

FILED
Court of Appeals
Division II
State of Washington
2/21/2020 2:45 PM
54012-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MAXENE BLOOD,

Appellant,

v.

WILLOW-WIST FARM, INC., a Washington corporation; VIKING
FEAST ICE CREAM, a Washington business; and "JANE DOE," an
individual,

Respondents.

***BRIEF OF RESPONDENT
WILLOW-WIST FARM, INC.***

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I. INTRODUCTION AND SUMMARY

In October 2014, Maxene Blood was a patron at defendant Willow-Wist's farm store in Sequim. Blood is a small woman, who was then nearly 80 years old, about 5' 3" tall, and just over 100 pounds. Amber Golding, a young woman working for defendant Viking Feast Ice Cream, is closer to 6' tall and then weighed considerably over 150 pounds.¹

Viking Feast had set up a table selling ice cream outside the farm store premises. At Viking Feast's direction, Golding rushed into the store, in a hurry to grab ice cream from a freezer inside. Golding pulled a few containers from the freezer... then quickly turned around. As a result of her haste and inattention, Golding ran straight into Blood, hit her hard and knocked her down.² Blood plainly stated under oath exactly what happened:

Q. Why did you fall?

A. Because someone came in, this woman [Amber Golding] ... and she turned around and very hurriedly, very hurriedly, hit me and knocked me down.

Q. Hit you hard?

A. Hard.³

Q. Did you crowd up on her?

A. No, I did not crowd up on her.

¹ CP 270-71.

² CP 192, 245-248.

³ CP 270-71.

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

A. Yes.⁴

Q. So the reason you fell was she knocked you down?

A. Yes.

Q. It wasn't that you slipped, is that correct?

A. I did not slip.

Q. Did you trip over anything?

A. No.

⁵

There is no evidence to contradict Blood's own sworn testimony. Indeed, two other eyewitnesses corroborate her testimony.⁶ There is no evidence that Golding was attempting to maneuver through a "crowd" of other store patrons when she collided with Blood; that Golding bumped into other patrons who then collided with Blood; or that other patrons pushed or otherwise caused Golding to run into Blood. There is no evidence that other patrons knocked Blood down; or that Blood tripped and fell over other patrons; or that an obstacle or slippery surface in the Willow-Wist store caused her to fall -- before or after Golding "hit Blood hard" and knocked her down.⁷ Blood flatly stated Golding simply turned, hit her and bowled her

⁴ CP 272; *see also* CP 270-71.

⁵ CP 18.

⁶ CP 244-47, 276-78.

⁷ CP 17-18.

over -- and easily could have avoided doing so. Despite her considerable size and weight advantage, Golding's only response was that she did not make contact with Blood and did not knock her over.⁸

In fact, Blood's own "human factors expert" conceded the evidence showed that Golding was "moving hurriedly"; "rushing"; and "inattentive to her environment" when she ran into Blood. Blood's own expert opined that *but for Golding's negligence, Blood would not have fallen and been injured*:

Had Ms. Golding been moving at an appropriate speed as she entered the farm store... noted the presence of other patrons in the store such as Ms. Blood, and looked before pivoting and walking out while engaged in conversation with the store owner, *this incident would not have occurred.*⁹

Nevertheless, in a desperate effort to avoid Willow-Wist's motion for summary judgment, Blood proffered this additional "expert" speculation:

Crowded conditions can increase the potential for contact between patrons... To the extent the store was overcrowded at the time of this incident, this would be a contributing cause to [sic] Ms. Blood's injury incident.¹⁰

Notwithstanding this supposed "potential for contact between patrons," nothing in the record shows that "crowding" caused "contact between patrons" of any kind; that "crowded conditions" caused Amber Golding to run into Maxene Blood; or that any other "condition" of the premises caused

⁸ CP 271, 297-98.

⁹ CP 192.

¹⁰ CP 193.

Blood to fall after Golding ran her over. Blood's expert was entitled to express opinions – but she was not entitled to assume facts not in evidence or deal in hypotheticals. Nor could the expert opine whether there was a material question of fact on summary judgment – that was a *question of law* for the trial court; and remains a *question of law* for this Court on appellate review.

Blood's own testimony, her expert's own opinion, and the absence of any evidence that a “dangerous condition” in the store caused Amber Golding to “barrel into” Maxene Blood¹¹ permitted just one reasonable conclusion: but for Amber's negligence, *this incident would not have occurred*.¹² Blood's own expert drew that very conclusion.

As a result, the trial court properly granted Willow-Wist's motion for summary judgment; declined to reconsider its summary judgment ruling; and dismissed Blood's claims against Willow-Wist.¹³ The trial court later entered judgment as a matter of law finding Viking Feast “100% liable” for the incident; along with judgment for over \$628,000 against Golding's employer, Viking Feast Ice Cream.¹⁴

¹¹ See CP 366 (trial court's ruling on reasonableness of settlement and covenant judgment between Viking Feast Ice Cream and Blood, in support of entry of judgment against Viking Feast for \$628,523.64; CP 6-7).

¹² CP 192.

¹³ CP 8-10, 78-80.

¹⁴ CP 6-7.

This Court should affirm the summary judgment in favor of Willow-Wist.

II. RESPONDENT WILLOW-WIST'S STATEMENT OF THE ISSUE ON APPEAL

Did the trial court properly grant Willow-Wist's motion for summary judgment, and decline to reconsider and reverse its summary judgment ruling, because there was no evidence that a "crowd" or any "dangerous condition" on the Willow-Wist premises caused Amber Golding to knock Maxene Blood down – and because Blood's own expert conceded that Blood would not have been knocked down and injured but for Golding's negligent haste and inattention?

III. RESPONDENT WILLOW-WIST'S STATEMENT OF THE CASE

A. *Willow-Wist's dairy farm did not employ or control Amber Golding, who was working under the sole direction of Viking Feast Ice Cream when, through her own haste and inattention, Golding knocked Maxene Blood to the floor.*

Willow-Wist is a dairy farm in Sequim that raises jersey cows for their milk. The farm is operated on 40 acres of farmland and pasture, with three structures: a home where the owners, Ryan and Sarah McCarthy, live with their two young sons; a barn with stalls for the jersey cows; and a building that houses a bottling facility and farm store. In the farm store there is a large refrigerator containing milk products, a variety of merchandise from local vendors (like soap and scarves), a freezer with ice cream and other frozen goods, and a counter where purchases can be made.¹⁵

¹⁵ CP 230-34 and 308.

Viking Feast Ice Cream is a business located in Poulsbo; and is a sole proprietorship owned and operated by Thormod Skald.¹⁶ Amber Golding is a friend of Skald who helped him sell Viking Feast ice cream products at various events in 2014.¹⁷

On October 4, 2014, Willow-Wist participated in the Clallam County Farm Tour—a yearly event promoted by the North Olympic Land Trust and Washington University extension to raise money for the Land Trust. Viking Feast sold its ice cream at the Farm Tour from its own stand, consisting of a table and a large “Viking Feast Ice Cream” banner, using its own supplies.¹⁸ Amber Golding was there to assist Viking Feast at Skald’s direction.¹⁹

At some point in the late afternoon, Viking Feast ran out of ice cream, and arranged to purchase pints from Willow-Wist to sell at Viking Feast’s outdoor stand. Skald told Golding to go into the farm store to get more pints of ice-cream for the line of customers waiting at Viking Feast’s stand.²⁰ According to Blood herself, Golding rushed into the farm store, “hurriedly” grabbed some pints of ice cream from the freezer, abruptly turned around – and then barreled into and knocked Blood to the ground:

¹⁶ CP 151.

¹⁷ CP 255-56, 282-85.

¹⁸ CP 295-96, 284.

¹⁹ CP 255-56, 282-85, 289-90.

²⁰ CP 253, 261-62, 286.

Q: And then *why did you fall?*

A: Because someone came in, this woman. She came in and as she was walking toward the freezer she said to Sarah, "Could I borrow some ice cream? We ran out." And Sarah said, "Yes." And Amber, I believe her name is, went to the freezer, took out some ice cream . . . and *she turned around and very hurriedly, very hurriedly, hit me and knocked me down.*

Q: *Hit you hard?*

A: *Hard.*

Q: *And was she significantly bigger than you?*

A: *Much, much bigger.*

Q: If you had to guess her height, how tall would you say?

A: Five-eleven, six feet.

Q: And over 150?

A: Definitely, in my estimation.

Q: Okay. And you're how tall?

A: About five-three.

Q: And at the time weighed about?

A: One hundred and two.²¹

Two other witnesses testified under oath and confirmed that the much larger, stronger and younger Golding ran into petite and elderly Blood and knocked her down.²²

²¹ CP 270-71 (emphasis added).

²² CP 245-47.

Shauntel Hart was a Willow-Wist customer who saw the incident, and testified under oath that Golding was “in a hurry” and “not really paying attention” when she knocked Blood to the floor:

A: So I was in the farm store looking at the gifts and things they had for sale There was an elderly lady that came in. And she kind of was standing to my left behind me. Not directly behind me, but – anyway, we were just looking at the stuff that was for sale. And as we were standing there, one of the employees from the Viking Ice Cream that was outside came into the shop... she 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. She grabbed her ice cream, turned around, and ran into the elderly lady that was behind me.* Pushed her on the floor – not pushed her on the floor, but she ended up falling onto the floor.²³

Sarah McCarthy stated:

Q. So just take me through what you saw...

A. ... Amber came in through the door and got ice cream... and then turned to her right and there was the elderly woman behind her. She kind of backed into her, and then like turned...

Q: Did Ms. Golding make contact with my client, Ms. Blood?

A: Yes.

Q: Describe what happened then.

²³ CP 276-77 (emphasis added).

A: She hit her, I remember, with her – Amber’s right shoulder to [Blood’s] left shoulder, kind of pushing her to the ground.²⁴

For her part, Golding claimed she did not knock Blood to the ground at all; but also admitted no else bumped or shoved Blood.²⁵ Neither Golding nor anyone else testified that someone pushed or shoved her into Blood; and there is no evidence that anyone else made physical contact with Blood before or after Golding “ran into Blood” and as Blood fell to the floor.

The evidence supports just one reasonable conclusion: the much younger, larger and stronger Amber Golding, in a hurry, focused on her goal and not paying attention to her surroundings bowled the petite, elderly Maxene Blood over. Blood herself testified that the conditions in the store gave Golding ample opportunity to avoid this incident:

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

A. Yes.²⁶

Blood also testified that the much bigger Golding moved so fast that she was unable to move out of the way, or even utter a warning to her to stop.²⁷

²⁴ CP 245-47.

²⁵ CP 55-56.

²⁶ CP 272 (emphasis added).

²⁷ CP 273.

Blood did not trip or slip because of “overcrowding” on the premises;²⁸ and has never identified any other “defective condition” in the store.²⁹

B. Plaintiff’s own expert opined that Golding’s inattention and haste was the “but for” cause of Blood’s fall

Blood’s own “human factors expert,” Joellen Gill, opined that Golding’s haste and inattention caused Blood’s fall – without which Blood would never have been injured:

Had Ms. Golding been moving at an appropriate speed as she entered the farm store... noted the presence of other patrons in the store such as Ms. Blood, and looked before pivoting and walking out while engaged in conversation with the store owner, *this incident would not have occurred.*³⁰

Nevertheless, Blood attempted to rely on this general statement in the Gill opinion letter to create a “material question of fact”:

Crowded conditions *can increase* the potential for contact between patrons... *To the extent* the store was overcrowded at the time of this incident, this *would be* a contributing cause to [sic] Ms. Blood’s injury incident.³¹

Stated in the abstract as it is, Gill’s statement might be true: a crowd “can increase the potential for contact between patrons.” But as an “expert,” Gill was entitled to express opinions based on the evidence in the record – not to rely on abstract principles, speculate or draw speculative conclusions

²⁸ *Id.*

²⁹ *Id.*

³⁰ CP 192.

³¹ CP 193 (emphasis added).

from hypotheticals.³² The evidence in the record on summary judgment showed that “crowded conditions” played no part in *this case* and, by Gill’s own admission, Golding would not have collided with Blood if she had not been rushing through the store without paying attention to those around her.

C. The trial court granted Willow-Wist’s motion for summary judgment; and denied Blood’s motion for reconsideration, because uncontroverted evidence showed that Golding’s haste and inattention to her surroundings was the “but for” cause of Blood’s fall and injury.

In March 2016, Blood’s complaint asserted a premises liability claim against Willow-Wist based on the allegedly “crowded” conditions in its store. Blood also sued Viking Feast, alleging it was vicariously liable for Golding’s negligence.³³

Willow-Wist filed its motion for summary judgment in August 2016. Among other things, Willow-Wist argued that Blood could not prove causation where there was no evidence a “crowd” pushed or shoved Golding or Blood; Blood admitted she had not been “crowded” too close to Golding

³² Willow-Wist moved to strike or exclude this portion of Gill’s testimony that the crowd was a “contributing cause” of the fall because it is improper speculation and not based on the facts in evidence. CP 84-85. Willow-Wist renews this motion. The Court should give no weight to Gill’s “crowded conditions” testimony.

³³ Blood initially appeared to allege that Willow-Wist was vicariously liable for Golding’s actions, but abandoned that theory in response to Willow-Wist’s motion for summary judgment. *Compare* CP 341-49 [Complaint]; CP 315-30 [Motion for Summary Judgment] and CP 89-104 [Opposition to Motion for Summary Judgment].

and that Golding easily could have avoided hitting her; and Blood and her own expert admitted Golding's haste and inattention caused the incident.³⁴

The trial court agreed and granted the motion on September 2, 2016 finding that despite the alleged crowd in the farm store there was no evidence that the crowd, or anything other than Golding, caused Blood to fall.³⁵ For the same reasons the trial court denied Blood's motion for reconsideration.³⁶

D. The trial court granted summary judgment against Viking Feast, attributing 100% of the fault for Blood's injury to Golding's negligence.

On May 5, 2017, eight months after Willow-Wist was dismissed, the Court entered summary judgment against Viking Feast, finding that Golding's negligence was the cause of Blood's fall; and that Viking Feast was vicariously liable for the incident and 100% at fault.³⁷

On September 7, 2018, the Court entered summary judgment awarding Blood's damages in the amount of \$627,360.14 (\$102,360.14 in medical expenses and \$525,000.00 in noneconomic damages) related to the October 4, 2014 fall.³⁸

Blood later filed (together with Viking Feast) a "Joint Motion for Determination of Reasonableness of Judgment and Covenant not to Enforce

³⁴ CP 329-30.

³⁵ CP 8-10 and CP 78-80.

³⁶ CP 8-10.

³⁷ CP 1038, 1041-42.

³⁸ CP 709-12.

Judgment and Entry of Judgment” (“Judgment Motion”). The Judgment Motion asked for a judgment in the amount of \$627,360.14, plus statutory costs of \$1,163.50, and for the court to approve a settlement between Blood and Viking Feast wherein Viking Feast agreed to assign its claims against its insurers related to the October 4, 2014 incident to Blood.³⁹ In exchange, Blood agreed not to enforce the judgment against Viking Feast.⁴⁰ On October 17, 2019, the Court entered “Plaintiff Maxene Blood’s Judgment” in the same amount as its summary judgment on September 7, 2018 plus costs.⁴¹

Blood’s appeal of the trial court’s order on Willow-Wist’s motion for summary judgment followed – nearly four years after the trial court considered and decided the motion.⁴²

IV. ARGUMENT AND AUTHORITY

A. This Court may affirm the trial court’s orders on summary judgment and reconsideration on any grounds supported by the record on review.

This Court reviews the trial court’s order on summary judgment *de novo*.⁴³ The record on review properly consists of documents and evidence

³⁹ CP 675-87 and 370-71.

⁴⁰ CP 675-87. Blood’s motion and her counsel’s declaration in support thereof both assert that Viking Feast, as Golding’s agent is 100% at fault for Golding’s actions: “hurriedly” entering the farm store, “quickly” turning around, and colliding with Blood. CP 675-87 and 690-92.

⁴¹ CP 363-71.

⁴² Intervenor Farmers Insurance Exchange, also commenced an appeal from the covenant judgment and assignment against its insured Viking Feast, but has since settled the claim and abandoned its appeal. *See* Farmers Insurance Exchange’s Notice of Settlement in Principle, filed 2/4/20.

that were before the trial court, as identified in the order granting summary judgment.⁴⁴ The Court should affirm the trial court's orders on any grounds supported by the record presented to the trial court, whether or not expressly relied upon by the court below.⁴⁵

Summary judgment is properly granted when there are no genuine issues of *material* fact in dispute, such that the moving party is entitled to judgment as a matter of law.⁴⁶ As the party moving for summary judgment below, Willow-Wist had “the initial burden of showing the absence of an issue of material fact.”⁴⁷

Willow-Wist could meet this burden in either of two ways. It could “establish through affidavits that no material factual issue exists or, alternatively, [it could] point out to the trial court that the [claimant] lacks competent evidence to support an essential element of his or her case.”⁴⁸

Upon such a showing, the burden shifted to Blood to produce admissible evidence to support, and to create a material question of fact, as to each and

⁴³ *Mahoney v. Shinpoch*, 107 Wash.2d 679, 683, 732 P.2d 510 (1987) .

⁴⁴ RAP 9.12; *Green v. Normandy Park*, 137 Wn.App. 665, 678-80, 151 P.3d 665 (2007).

⁴⁵ *Grange Ins. Ass'n v. Roberts*, 179 Wn.App. 739, 757, 320 P.3d 77 (2013), citing *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

⁴⁶ CR 56(e).

⁴⁷ *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

⁴⁸ *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988).

every essential element of her claims.⁴⁹ She could not merely rely on speculation or argumentative assertions that unresolved factual issues remained. Nor could she ask the trial court to accept her proffered expert affidavits at face value.⁵⁰ To the extent Blood's opposition relied on expert opinion testimony, "the opinion... must be based on facts. An opinion of an expert which is simply a conclusion, or is based on an assumption, is not evidence which will take a case to the jury."⁵¹

As the nonmoving party, Blood could not defeat Willow-Wist's summary judgment by producing a mere "scintilla" of evidence, evidence that is

⁴⁹ *First Class Cartage, Ltd. v. Fife Service and Towing, Inc.* (2004) 121 Wn. App. 257, 89 P.3d 226.

⁵⁰ *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736-37, 150 P.3d 633, 636 (2007), quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

⁵¹ *Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984); *see also*, *Seven Gables Corporation v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12-14, 721 P.2d 1 (1986) (unfair competition claims properly dismissed on summary judgment; affidavits stated bare conclusions and speculation rather than well-founded opinion based on specific facts in evidence); *Cho v. City of Seattle*, 185 Wn.App. 10, 341 P.3d 309 (2014), *rev. denied*, 183 Wn.2d 1007, 349 P.3d 857 (2015) (speculative and conclusory expert affidavits, particularly those which assume facts contrary to those in the record, cannot create a question of material fact sufficient to preclude entry of summary judgment); *Moore v. Hagge*, 158 Wn.App. 137, 155-56, 241 P.3d 787 (2010) (speculative and conclusory expert opinion not supported by facts and contrary to facts in the record is properly given no weight on summary judgment); *Rothweiler v. Clark County*, 108 Wn. App. 91, 29 P.3d 758 (2001) (in opposing a motion for summary judgment, an expert must support his opinions with specific facts or the opinions will be disregarded); *Price v. City of Seattle*, 106 Wn. App. 647, 656-567, 24 P.3d 1098 (2000). (summary judgment for City properly granted; plaintiffs relied on speculative and conclusory opinions of an expert who did not quantify supposed changes in volume and direction of water that allegedly caused a landslide).

"merely colorable," or evidence that "is not significantly probative."⁵² Blood was instead required to produce admissible evidence of specific facts to establish each essential element of her case.⁵³ Civil Rule 56 compelled Judge Melley to enter judgment for Willow-Wist as a matter of law if Blood failed to meet her burden of production as to any essential element of her case.⁵⁴

B. Summary Judgment in Willow-Wist's favor was proper where the undisputed evidence shows that Blood cannot prove the causation element of her claim: Golding's "haste and inattention," and not a "crowd," a "collision between patrons" or any other "condition" on the premises caused Blood's fall.

To prevail on her claims against Willow-Wist, Blood must produce evidence to support each and every essential element of her negligence claim: (1) a duty owed; (2) breach of duty; (3) resulting injury; and (4) a proximate cause between the breach and the injury.⁵⁵ Blood claimed a dangerous condition on Willow-Wist's land -- a "crowd" in the farm store -- caused her injuries. However, even if the store had been "crowded" -- and even if a "crowd" constitutes a "dangerous condition" for which Willow-Wist could be held liable, Blood's own uncontroverted testimony is that she and Golding were not crowded close to one another and that but for her negligence, conditions were such that Golding readily could have avoided knocking her

⁵² *Seiber v. Poulsbo Marine*, 136 Wn.App. at 737, citing *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987).

⁵³ *Id.*

⁵⁴ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). (failure of proof of an essential element of the nonmoving party's case renders all other facts immaterial on summary judgment).

⁵⁵ *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).

down. There is simply no evidence that the alleged “crowd” caused Golding to knock Ms. Blood to the ground.

Although Blood argues there is a factual dispute about the number of people in the farm store which prevents summary judgment, that dispute is not material. Even accepting as true that there was a “crowd” in the store, there is no evidence that other people or objects in the store pushed, shoved or constrained the movement of Golding or Blood in a way that caused Golding to ram into Blood and knock her down. Golding herself simply denied she knocked Blood down. That testimony is clearly disputed by Blood; and on summary judgment we must assume Golding shoved and knocked Blood down, as Blood and all of the other witnesses testified.⁵⁶

However, there is no dispute about the manner in which Golding “barreled into” Blood. She was talking to others; she was in a hurry; she wasn’t paying attention to her surroundings; she turned and her six foot, more than 150 pound frame essentially body slammed the petite, elderly Blood to the ground. According to Blood herself, the two were not “crowded” together such that Golding could not avoid her. Even Blood’s own expert opined that but for Golding’s haste and inattention, this never would have happened.

⁵⁶ *Young*, 112 Wn.2d at 226 (on summary judgment factual disputes are resolved in favor of the nonmoving party).

Indeed, on this record, the question whether there were “six or seven people” or “more than thirty” people in the store is a red herring. This is not a case where Golding was shoved into Blood; Blood was shoved into Golding; Golding was crowded so close to Blood that she could not avoid colliding with her; or even that a “crowd” of other people prevented Blood from breaking her fall. There simply is no evidence to support any such claim.

And absent such evidence, there is no material question of fact that “crowding” in the store – even if “crowding” is accepted as a fact – was a proximate cause of the injury to Blood.

C. An expert’s speculative opinion that “crowded conditions can increase the potential for contact” did not create a material question of fact sufficient to defeat Willow-Wist’s motion for summary judgment – because there is no evidence that such conditions did cause or contribute to the collision between Blood and Golding.

“Expert testimony must be based on the facts of the case and not on speculation or conjecture.”⁵⁷ “In order to preclude summary judgment, an expert’s affidavit must include more than mere speculation or conclusory statements.”⁵⁸

Here, Plaintiff’s human factors expert, Joellen Gill, opined in the abstract that “crowded conditions can increase the potential for contact between

⁵⁷ *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 493, 183 P.3d 283, 288 (2008).

⁵⁸ *Cho v. City of Seattle*, 185 Wn.App. at 20; see also *Theonnes v. Hazen*, 37 Wn. App. at 648 (“The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury.”)

patrons.” However, that abstract statement of principle – which did not require expert opinion in any event⁵⁹ – does nothing to create a *material* question of fact here. The only evidence in the record shows that a “crowd” did not cause Golding to slam into Blood and knock her to the ground; nor did a “crowd” contribute to or exacerbate Blood’s injury when she fell.

Cho v. City of Seattle is a very similar case – in which the plaintiff’s reliance on the opinion of a “human factors expert” to rebut the City’s motion for summary judgment proved futile. In *Cho*, the plaintiff was a pedestrian crossing First Avenue in an unmarked crosswalk, who was then struck by an intoxicated and inattentive driver.⁶⁰ The driver testified that she was paying attention to her passenger, not the road, when she drove into the crosswalk and struck Cho – just as Gill conceded that Golding was talking with the store owner, did not pay attention to other patrons, and was in a hurry when she wheeled around abruptly and struck Blood.⁶¹

The plaintiff Cho alleged the accident would not have occurred if the City had placed a traffic sign or signal at the crosswalk location. The City moved for summary judgment, arguing that the cause of the accident was the

⁵⁹ ER 702; *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258, 1262 (2004) (expert testimony must be helpful to the trier of fact, concern matters beyond the common knowledge of the average layperson and not mislead the jury); *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857, 863 (2011) (“To satisfy the pursuit of truth, evidence must meet certain criteria. Evidence must be probative and relevant, and meet the appropriate standard of probability. Expert testimony, in addition, must be helpful.”) (internal citations omitted).

⁶⁰ *Cho*, 185 Wn.App. at 11-14.

⁶¹ *Id.* at 12-14 and 17-18.

driver's intoxication and inattention – not the absence of a signal. In an effort to rebut the motion, Cho offered the opinion of a human factors expert – just as Blood offered the opinion of her human factors expert Gill in our case. The expert asserted that because the driver had successfully avoided a collision and apparently obeyed traffic signs and signals before she reached the crosswalk and struck Cho, she could have successfully avoided striking Cho if there had been a sign or signal at the crosswalk.

The trial court granted summary judgment; Division I affirmed. The Court upheld summary judgment for the City because the speculative opinion of Cho's expert failed to create a material question of fact concerning the "cause in fact" of the accident and Cho's resulting injury.⁶²

Gill's "overcrowding" opinion not only ignores the undisputed evidence that Golding and Blood were not too close to avoid a collision; but directly contradicts Gill's own conclusion, firmly founded on the evidence in the record, that but for Golding's negligent inattention and excessive hurry, the incident and injury never would have occurred. Gill also ignored the absence of any evidence that other patrons contributed in any way to the collision and Blood's injury – no one bumped or shoved either Blood or Golding; Golding was not trying to avoid others when she rammed into Blood; Blood did not trip or fall over other patrons after Golding shoved her; Blood was not unable

⁶² *Id.* at 21.

to break her fall because of “overcrowded conditions” in the store; and Blood did not slip and fall because of an obstacle or slippery surface.

Golding wheeled and rammed into Blood; and Blood was out of her weight class. That was the cause in fact of Blood’s injury. There is absolutely no evidence that other patrons had anything to do with it.

D. A crowded shop is open and obvious to all who enter; and it is not a “dangerous condition” on the premises.

In a premises liability case, a plaintiff’s status while on the land determines the duty of care the landowner may owe to her.⁶³ As a customer in the store, Blood was a business invitee. A landowner’s duty with regard to business invitees is to “keep the premises under his control reasonably safe and to warn of dangers which are not obvious . . . but are known to or discoverable by the owner in the exercise of reasonable care.”⁶⁴

A busy shop is not a “dangerous condition on the land,” and thus Willow-Wist cannot be liable for premises liability on this theory. Indeed, Willow-Wist has not thus far located a single reported case in which a merchant has been liable to an invitee under Blood’s theory of the case. The fact that a gym, festival, school, store, sidewalk, church, wedding, or other

⁶³ *Van Dinter v. Kennewick*, 121 Wn.2d 38, 41, 846 P.2d 522 (1993); *Younce v. Ferguson*, 106 Wn.2d 658, 666-67, 724 P.2d 991 (1986).

⁶⁴ *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 748, 875 P.2d 1228, 1234 (1994) (citing *Lamborn v. Phillips Pac. Chemical Co.*, 89 Wn.2d 701, 708, 575 P.2d 215 (1978); *Epperly v. Seattle*, 65 Wn.2d 777, 786, 399 P.2d 591 (1965); *Winfrey v. Rocket Research Co.*, 58 Wn. App. 722, 725, 794 P.2d 1300, review denied, 115 Wn.2d 1030, 803 P.2d 324 (1990).

event is crowded does not make the landowner liable when one participant accidentally bumps into another. Moreover, it is not enough to merely argue that a condition is dangerous; there must be evidence that the condition was in fact dangerous.⁶⁵ Here, there is no evidence that the crowd in the farm store was dangerous. Blood admits that Golding knocked her over and there is no evidence that Golding was pushed by the crowd into Blood.

Blood attempts to rely on *Hemmen v. Clark's Rest. Enters.*, 72 Wn.2d 690, 434 P.2d 729, 731 (1967) for the proposition that Washington recognizes a crowd as a “condition on the land” that may impose liability on the landowner. To the contrary, the *Hemmen* Court expressed skepticism that “overcrowding” would constitute a breach of the duty of care:

“Even if we were to assume that such overcrowding did exist and that such a condition was *somehow a breach of the proprietors duty of care*, there was no causal relationship between that condition and the Plaintiff’s injuries.”⁶⁶

Moreover, the *O’Bauer* case (which *Hemmen* recognized the facts showed overcrowding may have caused plaintiff’s injuries) involved the force of a

⁶⁵ Tellingly, Blood never proposed a benchmark to define a “dangerously overcrowded” shop. Her expert did not identify a building or fire code that imposed an occupancy limit, or specify any standard criteria for “overcrowding,” much less point to evidence that Willow-Wist was in violation of such a code or standard at the time of the incident. See *Tilton v. Quality Food Centers*, 154 Wn. App. 1022 (2010) (holding that plaintiff who slipped in a puddle of water must prove that the floor is “dangerously slippery” when wet); and *Brant v. Mkt. Basket Stores, Inc.*, 72 Wn.2d 446, 450, 433 P.2d 863 (1967) (fact that plaintiff fell on wet floor did not establish the fall resulted from a “dangerous condition”).

⁶⁶ *Id.* at 694 (*emphasis added*). As in our case, the Court in *Hemmen* also found the plaintiff failed to show that “overcrowding” was the cause of the plaintiff’s injury.

crowd that “surged” and pressed the plaintiff against a table.⁶⁷ Here, unlike *O’Bauer* there is no evidence that a crowd “surged” -- or that any single patron other than Golding was involved in any way with Blood’s fall.

Far from providing support for Blood’s claim against Willow-Wist, *Hemmen* and *O’Bauer* confirm that whether the store was occupied by five people or thirty people when Golding rammed into Blood was not a material question of fact – it was a mere red herring.

V. CONCLUSION

This is a simple and straightforward case. Amber Golding, a strapping young woman who towered over elderly and petite Maxene Blood, was working for Viking Feast Ice Cream. She rushed into the Willow-Wist shop, grabbed ice cream from a freezer, and then abruptly turned around without looking and ran her bulky frame into Blood, causing Blood to hit the floor.

There is no evidence that any other person or any “dangerous condition” in the store caused or contributed to the incident. There is no evidence any other person in the shop was in any way involved, whether the shop was “crowded” or not. No one pushed, shoved, tripped or constrained Golding or Blood at the time of the collision.

Golding’s haste, inattention, physical bulk and momentum caused the incident, pure and simple; and without those ingredients, the incident would not have occurred. Beyond sheer speculation about the possible role of

⁶⁷ *O’Bauer v. Katz Drug Co.*, 49 S.W.2d 1065 (Mo. Ct. App. 1932).

“overcrowding” – a condition Blood and her expert never did quantify, define or causally link to the collision between Golding and Blood – Blood and her expert conceded that Golding’s negligence was the but for cause of Blood’s injury. Blood also obtained a substantial money judgment against Viking Feast on the grounds that it was “100% at fault” for Golding’s conduct and the incident.

The trial court properly granted Willow-Wist’s motion for summary judgment; and properly declined to modify its ruling on Blood’s motion for reconsideration. Willow-Wist therefore asks the Court to affirm.

DATED and respectfully submitted this 21st day of February 2020

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be filed with Division II of the Court of Appeals of the State of Washington, and arranged for service of true and correct copies of the foregoing ***BRIEF OF RESPONDENT WILLOW-WIST, INC.*** upon the following:

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February 21, 2020 - 2:45 PM

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

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