In the Missouri Court of Appeals
Eastern District

DIVISION THREE

KAREN D. SPENCER,	)	No. ED105809
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
vs.	)	13SL-SC01460-01
	)	
AMERICAN AIRLINES, INC., et al.,	)	Honorable Richard M. Stewart
	)	
Respondents.	)	Filed: June 29, 2018

Karen D. Spencer ("Plaintiff") appeals the grant of summary judgment in favor of defendants American Airlines, Inc. (individually "AA") and Jimmy Lee (individually "Jimmy Lee" or "Lee") (collectively "Defendants") on Plaintiff's negligence claims. We affirm in part and reverse and remand in part.

I. BACKGROUND

A. The Relevant Facts in the Summary Judgment Record

Viewing the record in the light most favorable to Plaintiff, the party against whom summary judgment was entered, the relevant facts are as follows.[1] On November 5, 2012, Plaintiff and her husband Larry Spencer ("Husband") were passengers on an AA flight departing

[1] In determining whether summary judgment is appropriate, our Court "must view the record in the light most favorable to the non-movant[.]" *Street v. Harris*, 505 S.W.3d 414, 417 n.3 (Mo. App. E.D. 2016). The facts set out in this case are taken from Plaintiff's admissions to statements of material facts and from other materials accompanying Defendants' motions for summary judgment.

from Dallas-Fort Worth International Airport ("the DFW airport") and arriving at Lambert-St. Louis International Airport ("the STL airport").

While waiting in the gate area of the DFW airport for the flight to St. Louis, Plaintiff and her Husband noticed two men, later identified as defendant Jimmy Lee and his companion, sitting approximately twenty feet away. According to Plaintiff's and Husband's collective deposition testimony, Lee and his companion were loudly talking and exhibiting body language indicating they were having an argument. Plaintiff could not hear what the two men were saying to each other, and they did not strike each other or get to a point where they were ready to strike each other. There is no evidence Lee and his companion were otherwise physical with one another, screaming, or using profanity. Nevertheless, Plaintiff testified the two men's behavior in the gate area alarmed her and caused another family to change seats.

Before Plaintiff and her Husband boarded the flight, Lee and his companion boarded the flight separately. As Plaintiff and her Husband were boarding and getting to their assigned seats, they noticed Lee and his companion were seated in the row and seats directly in front of them, with Lee seated directly in front of Plaintiff.

According to portions of Plaintiff's deposition testimony that were attached to both AA's and Lee's motions for summary judgment, the following then transpired. After the flight reached its cruising altitude and the captain turned off the fasten-seat belt sign, Lee exhibited body language intended to get his companion's attention, but Lee's companion ignored him. Lee unfastened his seatbelt, stood up, and put one knee on his seat. Lee then "got so angry [ ] his partner would not acknowledge him[ ] that he motioned forward, and then lunged back as hard as he could in the seat, which then crunched [Plaintiff's] knee" and immediately caused Plaintiff to be in pain. Prior to her alleged injury, Plaintiff was sitting in her assigned seat with both feet flat on the floor, and her tray table was folded up. Because Plaintiff is very tall and has very long

legs, her knees were sitting "pretty close" to Lee's seatback before her alleged injury occurred. Plaintiff stated she could not be specific as to which part of Lee's seat struck her knee because the incident happened so fast, but she stated something hit her knee and "crushed" it after Lee lunged forward and backwards in his seat.

In portions of Plaintiff's Husband's deposition testimony that were attached to both AA's and Lee's motions for summary judgment, Husband answered in the affirmative when he was asked if he saw Lee "recline[ ] his seat and the seat str[ike] [Plaintiff]." Later in his deposition testimony, Husband stated that while he probably did not actually see the seat strike Plaintiff's knee, he saw Plaintiff grab her knee, saw Plaintiff wince, and saw the seat in front of her was reclined back.

Before Plaintiff's alleged injury on the plane, neither Plaintiff nor her Husband attempted to report the behavior of Lee and his companion to a flight attendant. In addition, while there was a flight attendant somewhere in the gate area when Lee and his companion were arguing before they boarded a plane, there were no flight attendants in the area when part of Lee's seat allegedly hit Plaintiff's knee on the plane because the attendants were elsewhere in the aircraft getting ready to begin snack service.

After Plaintiff's alleged injury, Plaintiff or her Husband pushed the call button for a flight attendant who arrived promptly. The flight attendant then tried to talk to Lee about the incident, but he ignored her. The attendant subsequently moved Plaintiff and her Husband to an exit row where Plaintiff could stretch her knee.

After the flight landed at the STL airport, another flight attendant called for a wheelchair and assisted Plaintiff off the aircraft. According to Plaintiff's Husband's deposition testimony, which is uncontroverted, the flight attendant did not do anything to aggravate Plaintiff's alleged injury.

Lee's seat was manufactured and installed in compliance with designs approved by the FAA, and the seat has a reclining mechanism. On the day of Plaintiff's alleged injury, the seat was fully operable and had no mechanical defects. The seatback on the seat assigned to Lee is the only part of the seat that moves when the reclining mechanism is engaged by the passenger, and the top of the seatback reclines a maximum of two inches. The passenger seat itself does not move or slide forwards or backwards or move up or down when the reclining mechanism is engaged by the passenger. At the time Plaintiff claims to have been injured, defendant Jimmy Lee was permitted to recline his seat back because the aircraft was not taking off or landing.

Plaintiff testified she received four injections to rebuild the cartilage in her knee and had to undergo months of physical therapy as a result of the alleged injury she sustained on the plane. Plaintiff also testified she is not able to walk as fast as she used to and it is painful for her to stand for a long time.

B. The Relevant Procedural Posture

On February 3, 2015, Plaintiff filed a second amended petition asserting negligence claims against Defendants. With respect to defendant AA, Plaintiff claims in relevant part: AA "knew or through the use of ordinary care could have known of the danger presented by [ ] Lee to other passengers on account of his enraged mental state and prior and continuing quarreling"; AA "had a duty to use the highest degree of care to supervise passengers in order to prevent harm to others and/or to restrain, remove, or otherwise remediate passengers who present a danger of harm to others"; and as a direct and proximate result of AA's acts or omissions, Plaintiff sustained injuries to her right knee and damages.

With respect to defendant Jimmy Lee, Plaintiff's second amended petition alleges in relevant part: at the time of the incident, Lee "owed a duty of ordinary care to all those people, including Plaintiff, who could have foreseeably been injured by his actions"; "Lee breached his

duty to Plaintiff and failed to exercise ordinary care while forcefully reclining his seat"; Lee was "negligent in reclining his seat in that he reclined [it] too fast, with too much force, without looking to observe the position of Plaintiff behind him, and without regard to the safety of Plaintiff"; and as a direct and proximate result of Lee's actions, Plaintiff sustained injuries to her right knee and damages.

After AA and Lee each filed an answer to Plaintiff's second amended petition, they each filed a motion for summary judgment and accompanying statement of material facts. AA's motion for summary judgment argued that, *inter alia*, Plaintiff could not establish AA had a duty to protect Plaintiff from any alleged injury caused by Lee under the circumstances of this case.[2] Lee's motion for summary judgment asserted Plaintiff could not establish, (1) Lee owed a duty to Plaintiff when reclining his airline seat; or (2) Lee's airline seat was the cause-in-fact of Plaintiff's alleged injury.[3]

In response, Plaintiff admitted almost all of the facts set forth in AA's and Lee's statements of material facts. Although Plaintiff did not file her own statement of material facts in response to either AA's or Lee's motion for summary judgment, she filed a memorandum in opposition to both motions. After Defendants each filed a reply motion, the trial court granted summary judgment in favor of both Defendants without setting forth any specific reasoning for its decision. This appeal followed.

[2] Supporting materials attached to AA's motion for summary judgment and accompanying statement of material facts consisted of: Plaintiff's April 22, 2016 deposition testimony set out in full; Plaintiff's Husband's September 22, 2016 deposition testimony set out in full; an affidavit of Clymer Wright (an employee of AA who made statements concerning the design and specifications of Lee's seat); and a handwritten statement prepared by Plaintiff's Husband with the assistance of Plaintiff in January or February of 2013.

[3] Supporting materials attached to Lee's motion for summary judgment and accompanying statement of material facts consisted of: portions of Plaintiff's April 22, 2016 deposition testimony; portions of Plaintiff's Husband's September 22, 2016 deposition testimony; Clymer Wright's affidavit discussed in the preceding footnote; and two layouts of the seats on the aircraft.

II. DISCUSSION

Plaintiff raises two points on appeal. In Plaintiff's second point on appeal, which we will consider first, she asserts the trial court erred in granting summary judgment in favor of AA. In Plaintiff's first point on appeal, she claims the trial court erred in granting summary judgment in favor of Jimmy Lee.

A. The Standard of Review and General Law

Our Court's review of a trial court's decision granting summary judgment is de novo. *B.B. v. Methodist Church of Shelbina, Missouri*, 541 S.W.3d 644, 650 (Mo. App. E.D. 2017). Summary judgment is proper "where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Street v. Harris*, 505 S.W.3d 414, 415 (Mo. App. E.D. 2016) (quoting *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)). A defendant may establish summary judgment is appropriate by showing, *inter alia*, (1) facts negating any one of the elements of the plaintiff's cause of action; or (2) the plaintiff, after an adequate period of discovery, has not and will not be able to produce evidence sufficient for the finder of fact to find the existence of one of the plaintiff's elements.[4] *B.B.*, 541 S.W.3d at 650.

In determining whether a genuine factual dispute exists, a court "must view the record in the light most favorable to the non-movant, which means that the movant bears the burden of establishing a right to judgment as a matter of law on the record as submitted; any evidence in the record that presents a genuine dispute as to the material facts defeats the movant's prima facie showing." *Street*, 505 S.W.3d at 416 (internal quotations omitted) (quoting *ITT*, 854

[4] A defendant may also establish its right to judgment as a matter of law by showing, "there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." *B.B.*, 541 S.W.3d at 650. It is undisputed neither defendant AA nor defendant Lee alleged entitlement to summary judgment on this basis.

S.W.3d at 382). If the movant succeeds in establishing his right to judgment as a matter of law, then the non-moving party must demonstrate that at least one of the material facts asserted by the moving party as undisputed is, in fact, genuinely disputed. *B.B.*, 541 S.W.3d at 650. To prove a genuine dispute as to the material facts exists, "the non-moving party . . . must produce affidavits, depositions, answers to interrogatories, or admissions on file." *Id*. at 650-51.

Our Court will affirm a grant of summary judgment on any legal theory that is supported by the record. *Id*. at 651. Where, as here, the trial court does not set forth its reasoning in the decision granting summary judgment, this Court presumes the decision is based on grounds specified in the movant's motion for summary judgment. *Rapp v. Eagle Plumbing, Inc.*, 440 S.W.3d 519, 522 (Mo. App. E.D. 2014).

In this case, Plaintiff filed negligence claims against AA and Jimmy Lee. In a negligence action, a plaintiff must demonstrate, (1) the defendant had a duty to protect the plaintiff from injury; (2) the defendant breached that duty; and (3) the defendant's breach was the cause-in-fact and proximate cause of plaintiff's injury. *Wilmes v. Consumers Oil Company of Maryville*, 473 S.W.3d 705, 720, 722 (Mo. App. W.D. 2015); *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 370, 372 (Mo. App. E.D. 2014); *Heffernan v. Reinhold*, 73 S.W.3d 659, 664 (Mo. App. E.D. 2002).

B. Whether the Trial Court Erred in Granting Summary Judgment in Favor of AA

In Plaintiff's second point on appeal, she asserts the trial court erred in granting summary judgment in favor of AA. In response, AA asserts it is entitled to summary judgment because there is no evidence in the record showing it had a duty to protect Plaintiff from any alleged injury caused by Lee under the circumstances of this case. Because we agree with AA and because we will affirm a grant of summary judgment on any legal theory supported by the record, we limit our discussion to the element of duty. *See B.B.*, 541 S.W.3d at 651.

1. Applicable Law

The issue of whether a defendant had a duty to protect a plaintiff from injury is "purely a question of law." *Wilmes*, 473 S.W.3d at 720-21 and *Owens v. Unified Investigations & Sciences*, *Inc.*, 166 S.W.3d 89, 92 (Mo. App. E.D. 2005) (quoting *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P.*, 75 S.W.3d 247, 257 (Mo. banc 2002) (quotations omitted)). "The touchstone for the creation of a duty is foreseeability." *L.A.C.*, 75 S.W.3d at 257 (quotations omitted). A legal duty owed by one party to another may arise because the law imposes a duty, (1) based upon a special relationship between the parties; or (2) under a particular set of circumstances where a party must exercise due care to avoid a foreseeable injury to another.[5] *Wilmes*, 473 S.W.3d at 721; *Hackmann v. Missouri American Water Co.*, 308 S.W.3d 237, 239 (Mo. App. E.D. 2009).

It is well established under Missouri law that a special relationship exists between a common carrier, like AA, and its passengers. *Behrenhausen v. All About Travel, Inc.*, 967 S.W.2d 213, 215, 217 (Mo. App. W.D. 1998) and *Boyette v. Trans World Airlines, Inc.*, 954 S.W.2d 350, 352, 354 (Mo. App. E.D. 1997) (similarly finding with respect to an airline). "A common carrier has a duty to exercise the highest degree of care to safely transport its passengers and protect them while in transit[,]" i.e., when the special relationship of common carrier and passenger is in existence. *Behrenhausen*, 967 S.W.2d at 217 (quoting *Boyette*, 954 S.W.3d at 354) (quotations omitted).

Nevertheless, the heightened duty for common carriers does not rise to a level where a common carrier is strictly liable for, or an insurer of, the safety of its passengers. *Trader v.*

[5] A legal duty owed by one party to another may also arise under circumstances where it is prescribed by the legislature or a party has assumed a duty pursuant to a written or oral agreement. *Wilmes*, 473 S.W.3d at 721; *Hackmann v. Missouri American Water Co.*, 308 S.W.3d 237, 239 (Mo. App. E.D. 2009). It is undisputed neither of those circumstances applies to defendant AA here.

Blanz, 937 S.W.2d 325, 327 (Mo. App. W.D. 1996); *Collier v. Bi-State Development Agency*, 700 S.W.2d 479, 480 (Mo. App. E.D. 1985); *Bass v. Bi-State Development Agency*, 661 S.W.2d 609, 612 (Mo. App. E.D. 1983). Instead, a common carrier only has a duty "to exercise the highest degree of care to protect its passengers from all dangers that are known or by the exercise of the highest degree of care ought to be known[,] . . . includ[ing] the actions of third parties over whom the carrier has no control[,] when injury reasonably could have been anticipated by the carrier or its employees." *Bass*, 661 S.W.2d at 612; *see* Comment E to the Restatement (Second) of Torts section 314A (1965)[6] (indicating a defendant-common carrier does not have a duty to a passenger when the carrier neither knows nor should know of the danger to its passengers); *see also Thiele v. Rieter*, 838 S.W.2d 441, 443 (Mo. App. E.D. 1992) (adopting the duty of a common carrier to its passengers as set forth in the Restatement (Second) of Torts section 314A). In other words, a common carrier only has a duty to protect its passengers from dangers that are known or reasonably foreseeable. *See Behrenhausen*, 967 S.W.2d at 217; *see also L.A.C.*, 75 S.W.3d at 257 ("[a] duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury") (quotations omitted).

2. Analysis

In this case, Plaintiff argues AA had a duty to protect her from the injury on the plane allegedly caused by Jimmy Lee. Plaintiff asserts AA had such a duty because its employees knew or should have known Lee was upset and a danger to other passengers in that prior to the incident Lee and his companion were arguing on the plane and in the gate area.

It is undisputed a common carrier-passenger relationship existed between AA and Plaintiff when Plaintiff was in transit on the plane. Although AA claims a common carrier-passenger relationship did not yet exist between AA and Plaintiff when Plaintiff was sitting in

[6] All further references to the Restatement (Second) of Torts are to the 1965 version.

the gate area before she boarded the plane, we assume *arguendo*, and without deciding, that such a relationship existed.[7] Therefore, at all relevant times prior to the incident in this case, AA had a duty to exercise the highest degree of care to protect Plaintiff and other passengers from all dangers that were known or by the exercise of the highest degree of care should have been known by AA or its employees. *See Bass*, 661 S.W.2d at 612; Comment E to the Restatement (Second) of Torts section 314A; *see also Thiele*, 838 S.W.2d at 443. Applying the preceding principle and heightened duty to the circumstances of this case, the issue here is whether AA or its employees knew or should have known that when Lee was on the plane, he would have injured Plaintiff in the manner alleged, i.e., he would have "got[ten] so angry [ ] his partner would not acknowledge him[ ] that he motioned forward, and then lunged back as hard as he could in the seat, which then crunched [Plaintiff's] knee." *See id.*

Before Plaintiff's alleged injury on the plane, neither Plaintiff nor her Husband attempted to report the behavior of Lee and his companion to an AA flight attendant. In addition, there were no AA flight attendants in the area when part of Lee's seat allegedly hit Plaintiff's knee because the attendants were elsewhere in the aircraft getting ready to begin snack service. While there was an AA flight attendant somewhere in the gate area when Lee and his companion were arguing before they boarded a plane, there is no evidence the attendant was aware of Lee's conduct in the gate area, and there is no evidence Lee was engaging in any sort of argumentative behavior as he was boarding the plane. Accordingly, there is no evidence in the record to

[7] We note Missouri Courts have held that once a *former* passenger has safely departed from a common carrier and is in a reasonably safe place, such as a street, sidewalk, or an airport terminal, the common carrier-passenger relationship is terminated and the carrier is not liable for any injuries sustained by the former passenger. *See Behrenhausen*, 967 S.W.2d at 217-18 (citing *Boyette*, 954 S.W.2d at 352-54; *Trader*, 937 S.W.2d at 327; *Sanford v. Bi-State Development Agency*, 705 S.W.2d 572, 575 (Mo. App. E.D. 1986)). In this case, it is unnecessary for us to decide whether a common carrier-passenger relationship existed between AA and Plaintiff when Plaintiff was a *prospective* passenger sitting in the gate area before she boarded the plane. As indicated below, even assuming *arguendo* that such a relationship existed, AA did not have a duty to protect Plaintiff from her alleged injury caused by Lee, because there is no evidence in the record to support a finding AA or its employees knew or by the exercise of the highest degree of care should have known Lee was a danger to Plaintiff or other passengers before the alleged injury in this case occurred.

support a finding AA or its employees knew Lee was a danger to Plaintiff or other passengers before the incident on the plane occurred.

We also find the evidence in the record before us does not show AA or its employees, even by the exercise of the highest degree of care, should have known Lee was a danger to Plaintiff or other passengers before the incident on the plane occurred. When Lee and his companion were arguing before they boarded a plane, the undisputed evidence shows the men did not strike each other or get to a point where they were ready to strike each other. Moreover, there is no evidence the men were otherwise physical with one another, screaming, or using profanity. Instead, Lee and his companion were only loudly talking and exhibiting body language indicating they were having an argument. We find that although the behavior of Lee and his companion caused Plaintiff to feel alarmed and another family to move seats in the gate area, AA or its employees could not have reasonably anticipated a prospective passenger such as Lee, who was merely loudly talking and exhibiting body language, would be a danger to Plaintiff or other prospective passengers on the plane. This is especially true under the circumstances of this case, where there is no evidence Lee and his companion were behaving in such a manner when they boarded the flight, and the record shows Lee and his companion boarded the flight separately. Similarly, we find AA or its employees could not have reasonably anticipated Plaintiff's alleged injury from Lee's behavior on the plane prior to the incident, which consisted only of exhibiting body language intended to get his companion's attention, unfastening his seatbelt (which he was permitted to do at the time because the flight had reached its cruising altitude), standing up, and putting one knee on his seat.

Based on the record before us, the danger to Plaintiff allegedly caused by Lee was not known or reasonably foreseeable to AA or its employees. Accordingly, AA has established that Plaintiff, after an adequate period of discovery, has not and will not be able to produce evidence

sufficient for the finder of fact to find AA had a duty to protect Plaintiff from her alleged injury. *See Behrenhausen*, 967 S.W.2d at 217; *see also L.A.C.*, 75 S.W.3d at 257; *Thiele*, 838 S.W.2d at 443; *Bass*, 661 S.W.2d at 612; Comment E to the Restatement (Second) of Torts section 314A. Because such a duty is an essential element of Plaintiff's negligence action, AA has demonstrated there is no genuine issue as to the material facts and it is entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in its favor. *See B.B.*, 541 S.W.3d at 650; *Street*, 505 S.W.3d at 415-16; *see also ITT*, 854 S.W.2d at 376; *Wilmes*, 473 S.W.3d at 720; *Blanks*, 450 S.W.3d at 370; *Heffernan*, 73 S.W.3d at 664. Point two is denied.

C. Whether the Trial Court Erred in Granting Summary Judgment in Favor of Jimmy Lee

In Plaintiff's first point on appeal, she claims the trial court erred in granting summary judgment in favor of Jimmy Lee. In response, Lee asserts he is entitled to summary judgment because there is no evidence in the record that, (1) Lee owed a duty to Plaintiff when reclining his airline seat; or (2) Lee's conduct in reclining his airline seat was the cause-in-fact of Plaintiff's alleged injury. Because these were the only two grounds in Lee's motion for summary judgment and it is his burden to establish he is entitled to judgment as a matter of law, we limit our discussion accordingly. *See Street*, 505 S.W.3d at 416; *see also ITT*, 854 S.W.2d at 382.

1. Duty

We first turn to whether the summary judgment record sufficiently establishes Lee owed a duty to Plaintiff. As previously stated, the issue of whether a defendant had a duty to protect a plaintiff from injury is "purely a question of law." *Wilmes*, 473 S.W.3d at 720-21 and *Owens*, 166 S.W.3d at 92 (quoting *L.A.C.*, 75 S.W.3d at 257). A legal duty owed by one party to another may arise because the law imposes a duty under a particular set of circumstances where a party

must exercise due care to avoid a foreseeable injury to another.[8] *Wilmes*, 473 S.W.3d at 721; *Hackmann*, 308 S.W.3d at 239.

Under traditional principles of negligence, "a duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury." *Daoukas v. City of St. Louis*, 228 S.W.3d 30, 35 (Mo. App. E.D. 2007) (quoting *Cupp v. National R.R. Passenger Corp.*, 138 S.W.3d 766, 772 (Mo. App. E.D. 2004)) (quoting *L.A.C.*, 75 S.W.3d at 257 (quotations omitted)). Moreover, "this duty is measured by whether a reasonably prudent person would have anticipated danger and provided against it." *Id*.

In this case, Lee argues it was not reasonably foreseeable he could have injured Plaintiff by reclining his airline seat, citing to materials attached to Lee's motion for summary judgment providing he was permitted to recline his seat back at the time of the alleged injury. While this evidence may support a conclusion that there is not a foreseeable likelihood an airline passenger who reclines a seat back in a relatively careful manner would cause harm or injury to a passenger sitting behind him, materials attached to Lee's motion for summary indicate Lee reclined his seat in a forceful manner. According to portions of Plaintiff's deposition testimony attached to Lee's motion for summary judgment, after Lee unfastened his seatbelt, stood up, and put one knee on his seat, he "got so angry [ ] his partner would not acknowledge him[ ] that he motioned forward, and then lunged back as hard as he could in the seat, which then crunched [Plaintiff's] knee."

As previously stated, in determining whether a genuine factual dispute exists, a court "must view the record in the light most favorable to the non-movant, which means that the movant bears the burden of establishing a right to judgment as a matter of law on the record as

[8] A legal duty owed by one party to another may also arise under circumstances where, (1) it is prescribed by the legislature; (2) the law imposes a duty based upon a special relationship between the parties; or (3) a party has assumed a duty pursuant to a written or oral agreement. *Wilmes*, 473 S.W.3d at 721; *Hackmann*, 308 S.W.3d at 239. It is undisputed none of those circumstances apply to defendant Jimmy Lee here.

submitted; any evidence in the record that presents a genuine dispute as to the material facts defeats the movant's prima facie showing." *Street*, 505 S.W.3d at 416 (internal quotations omitted) (quoting *ITT*, 854 S.W.3d at 382). Viewing the record in the light most favorable to Plaintiff, a reasonably prudent person in the position of Jimmy Lee would have anticipated that forcibly lunging an airline seat would cause harm or injury to a passenger such as Plaintiff who is sitting directly behind him. Accordingly, Lee owed a duty to Plaintiff to protect her from injury under the circumstances of this case, and he is not entitled to summary judgment as to this element of Plaintiff's negligence cause of action. *See L.A.C.*, 75 S.W.3d at 257; *Daoukas*, 228 S.W.3d at 35; *Cupp*, 138 S.W.3d at 772; *see also Street*, 505 S.W.3d at 416; *Wilmes*, 473 S.W.3d at 720; *Blanks*, 450 S.W.3d at 370; *Heffernan*, 73 S.W.3d at 664.

2. Causation-in-Fact

We next turn to whether the summary judgment record sufficiently establishes Lee's conduct in reclining his airline seat was the cause-in-fact of Plaintiff's alleged injury. "A defendant's conduct is the actual cause, or cause-in-fact, of the plaintiff's injury where the injury would not have occurred 'but for' that conduct." *Blanks*, 450 S.W.3d at 372-73; *see Wilmes*, 473 S.W.3d at 722 and *Heffernan*, 73 S.W.3d at 664 (similarly finding).

In this case, Lee argues Plaintiff cannot prove his conduct in reclining his airline seat was the cause-in-fact of Plaintiff's alleged injury because materials attached to Lee's motion for summary judgment indicate, *inter alia*: Lee's seat was fully operable and had no mechanical defects; the seatback on the seat assigned to Lee is the only part of the seat that moves when the reclining mechanism is engaged by the passenger; and the top of the seatback reclines a maximum of two inches. While this evidence may support a conclusion that part of Lee's seat may not have hit Plaintiff's knee, other materials attached to Lee's motion for summary judgment indicate part of Lee's seat did in fact hit Plaintiff's knee. Specifically, portions of

Plaintiff's deposition testimony and portions of Plaintiff's Husband's deposition testimony that are attached to Lee's motion for summary judgment provide: Plaintiff is very tall and has very long legs; her knees were sitting "pretty close" to Lee's seatback before her alleged injury occurred; Lee "motioned forward, and then lunged back as hard as he could in the seat, which then crunched [Plaintiff's] knee"; although Plaintiff could not be specific as to which part of Lee's seat struck her knee because the incident happened so fast, something hit her knee and "crushed" it after Lee lunged forward and backwards in his seat; and Husband answered in the affirmative when he was asked if he saw Lee "recline[ ] his seat and the seat str[ike] [Plaintiff]."

We find the preceding materials submitted by Lee in support of his motion for summary judgment are inconsistent and require an evaluative judgment between two rationally possible conclusions as to whether a part of Lee's seat-back hit Plaintiff's knee and was the cause-in-fact of her alleged injury. "*[M]aterials submitted by the movant that are, themselves, inconsistent* on the material facts defeat the movant's prima facie showing." *Street*, 505 S.W.3d at 417 (emphasis in original) (quoting *ITT*, 854 S.W.2d at 382). Furthermore, summary judgment should be denied where the materials submitted by the movant require an evaluative judgment between two rationally possible conclusions, even if a court is convinced the evidence makes it unlikely the non-movant can prevail at trial. *See id.*; *Wilmes*, 473 S.W.3d at 715. Therefore, Lee is not entitled to summary judgment on the basis there is no evidence in the record that Lee's conduct in reclining his airline seat was the cause-in-fact of Plaintiff's alleged injury. *See id.*; *see also Wilmes*, 473 S.W.3d at 722 ("[t]he trier of fact normally decides causation, particularly where reasonable minds could differ as to causation based upon the facts of the case").

3. Conclusion as to Point One

Based on the foregoing, defendant Jimmy Lee has not established facts negating one of the elements of Plaintiff's negligence cause of action or that Plaintiff, after an adequate period of

discovery, has not and will not be able to produce evidence sufficient for the finder of fact to find the existence of one of the Plaintiff's elements. *See Wilmes*, 473 S.W.3d at 720, 722; *Blanks*, 450 S.W.3d at 370, 372; *Heffernan*, 73 S.W.3d at 664. Accordingly, the trial court erred in granting summary judgment in favor of Lee under the circumstances of this case. *See B.B.*, 541 S.W.3d at 650. Point one is granted.

III. CONCLUSION

The portion of the trial court's judgment granting AA summary judgment on Plaintiff's negligence claim is affirmed. The portion of the trial court's judgment granting Jimmy Lee summary judgment on Plaintiff's negligence claim is reversed, and we remand the cause for further proceedings in accordance with our opinion.

ROBERT M. CLAYTON III, Judge

Gary M. Gaertner, Jr., P.J., and
Angela T. Quigless, J., concur.