

NO. 295737-III

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

FILED

APR 13 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
D:

ELIZABETH DONOHOE

Appellant

v.

BEST BUY STORES, L.P., a foreign corporation; TECHNIBILT, LTD., a
foreign corporation; CARI-ALL, INC., an alien corporation; and DOES 1
through 5, inclusive

Respondents.

BRIEF OF RESPONDENTS

ATTORNEY FOR RESPONDENTS
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I. ASSIGNMENTS OF ERROR

1. The trial court did not commit error when it granted Defendants' Motion for Summary Judgment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court committed error when it granted Defendants' Motion for Summary Judgment where Plaintiff could not prove that the alleged shopping cart incident was proximately caused by an alleged defect in the cart, which was the basis of Plaintiff's claim.

III. STATEMENT OF THE CASE

A. Facts

This lawsuit arises out of an alleged shopping cart incident which occurred on December 13, 2006 inside a Best Buy store in Spokane, Washington. Plaintiff, an 81 year old woman named Elizabeth Donohoe, and her daughter Janice were in the store shopping. Plaintiff alleges she was injured while standing in the check out line when a female customer in line behind her pushed a shopping cart into her leg, causing her to fall. (CP 5-17).

Plaintiff and her daughter had been shopping in the store for approximately twenty minutes and proceeded to the checkout line. Plaintiff's daughter was at the checkout counter paying for her purchases and Plaintiff was standing in line directly behind her. Plaintiff had been waiting in line for "several" minutes. The checkout line was roped off

with metal posts and attached ropes. The posts and ropes were to the left and right of where she was standing. She was facing the checkout counter which was directly ahead of her. (CP 36-38).

A female customer stepped in line behind Plaintiff. She was pushing a shopping cart which was manufactured by Technibilt. Prior to the incident Plaintiff had turned around and observed the woman. At some point Plaintiff felt a “hit” on her right heel. She believes that the woman hit her with the cart and that the front lower part of the cart made contact with her right heel. She fell and was injured. Plaintiff never saw the woman or spoke to her after the incident. She believes the woman proceeded through the checkout line and left the store. She doesn’t know whether the woman knew she hit her. (CP 37-39)

According to the Plaintiff, a “young Best Buy boy” employee approached her and offered assistance. She told him she wanted to wait a moment or two before getting up. She showed him that her leg was injured, but did not tell him what happened or what caused her to fall. He left her for a moment to find the store manager and a wheelchair. Plaintiff’s daughter also came to her aid. She saw her fall but did not see the customer hit her with a cart. Plaintiff told her daughter what happened. Her daughter did not make any effort to speak to the female customer. (CP 38-39).

According to the Plaintiff, a male Best Buy employee, who she

believed was the store manager, responded to the scene. She believes that “quite a few minutes” had gone by between the time she fell and the time the manager arrived. It is her belief that the woman who hit her had already left the store. She showed the manager a bruise on her right calf. She believes that when she fell one of the metal posts hit her right leg. She doesn’t recall whether she told the manager that another customer ran into her with a cart. A Best Buy employee helped her into a wheelchair and pushed her to her daughter’s car. (CP 39-40).

B. Plaintiff’s Complaint and Claims

Plaintiff claims that Technibilt negligently designed and constructed the cart; breached its warranties of fitness for a particular purpose; and failed to provide warnings to Best Buy customers as to the trip/knock down hazards associated with the carts. She alleged in her Complaint that the carts are dangerous by design because the lower base is longer than the small upper basket on top and the basket impairs the average shopper’s view of the base, thereby creating a potential trip/knock down hazard. She claims that the negligent design of the cart was a proximate cause of the incident in that the customer who hit her did so because the upper basket impaired her view of the lower base of the cart. (CP 7-17).

Plaintiff claims that Best Buy failed to maintain a reasonably safe store by allowing customers to use the dangerously designed carts. She claims they contain latent defects that do not conform to industry customs,

standards, codes, and regulations in that the average customer's view of the front of the base of the cart is impaired by the upper basket. She claims that Best Buy negligently failed to properly design the carts; mark the trip/knock down hazards associated with them; and warn patrons about their hazards. (CP 7-17). She stated her theory of liability as follows:

18. As designed and manufactured by Technibilt and/or Carry-All, the shopping cart that Ms. Donohoe was struck and entangled with has a base approximately 7" tall and extending approximately 24" past and longer than the upper basket of the shopping cart. . . .

19. Upon information and belief, for a person of average height who pushes the shopping cart in the manner in which it was intended to be pushed, sight of the protruding base of the shopping cart is impaired by the upper basket, as depicted in Exhibit B attached hereto.

20. To the extent that it incorporates a low level, protruding base that is approximately 7' tall and extends approximately 24" past the upper basket of the shopping cart, the design of the shopping cart is atypical of the majority of other shopping carts utilized in the relative consumer shopping industry.

(CP 9)

In short, the lawsuit was based on the claim that the carts are unreasonably dangerous by design because the lower base is longer than the small upper basket on top and the basket impairs the average shopper's view of the base. (CP 7-17).

Plaintiff retained Dr. Gill, a Human Factors expert. During his deposition he admitted he could not say on a more probable than not basis that the customer ran into the Plaintiff because the basket impaired her view of the front of the base of the cart. He testified as follows:

Q: Now, you don't have any personal knowledge, do you, as to what this woman was actually doing at the time of the incident, whether she was looking to the right or looking to the left or looking behind her; you don't know?

A: No, ma'am I don't.

(CP 191)

Q: Since you don't know exactly what she was doing, whether she was even facing forward, isn't it true that she could have been looking in her purse or doing something else instead of looking towards the plaintiff?

A: That's correct, I don't know what activity she was engaged in at the moment this happened.

Q: So you can't say, can you, what caused her to push this cart into the plaintiff?

A: I can only tell you that the design of the cart is such that it contributes to this type of accident; it's foreseeable that this type of accident is going to happen. But beyond that, no, I don't know the details.

(CP 191).

Dr. Gill's opinions regarding the shopping carts were expressed in broad, general statements such as, "what you got is a cart that is designed and intended to be used on a retail floor, that has a very low profile, on the order of 6-8" off the floor . . . and what that's going to do is create a potential trip hazard and/or bump or entrapment hazard." Dr. Gill admitted that he could not cite any industry standards that even address the design of a shopping cart. He could not cite any shopping cart industry standards which were violated. (CP 187, 190). Dr. Gill testified as follows:

Q: With respect to the design of the cart, are you aware of any industry standards that would prohibit such a design that we have here?

A: I am not aware of any industry standards that would address the design of a shopping cart at that level of detail in terms of structural dimensions, you know, the dimensions of it or the general configuration. I am not aware of any.

CP (190).

C. Trial Court Proceedings and Motion for SJ

Defendants filed a motion requesting dismissal based on lack of evidence that the alleged incident was proximately caused by a defect in the cart. (CP 45). Defendants presented the following issues:

“Plaintiff cannot prove that the alleged shopping cart incident which caused Plaintiff’s injuries was proximately caused by a defect in the cart since there is no evidence that the customer who ran into her did so because of the design and/or because the basket impaired her view of the lower front base of the cart.” (CP 49).

Defendants argued that Plaintiff could not prove the cart was dangerously designed or that it fell below or violated any shopping cart industry standards. Carts designed with a smaller basket on top for storing smaller items and a longer base on the bottom to store larger and longer items are commonly used in retail stores. Defendants further argued that even if, for the sake of argument, Plaintiff could prove the cart was dangerously designed, her inability to prove that the alleged defective design was a proximate cause of the incident warranted dismissal of the case. (CP 51-52).

Defendants presented the following case law and arguments:

The test to be applied to determine liability in a strict tort liability design

defect case is whether the product is unreasonably dangerous to an extent beyond that which would be contemplated by an ordinary experienced user who has ordinary knowledge common to the community as to the product's characteristics. *Lamon v. McDonnell Douglas Corporation*, 19 Wash. App. 515, 519-521, 576 P.2d 426 (1978).

(CP 52).

In order to prove strict liability, a **plaintiff must prove (1) that there was a defect**, (2) which existed at the time the product left the hands of the manufacturer, (3) which was not contemplated by the user, (4) which renders the product unreasonably dangerous, and (5) **which was the proximate cause**. *Id.* At 521. A product is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases the product. *Id.* At 521.

(CP 52).

A product has been said to be unreasonably dangerous if there is an unreasonable risk of causing substantial bodily harm to one whom the manufacturer should expect to be in the vicinity of probable use. Thus, we find various definitions for the term 'unreasonably dangerous' depending upon whether the approach to the term is from the standpoint of the purchaser, the ordinary user, or the plaintiff, but each definition reaches the same general concept that hazards must exist in the product of which the user would not be expected to be aware and which would not be contemplated by the ordinarily experienced user of that product." *Id.* at 521-522.

(CP 52).

"[W]hether a product is unreasonably dangerous depends also on the possible seriousness and the cost of preventing the harm, as well as the foreseeability thereof." *Id.* at 522. "A defective condition is a condition not contemplated by the ultimate user and which presents a hazard which he would not expect." *Id.* at 522. "The terms 'defective condition' and 'unreasonably dangerous' have been defined as essentially synonymous." *Id.* at 522.

(CP 52-53).

"[T]here is no duty on the part of the manufacturer to give warning of a product-connected danger where the person who claims to be entitled to the warning knows of the danger. Where the product-connected danger is

obvious or known, the manufacturer or seller has no duty to warn.” Id at 523. “In a product liability suit alleging inadequate warnings, the plaintiff must show that his or her injury was proximately caused by a product that was ‘not reasonably safe because adequate warnings or instructions were not provided.’” *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wash. 2d 747, 752, 818 P.2d 1337(1992) RCWA 7.72.030(1).

(CP 53).

“To show proximate causation, the plaintiff must show both cause in fact and legal causation.” Id. At 753 citing *Baughn v. Honda Motor Co., Ltd.*, 107 Wash.2d 127, 142, 727 P.2d 655 (1986). “Cause in fact refers to the ‘but for’ consequences of an act-the physical connection between an act and an injury.” *Ayers* at 753 citing *Hartley v. State*, 103 Wash. 2d 768, 778, 698 p.2d 77 (1985). “Legal causation depends on considerations of ‘logic, common sense, justice, policy, and precedent.” *Ayers*, at 756. “It involves the ‘determination of whether liability *should* attach as a matter of law given the existence of cause in fact.” *Ayers*, at 756 citing *Hartley* at 779.

(CP 53).

Defendants argued there was no evidence the customer’s view of the front end of the base was impaired, but even if that were the case, a customer’s inability to see the front of the base of the cart does not, in and of itself, make the cart unreasonably dangerous. Customers are expected to use reasonable care when pushing shopping carts and maintain a safe distance between the cart and other customers. One need only look at the cart to see that the base extends further than the upper basket. There is nothing latent about it. (CP 53-54).

Defendants argued that even if, for the sake of argument, Plaintiff could prove the cart was defectively designed, she could not prove that the alleged defective design was the cause of the incident since there was no

evidence the customer hit her because her view was impaired by the basket. That fact essentially warranted dismissal. (CP 54).

Defendants argued that Plaintiff had to prove that (1) Best Buy owed her a duty of care; (2) Best Buy breached its duty by maintaining dangerously designed shopping carts and failed to warn customers about them; (3) Plaintiff was injured; and (4) **the allegedly dangerous design of the cart was the proximate cause of the incident and Plaintiff's injuries.** *Pedroza v. Bryant*, 101 Wash.2d 226, 228, 677 P.2d 166 (1984). (CP 54).

Defendants argued there was no evidence that Best Buy negligently failed to maintain the store in a reasonably safe condition because there was no evidence the carts were dangerously designed. Therefore, Plaintiff could not establish that a dangerous condition existed. Second, there was no evidence that the customer's view of the front of the base of the cart was impaired and/or that this was the explanation as to why she ran into her. Therefore, Plaintiff could not establish that the incident occurred due to the alleged dangerous design of the cart. (CP 55-56).

The trial court agreed and properly dismissed this case.

IV. ARGUMENT

A. Standard of Review

“The standard of review on appeal of Summary Judgment is de novo, with the reviewing court performing the same inquiry as the trial court.” *Ski Acres v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000

(1992).

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young*, 12 Wn.2d at 225. Once that initial burden has been met, the burden shifts to the nonmoving party to set forth “*specific facts* showing there is a genuine issue for trial.” *Rathvon v. Columbia Pac. Airlines*, 30 Wash. App. 193, 201, 633 P.2d 122 (1981), *review denied*, 96 Wn.2d 1025 (1982). In doing so, the nonmoving party can no longer rely on the allegations in the pleadings. *Ashcroft v. Wallingford*, 17 Wash. App. 853, 854, 565 P.2d 1224 (1977), *review denied*, 91 Wn.2d 10, 16 (1979).

A defendant may move for summary judgment by either: (1) setting forth its version of facts and alleging that there is no genuine issue of material fact, or (2) alleging that the nonmoving party lacks sufficient evidence to support its case. *Guile v. Ballard Comm. Hosp.*, 70 Wash. App. 18, 851 P.2d 689, *review denied*, 122 Wn.2d 1010, 863 P.2d 72 (1993)

The purpose behind a summary judgment motion is “to examine

the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." *Young v. Key Pharmaceuticals, Inc.*, at 226, citing *Zobrist v. Culp*, 18 Wash. App. 622, 637, 570 P.2d 147 (1977).

"Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion." *McKinney v. Tukwila*, 103 Wash. App. 391, 13 P.3d 631 (2000).

The existence of facts cannot rest in guess, speculation, or conjecture. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). A party may not establish a theory using circumstantial evidence unless the party's theory is "the *only* conclusion that can fairly or reasonably be drawn" from the facts. *Id.* At 810. The jury may not enter into the realm of conjecture or speculation, and the non-moving party cannot recover because of what they claim might have happened. *Nakamura v. Jeffery*, 6 Wash. App. 274, 277, 492 P.2d 244 (1972).

Here, plaintiff's lawsuit is based solely on speculation as to what caused the customer to hit the Plaintiff with a cart.

B. The Trial Court Judge properly considered the Plaintiff's design defect claim in its entirety, as did Defendants in their Motion for Summary Judgment.

The sum and substance of Plaintiff's argument on appeal is that the court's dismissal of this case was improper because Defendants' motion was brought with respect to only one of Plaintiff's two claims and the trial court Judge essentially ignored the other. One need only review the

Complaint to see that Plaintiff did not set forth two separate, independent claims, and Defendants did not limit their motion in any way. Defendants' motion was for dismissal of Plaintiff's lawsuit, which was based on defective design allegedly created by the design of the basket in relation to the length of the base of the cart. The fact Plaintiff alleges several factors related to the design which, when combined, create a potential trip/knock down hazard does not create two independent, exclusive claims.

Plaintiff is basing her defective design claim on the length of the base of the cart in relation to the upper basket. They are not two separate, independent claims. She alleges that persons operating the carts cannot see the front of the base because of the basket. Plaintiff's attempt to now make the base design and the basket design mutually exclusive and two entirely independent bases of liability is absurd.

Plaintiff's Complaint sets forth her theory that the lower base of the cart is designed to protrude 24 inches beyond the upper basket; that the average person operating the cart wouldn't realize or expect that the front of the protruding base would be that long; that the upper basket is designed in such a way that it impairs the cart operator's view of the front of the protruding base; and those two factors, combined, create a potential trip/knock down hazard in that customers may not be able to see the front of the base and may run into customers and trip them or knock them down.

Plaintiff is now trying to argue that the Complaint sets forth two separate, independent claims, one of which pertains to the length of the

base of the cart, the other which relates to the basket design, and that Defendant's Motion for Summary Judgment dealt solely with the basket design. This argument defies common sense. You cannot have one without the other. The claim set forth in the Complaint is based on the basket design in relation to the protruding base design.

In addition, Plaintiff's own expert, Richard Gill, stated in his deposition that the alleged design defect is based on the length of the base of the cart in relation to the upper basket. He stated, "If you were simply to extend the basket in Figure 1 out 2 feet so that it would line up with the nose out front, none of us would be sitting here today, in my opinion. I'd have no criticism of the cart." (CP 192).

Plaintiff's design defect claim encompasses the design of the base AND the design of the basket, as did Defendant's Motion for Summary Judgment, as did the Court's decision on Defendant's Motion for Summary Judgment. The two were necessarily interrelated.

Defendants stated in Issues section, IV of their motion "Plaintiff cannot prove that the alleged shopping cart incident which caused Plaintiff's injuries was proximately caused by a defect in the cart since there is no evidence that the customer who ran into her did so because of the design and/or because the basket impaired her view of the lower front base of the cart." (CP 49). The issue presented to the court clearly encompassed Plaintiff's entire defective design claim.

For Plaintiff to now argue that she had two independent theories of

liability, one of which was ignored or not dealt with, is entirely inconsistent with her Complaint.

Plaintiff argues that Richard Gill's opinions create a genuine issue of material fact. Dr. Gill's comments as to what he believes caused the incident do not rise to the level of admissible expert opinion. He concedes there are no shopping cart industry standards which dictate the design specifications. More importantly, he cannot state on a more probable than not basis that the customer ran into the Plaintiff because of the alleged design defect (that the basket impaired her view of the front of the base). (CP 187; 190). That's the whole case.

Since the alleged design defect claim entails the design of the basket in relation to the customer's ability or inability to view the front of the base of the cart, Plaintiff cannot prove on a more probable than not basis that the alleged design defect was a proximate cause of the incident. All Dr. Gill could say in his deposition was "what you got is a cart that is designed and intended to be used on a retail floor, that has a very low profile, on the order of 6-8" off the floor . . . and what that's going to do is create a potential trip hazard and/or bump or entrapment hazard." (CP 187).

Dr. Gill's general statement about carts is in no way admissible expert evidence that on a more probable than not basis the alleged defective design was a proximate cause of Plaintiff's injuries.

In short, Dr. Gill's opinions are based on speculation. Testimony by experts under ER 702 is admissible "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Dr. Gill's statements do not rise to that level.

In addition, Plaintiff's attempt to create a genuine issue of material fact based on other random incidents at other Best Buy stores does not suffice. Best Buy disclosed to Plaintiff in discovery that over the last six years five other individuals reported falling in a Best Buy store and that the falls involved shopping carts. Defendants informed Plaintiff regarding the following reports:

- A Silverdale Best Buy customer claimed that on 3/21/05, another customer was pushing a cart through the aisles and he tripped over it.
- A Knoxville store customer reported that on 4/26/09 she was walking through the aisles looking for an item and tripped over a stack of shopping carts.
- A Florence, Kentucky customer reported that on 12/21/09 she was walking to a restroom and tripped over a cart.
- A Toledo, Ohio customer reported that after exiting a Best Buy store on 12/23/09 he tripped over a shopping cart in the

parking lot.

- A customer in Connecticut reported that on 2/13/09 she was shopping at a Best Buy store; another customer was ahead of her pushing a cart; an employee was directly behind her pushing a cart; the customer in front of her came to an abrupt stop; the claimant stepped backward to avoid walking into the customer in front of her and stepped onto and tripped over the shopping cart directly behind her.

- An Illinois customer reported that while shopping at Best Buy on 11/28/09 she was walking along an aisle when another customer pushed a cart out from another aisle and caused her to trip.

(CP 227-228).

None of these incidents serve as evidence that the subject cart was defectively designed. It is merely information based on hearsay as to reports made by other customers involving shopping carts. It certainly does not prove why the customer in this case hit the Plaintiff with a cart. It has no relevance to this case or issues regarding the cause of this specific incident.

Plaintiff argues that the evidence supports a reasonable inference the cart operator could not see the front base of the cart. There is no such inference. This is pure speculation on the part of the Plaintiff. No one can say where this woman was even positioned in relation to the cart at the

time. She may have been standing to the side of the cart and had a direct view of the base of the cart. She may have been standing in front of it. No one can say whether she had anything in her cart. Perhaps she had placed an item or items on the base only and nothing in the upper basket. If there was nothing in the upper basket she would have a clear view of the base by merely looking down through the open slats of the metal basket. The argument that she was standing directly behind her cart facing forward and ran into the Plaintiff because her view of the front of the base is pure speculation.

V. CONCLUSION

For the above mentioned reasons, the trial court did not commit error when it granted Defendant's Motion for Summary Judgment. Defendants request this court to affirm the trial court decision.

RESPECTFULLY SUBMITTED this 12th day of April, 2011.

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& ASSOCIATES PLLC

By Kathleen Thompson
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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION III

ELIZABETH DONOHOE,

Plaintiff/Appellant,

v.

BEST BUY STORES, L.P., a
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DOES 1 through 5, inclusive,

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CERTIFICATE OF SERVICE

I, Cheryl B. Lee, certify and declare as follows:

I am over the age of 18 and am otherwise competent to make this declaration. This declaration is made upon personal knowledge setting forth facts I believe to be true.

That on April 12, 2011, I caused to be served via UPS Overnight Delivery, a true and correct copy of the attached **Brief of Respondent**, on the following counsel of record:

JJ Thompson
Layman Layman & Robinson
601 South Division Street
Spokane, WA 99202

DATED: April 12, 2011, at Seattle, Washington.

By Cheryl Lee
Cheryl B. Lee
Legal Assistant to Kathleen Thompson