. CONCLUSION

At trial, the jury will be entitled to weigh all the evidence, make credibility determinations, and ultimately decide what liability, if any, should be apportioned to Willow-Wist. However, on a summary judgment motion, the court must construe all facts and reasonable inferences in the

light most favorable to Ms. Blood. Therefore, it is a fact that the store was overly crowded. It is a natural and obvious inference that an overly crowded store enhances the likelihood that patrons will collide with each other and that Ms. Golding would not have collided with Ms. Blood but for the overly crowded conditions in the farm store. It was improper for the trial court to conclude as a matter of law that the overly crowded store did not contribute to a collision between two patrons.

Respectfully submitted this 13th day of March, 2020.

INGRAM, ZELASKO & GOODWIN, LLP
Attorneys for Petitioner



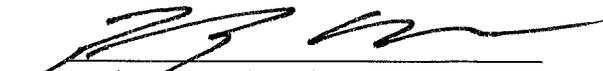
Zachary D. Edwards, WSBA #44862

CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury under the laws of the State of Washington that on March 13, 2020, I sent the foregoing document to the following persons via the method indicated below:

<p>Gary Allan Western Hanni Pichel Wilson Smith Cochran Dickerson 901 5th Ave., Ste. 1700 Seattle, WA 98164-2050 western@wscd.com pichel@wscd.com</p>	<p><input type="checkbox"/> By Mail <input type="checkbox"/> By Hand-Delivery <input checked="" type="checkbox"/> By Email through JIS portal</p>
<p>Gary Williams Attorney at Law 252 Blueberry Hill Dr. Quilcene, WA 98376-9667 gw@areyoucovered.com</p>	<p><input type="checkbox"/> By Mail <input type="checkbox"/> By Hand-Delivery <input checked="" type="checkbox"/> By Email through JIS portal</p>
<p>Misty Anne Edmundson Jennifer Page Dinning Soha & Lang, P.S. 1325 4th Ave, Ste. 2000 Seattle, WA 98101-2570 edmundson@sohalang.com dinning@sohalang.com</p>	<p><input type="checkbox"/> By Mail <input type="checkbox"/> By Hand-Delivery <input checked="" type="checkbox"/> By Email through JIS portal</p>
<p>Rafael E. Urquia Urquia Law, PLLC 1135 Lawrence Street Port Townsend, WA 98368 rafael@urquialaw.com</p>	<p><input type="checkbox"/> By Mail <input type="checkbox"/> By Hand-Delivery <input checked="" type="checkbox"/> By Email through JIS portal</p>

DATED: March 13, 2020.


Zachary D. Edwards

INGRAM, ZELASKO & GOODWIN, LLP

March 13, 2020 - 10:11 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54012-6
Appellate Court Case Title: Maxene Blood, Appellant v Willow-Wist Farm, Inc., et al, Respondents
Superior Court Case Number: 16-2-00168-1

The following documents have been uploaded:

- 540126_Briefs_20200313100728D2055293_4516.pdf
This File Contains:
Briefs - Petitioners Reply
The Original File Name was Appellants Response Brief.pdf

A copy of the uploaded files will be sent to:

- dinning@sohalang.com
- edmundson@sohalang.com
- gw@areyoucovered.com
- jacobi@wscd.com
- murray@sohalang.com
- ossenkop@wscd.com
- phares@wscd.com
- pichel@wscd.com
- rafael@urquialaw.com
- thomas@sohalang.com
- western@wscd.com

Comments:

Sender Name: Christy Carey - Email: ccarey@izglaw.com

Filing on Behalf of: Zachary David Edwards - Email: zedwards@izglaw.com (Alternate Email: izglaw@izglaw.com)

Address:
120 East First Street
Aberdeen, WA, 98520
Phone: (360) 533-2865 EXT 105

Note: The Filing Id is 20200313100728D2055293