IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BETTY J. NEWOM,[1] as personal representative of the Estate of CHRISTOPHER M. SMITH (deceased); Respondent, BRIDGETT HARRIS, Plaintiff, v. PIERCE COUNTY; PIERCE COUNTY SHERIFF'S DEPARTMENT; Appellants, PAULA JENNIFER MARSHALL; JOHN DOES 1–10; JANE DOES 1–10, Defendants.	)	NO. 63622-7-I DIVISION ONE UNPUBLISHED OPINION FILED: October 25, 2010

Lau, J. — Paula Marshall shot and killed her ex-boyfriend Christopher Smith two days after they had a physical altercation at Smith's house. Betty Newnom, as

[1] The true and correct spelling, "Newnom," will be used in this opinion.

personal representative for the estate of Christopher Smith (the estate), sued Pierce County and the Pierce County Sheriff's Department (collectively "Pierce County") for wrongful death, alleging that sheriff deputies negligently failed to make a mandatory arrest after the initial domestic incident as required by RCW 10.31.100(2)(c). Pierce County appeals the trial court's order denying its motion for partial summary judgment against the estate. Because we conclude that the estate failed to raise a genuine material factual dispute regarding whether the deputies' failure to make an arrest was the cause in fact of Smith's death, we reverse the trial court's order denying Pierce County's summary judgment motion.

FACTS AND PROCEDURAL HISTORY

Viewed in the light most favorable to the estate, the record reveals the following facts. Paula Marshall and Christopher Smith dated and lived together for a time and had a child together. They later broke up. On January 30, 2007, Marshall arrived at Smith's home uninvited and without warning. Smith told Marshall he would call the police if she did not leave. Marshall threw a flashlight, which hit Smith on the back of the head. Marshall then threw deer horns at Smith but missed. Marshall also sprayed lacquer at Smith's face but missed. Smith then picked Marshall up to remove her from the home. Marshall kicked and bit Smith. They both stumbled off the one-foot high deck onto some rocks on the ground. After the incident, Smith had a limp and a possible broken toe. Smith visited the doctor two days later.

Both Smith and Marshall called the police immediately after the incident. Each

claimed an assault by the other. Smith called from his home, and Marshall called from her car, approximately a quarter mile away. When Deputy Gregg Marty arrived at the house, Smith related the above facts to Deputy Marty.

In the meantime, Deputy Jank arrived at Marshall's car to interview her. She told Deputy Jank that after calling first, she went to Smith's house to talk about their child's schooling. Marshall said this discussion prompted yelling by Smith and he shoved her into the couch and into a wall. Marshall (5 feet 2 inches and 110 pounds) is much smaller than Smith (5 feet 11 inches and 200 pounds). Marshall admitted she kicked, bit, and threw deer horns at Smith while attempting to escape. She said that after Smith threw her off the deck onto her back, she escaped. Deputy Jank noted redness on her back and an abrasion on her hand. Smith reported abdominal pain and received medical attention.

Deputies Jank and Marty discussed whether to make an arrest. Deputy Marty concluded Marshall was the aggressor based on his conversation with Smith. But Deputy Jank expressed uncertainty. Deputy Marty then talked to Marshall and told her to stay away from the house. The only witness to the altercation was the couple's four-year-old son. Deputies did not interview him. Other adults present in the house when the deputies arrived did not witness the events. The deputies made no arrest.

The next day, a detective from the Domestic Violence Unit called Smith for a follow-up investigation, but Smith did not answer. A detective also called Marshall, who agreed to meet the following day. Marshall also obtained a temporary protection order

against Smith. A detective determined that neither Smith nor Marshall had a criminal record. The investigation was still ongoing when Marshall killed Smith.

On February 1 at about 9:30 p.m., Marshall saw Smith and his girl friend, Bridgett Harris, near a tavern. Marshall shot and killed Smith and then shot at but missed Harris. Marshall pleaded guilty to first degree murder. Marshall claims to remember almost nothing about the murder.

Betty Newnom is Christopher Smith's mother and the personal representative of Smith's estate. The estate and Harris filed suit against Pierce County, alleging the deputies failed to comply with their statutory, nondiscretionary duty to arrest one or both of the parties to the domestic violence incident on January 30, and this failure was the proximate cause of Smith's death and Harris's injuries. The complaint also alleged that Marshall was clearly the aggressor in the altercation with Smith. It further alleged that the deputies failed to (1) determine that Marshall was the aggressor, (2) determine who was the aggressor, (3) arrest either party as required by law, (4) preserve evidence, (5) notify Smith of his rights and remedies as a domestic violence victim, and (6) inform him that Marshall was not going to be arrested or cited.

Pierce County moved for summary judgment against the estate and Harris. The trial court granted the motion as to Harris's claims[2] but denied the motion as to the estate's claims. The court agreed with the estate's contention that the deputies had a

[2] Bridgett Harris does not appeal the trial court's summary judgment dismissal of her claims against Pierce County. And claims against defendant Paula Marshall are also not at issue in this appeal.

duty to arrest even though the primary physical aggressor could not be identified and was no longer at the house. The court also concluded that proximate cause was an issue for the jury. Pierce County appeals.[3]

Standard of Review

This court reviews an order denying a motion for summary judgment de novo, engaging in the same inquiry as the trial court. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is of such a nature that it

[3] The Commissioner granted discretionary review in this case in a ruling filed September 18, 2009. Pierce County filed its appellant's brief on November 24, 2009. On December 17, 2009, the estate filed a motion to extend time to file a respondent's brief. On December 21, 2009, the motion was granted, but the ruling allowed no further extensions. This allowed the estate until January 25, 2010, to submit a response brief, but none was filed. On February 3, 2010, the court filed a motion for sanctions for failure to file. On February 16, 2010, respondent filed another motion for extension of time to extend the deadline until February 26, 2010. This motion was granted, but provided that "no further extensions will be allowed without sanctions being imposed." Notation Ruling, Pierce County v. Newnom, No. 63622-7-I (Wash. Ct. App. Feb. 25, 2010). Again, the estate did not meet the deadline. On March 5, 2010, Pierce County filed a notice and motion for order that respondents file responsive brief seeking a ruling that the appeal go forward without a respondent's brief or oral argument by respondent. Respondent did not reply to or appear for the hearing on this motion. The commissioner issued a notation ruling on March 22, 2010, that the appeal would go forward without a respondent's brief and that respondent would not be able to present oral argument on the merits, citing RAP 11.2(a). Nevertheless, the estate's attorney appeared for oral argument before this panel and requested permission to argue or continue the oral argument hearing. This court declined these requests based on the commissioner's ruling, but agreed to consider respondent's answer to petitioner's motion for discretionary review, which the estate's attorney represented was "almost identical" to the respondent's brief he had drafted.

affects the outcome of the litigation." Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). We consider the facts and inferences from the facts in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

A defendant moving for summary judgment may meet the initial burden by pointing out the absence of evidence to support the nonmoving party's case. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff." Young, 112 Wn.2d at 225 (footnote omitted). The facts set forth must be specific, detailed, and not speculative or conclusory. Sanders v. Woods, 121 Wn. App. 593, 600, 89 P.3d 312 (2004). If, at this point, the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial,' then the trial court should grant the motion." Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

DISCUSSION

Pierce County argues that no duty to arrest exists in this case because (1) the public duty doctrine shields the county from liability, (2) former RCW 10.31.100 (2006)[4]

[4] Former RCW 10.31.100(2) (2006) provides,

"(2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without warrant when the officer has probable cause to believe that:

" . . . .

"(c) The person is sixteen years or older and within the preceding four hours has

does not require the police to make an arrest if, as here, they cannot determine the primary physical aggressor as defined by the statute, and (3) because "the Domestic Violence Protection Act[5] limits the mandatory duty to arrest to cases where the offender is on the scene," there was no duty to arrest because Marshall had left the home. Donaldson v. City of Seattle, 65 Wn. App. 661, 675, 831 P.2d 1098 (1992).

Pierce County also argues no proximate cause, asserting that "plaintiff's claim also should have been dismissed because as a matter of law it cannot prove, as it must, that 'but for' a failure to arrest on January 30, 2007, Marshall would not have been able to commit the murder two days later on February 1, 2007." Br. of Appellant, at 22. Pierce County argues further that the police response was not the legal cause of the murder two days later.

The estate counters, "When a peace officer develops probable cause to believe

---

assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved."

[5] RCW 10.31.100 is entitled "Arrest without warrant." RCW 10.31.100(2)(c) describes when an arrest is required pursuant to chapter 10.99 RCW, the domestic violence protection act.

that multiple family or household members assaulted each other, the [domestic violence protection act] requires at least one party to be arrested regardless of whether the 'primary aggressor' can be identified or not." Respondent's Answer to Petitioner's Motion for Discretionary Review (Respondent's Answer), at 5. The estate contends that the "[Domestic Violence Protection Act]'s four-hour mandatory arrest requirement still applies when [as here] the abuser leaves the victim's residence and drives six blocks down the street." Respondent's Answer, at 12.

As to proximate cause, the estate responds that testimony by Paula Marshall and prosecuting attorney Diane Clarkson created a genuine issue of material fact. The trial court therefore properly denied Pierce County's summary judgment motion.

"The essential elements of actionable negligence are: (1) the existence of a duty owed to the complaining party; (2) a breach thereof; (3) a resulting injury; and (4) a proximate cause between the claimed breach and resulting injury." Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). "If the plaintiff fails to present evidence to prove each essential element of the negligence claim, then summary judgment for the defendant is proper." Sligar v. Odell, 156 Wn. App. 720, 731, 233 P.3d 914 (2010).

While the parties' arguments focus principally on the duty element, we need not resolve that question here. Our review of the record shows the estate failed to present any evidence to establish that the failure to arrest either Smith or Marshall or both proximately caused Smith's murder.[6]

[6] Because we resolve this case on the cause in fact prong, we need not address the parties' legal causation arguments.

Proximate cause has two required prongs—cause in fact and legal causation. Hartley v. State, 103 Wn.2d 768, 777–79, 698 P.2d 77 (1985). "Cause in fact concerns 'but for' causation, events the act produced in a direct unbroken sequence which would not have resulted had the act not occurred." Hertog v. City of Seattle, 138 Wn.2d 265, 282–83, 979 P.2d 400 (1999). The cause in fact issue is normally left to the jury, however, if "reasonable minds could not differ, th[is] factual question[ ] may be determined as a matter of law." Hertog, 138 Wn.2d at 275.

Evidence establishing proximate cause must rise above guess, speculation, or conjecture. Gardner v. Seymour, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). A jury is not permitted to speculate on how an accident or injury occurred when causation is based solely on circumstantial evidence and there is nothing more substantial to proceed on than competing theories with the defendant liable under one but not the other. Sanchez v. Haddix, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981).

To prove cause in fact, the estate must show that but for the failure to arrest, the murder would not have occurred. Lynn v. Labor Ready, Inc., 136 Wn. App. 295, 151 P.3d 201 (2006) (although representative in wrongful death suit introduced testimony that killer and victim might have met at work, no fact issue tending to show that but for defendant's negligent hiring, murder would not have occurred); Hungerford v. Dep't of Corr., 135 Wn. App. 240, 139 P.3d 1131 (2006) (summary judgment warranted because even if defendant failed to report a parole violation by killer, plaintiff had not shown that but for this error, killer would have been incarcerated and unable to kill

victim).

The estate contends that only a jury can determine whether the deputies' failure to arrest someone caused the subsequent murder. The estate relies principally on Donaldson v. Seattle, 65 Wn. App. 661, 831 P.2d 1098 (1992). In Donaldson, Steve Barnes and Leola Washington had a troubled relationship over several years. "Barnes's assaultive behavior toward Leola began early in their relationship." Donaldson, 65 Wn. App. at 664. After an assault one morning, Washington called police from a neighbor's home. Police "completed an area search" but did not find Barnes. The next morning, Barnes stabbed and killed Washington. Donaldson, 65 Wn. App. at 665–66. The jury found that defendant City of Seattle negligently caused Washington's death. The trial court denied motions for a judgment notwithstanding the verdict and a new trial. We reversed, "Finding, as a matter of law, the City had no ongoing duty to conduct a mandatory investigation," under the facts presented. Donaldson, 65 Wn. App. at 676. And on the question of "cause in fact," the City argued for the first time on appeal that "even if arrested, Barnes would have been promptly released and able to commit the crime." Donaldson, 65 Wn. App. at 668. We concluded,

> The record contains scant evidence to support this theory and, ironically, what little evidence is present came through cross examination of the plaintiff's expert witness. Barnes returned to murder Leola within 24 hours after the police response to her call. In view of the evidence presented we find cause in fact to be a jury issue.

Donaldson, 65 Wn. App. at 668. On this point we noted,

> Whether the City believed testimony as to a possible release would have been unfavorable or whether, for practical reasons, the City merely decided not to offer such evidence is unclear. The fact remains that the City neither sought an instruction from the trial court unequivocally placing the burden on Donaldson to establish the likelihood of release nor attempted to establish it by its own evidence. A jury decision should be overturned only if there is no competent evidence or reasonable inference that would sustain the verdict.

Donaldson, 65 Wn. App. at 668 n.12.

The estate argues that a fact issue exists on causation because (1) "Although Ms. Marshall speculated at her deposition that she still would have gone on to [m]urder Mr. Smith even if she would have been arrested on 1/30/07, she conveniently had no recollection of the events surrounding the murder and she testified that the shooting 'was just an accident,'" (2) "It is undisputed that Paula Marshall was suffering from severe mental problems at the time of the [domestic violence] incident, that she wasn't consistently taking her psychotropic medications, and that she believes the 'accident' may not have happened if she had been taking her medication as instructed by her doctor," and (3) prosecuting attorney Diane Clarkson provided contradictory testimony about whether an arrest and charges should have been made. Resp't's Answer at 15–16. From this evidence, the estate maintains that Marshall could not "possibly know whether or not she still would have murdered Mr. Smith if she would have been arrested on 1/30/07." Resp't's Answer, at 16. The estate argues further that "if a single witness (such as Ms. Clarkson) gave contradictory or conflicting testimony on various occasions this would only demonstrate additional disputed material facts to be resolved by a jury." Resp't's Answer, at 17.

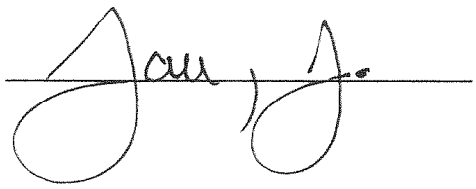
To defeat summary judgment, the estate must "point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion," and it "may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof." Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 627, 818 P.2d 1056 (1991) (quoting Amend v. Bell, 89 Wn.2d 124, 129, 570 P.2d 138 (1977)). Considering the above quoted evidence and any reasonable inferences in the light most favorable to the estate, the evidence fails to establish a material fact issue on cause in fact—an element essential to the estate's negligence claim. The critical cause in fact issue is "but for" the deputies' failure to arrest on January 30, 2007, would Marshall have been able to murder Smith two days later. But the record shows no evidence that an arrest on January 30, 2007, would have prevented Smith's murder two days later.

And unlike in Donaldson, Pierce County presented unrefuted evidence that even if deputies had made an arrest for the domestic incident, prompt release would have followed. Prosecuting attorney Diane Clarkson testified that "regardless of whether arrests had been made and charges filed, any person arrested as a result of the January 30, 2007 incident between Smith and Marshall would have been released the next day on January 31, 2007." Declaration of Diane Clarkson, at 3.[7]

In sum, because the estate presented no evidence that the deputies' failure to

[7] The record does not support the estate's claim that this testimony conflicted with Clarkson's Civil Service Commission hearing testimony that implied police should have made an arrest.

arrest either Marshall or Smith or both proximately caused (cause in fact) Smith's death, we conclude the trial court erred by denying Pierce County's summary judgment motion against the estate. Accordingly, we reverse the order denying summary judgment.



WE CONCUR: