IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARIE GEARY and ROBERT GEARY, husband and wife,	)	No. 67534-6-I
Appellants,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
HOME DEPOT U.S.A., INC., a foreign corporation; GERALD T. SCOTT and CHERYL SCOTT, husband and wife, and the marital community composed thereof,	)	FILED: December 10, 2012
Respondents.	)	

Grosse, J. — Even if a plaintiff describes an unnamed defendant with reasonable particularity for purposes of RCW 4.16.080, an amended complaint substituting a named defendant for the unnamed defendant must nonetheless comply with CR 15(c). Here, the plaintiff concedes that her amended complaint substituting named defendants for John Doe and Jane Doe defendants did not meet the requirements of CR 15(c). Summary judgment dismissal of the plaintiff's complaint against these defendants was therefore proper. Further, in order to establish the element of cause in fact in a negligence action, a plaintiff must provide more than mere speculation as to what the defendant should have done to prevent the accident. Here, the plaintiff offers nothing but speculation as to what the store should have done to prevent the lumber cart from striking her. This speculation is insufficient to establish cause in fact. Summary judgment dismissal of the plaintiff's claims against the store was also proper.

We affirm the trial court.

FACTS

On June 15, 2007, Marie Geary and her husband were shopping in a Home Depot store. As they were walking down the main aisle inside the store, Geary was struck by a cart pushed by a person later identified as Gerard Scott.[1] According to the store manager, the cart that struck Geary was a lumber cart, and it was not overloaded or in any other way unusual. Geary left the Home Depot after the incident without ascertaining the name of the person who was pushing the cart that struck her.

Geary retained counsel shortly after the incident. In July 2007, counsel corresponded with Sedgwick Claims Management, a third-party administrator for Home Depot, about the incident. It was not, however, until April 2010 that Geary's counsel asked Sedgwick to disclose the identity of the customer who was pushing the lumber cart. At the time, Sedgwick did not know Scott's identity and so informed Geary's counsel.

On June 7, 2010, eight days before the statute of limitations expired, Geary and her husband filed a complaint for damages against Home Depot and "John Doe and Jane Doe." As to John Doe, the complaint alleged:

> Defendant John Doe was also a prospective customer in the store and was pushing a heavy four-wheeled merchandise cart on which lumber was stacked. As Defendant Doe emerged from a merchandise aisle, he pushed the cart into plaintiff Marie, striking her and causing her personal injury.

[1] Although Marie Geary's husband filed a claim for loss of consortium along with Marie Geary's claim for personal injuries, we will refer only to Marie Geary and will refer to her as "Geary."

In November 2010, Home Depot produced a document in response to Geary's discovery request that identified "Jerry Scott" as a "witness." Geary's counsel hired an investigator to locate Scott's residence and correct identity.

Apparently, counsel determined that Scott was the person who was pushing the lumber cart, although it is unclear from the record precisely how Scott was identified or who identified him. On February 4, 2011, Geary and Home Depot entered a stipulation agreeing "that pursuant to CR 15(a) plaintiffs may file an amended summons and amended complaint in this matter to substitute 'Gerard T. Scott' and 'Cheryl Scott' for the party defendants originally identified as 'John Doe' and 'Jane Doe'."[2] Also on February 4, 2011, and just short of three years and eight months after the accident, Geary filed an amended complaint for damages in which she substituted the Scotts for John Doe and Jane Doe.

The Scotts filed a motion for summary judgment in May 2011 alleging that Geary's action against them was barred by the statute of limitations. Home Depot filed a motion for summary judgment, also in May 2011, alleging no duty and no proximate cause.

The trial court granted the Scotts' and Home Depot's motions for summary judgment and dismissed Geary's claims against them with prejudice. Geary

[2] The Scotts argue that the amended complaint should be stricken because Geary did not obtain leave of court or the Scotts' consent to file an amended complaint as required by CR 15(a). The Scotts asked for the same relief in their motion for summary judgment but the trial court did not rule on it. Because the Scotts did not file a cross-appeal regarding their request to strike the amended complaint, the issue is not properly before us in this appeal and we do not address it.

appeals both summary judgment orders.

ANALYSIS

Standard of Review

A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[3] We review summary judgment orders de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.[4]

Issues of negligence and causation in tort actions are questions of fact not usually susceptible to summary judgment, but a question of fact may be determined as a matter of law where reasonable minds can reach only one conclusion.[5]

Defendants Gerard Scott and Cheryl Scott

Geary's cause of action for personal injuries is governed by the three-year statute of limitations in RCW 4.16.080. The incident at Home Depot occurred on June 15, 2007. Geary's initial complaint, naming John Doe and Jane Doe as defendants, was filed on June 7, 2010. The named defendant, Home Depot, was timely served. Geary's amended complaint, substituting the Scotts for John Doe and Jane Doe, was filed on February 4, 2011, well after the statute of limitations had expired.

Geary argues that the statute of limitations was tolled as to the Scotts by

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[3] CR 56(c).
[4] Wellman & Zuck, Inc. v. Hartford Fire Ins. Co., ___ Wn. App. ___, 285 P.2d 892, 897 (2012).
[5] Moore v. Hagge, 158 Wn. App. 137, 147-48, 241 P.3d 787 (2010), review denied, 171 Wn.2d 1004 (2011).

virtue of RCW 4.16.170 because she timely served Home Depot. RCW 4.16.170 provides:

> For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

Construing this statute, the Supreme Court held in Sidis v. Brodie/Dohrmann, Inc. that service of process on one defendant tolls the statute of limitations as to unserved defendants.[6] Although all the defendants in Sidis were named, the court stated the following with regard to the application of RCW 4.16.170 to unnamed defendants:

> Respondents assert there is no valid reason to distinguish between named and unnamed defendants for purposes of the tolling statute. That issue is not, however, part of this case. All defendants were named. It has been argued that plaintiffs might attempt to evade the name requirement by naming numerous "John Doe" defendants but only serving one easy target such as the State, resulting in what arguably might be considered an abuse of process. There is no such abuse here and, therefore, a ruling on this issue can await another time. We note, however, that in some cases, if identified with reasonable particularity, "John Doe" defendants may be appropriately "named" for purposes of RCW 4.16.170.[7]

[6] 117 Wn.2d 325, 329, 815 P.2d 781 (1991).
[7] Sidis, 117 Wn.2d at 331 (emphasis added).

In Iwai v. State,[8] the court declined to adopt the foregoing dicta from Sidis as a holding with regard to unnamed defendants, noting that "'even in jurisdictions which permit a fictitious name practice it is not universally held that the statute of limitations is tolled until the true identity of the defendant is discovered . . . .'"[9] Despite stating that it was not going to adopt the holding in Sidis, the court in Iwai concluded that the plaintiff's broad designation of John Doe defendants "allegedly 'negligent or otherwise responsible'" did not sufficiently identify the later-named defendant to justify tolling the statute of limitations.[10]

The court in Bresina v. Ace Paving Co., Inc.[11] also addressed the Sidis dicta. In that case, the plaintiff was injured when she tripped over the edge of a sidewalk while walking to a cash machine outside a grocery store. She filed a complaint for personal injuries against both named and unnamed defendants, alleging that the named defendants constructed, owned, controlled, or had some legal responsibility for the area in which the plaintiff fell, and that the unnamed defendants "may have the same responsibility."[12] The plaintiff served at least one of the named defendants before the three-year statute of limitations expired.

After the statute of limitations expired, the plaintiff in Bresina filed an amended complaint substituting Ace Paving for one of the unnamed defendants,

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[8] 76 Wn. App. 308, 884 P.2d 936 (1995), aff'd on other grounds, 129 Wn.2d 84, 915 P.2d 1089 (1996).
[9] Iwai, 76 Wn. App. at 312 (quoting Mergenthaler v. Asbestos Corp. of Am., 500 A.2d 1357, 1363 n.11 (Del. Super. Ct. 1985)).
[10] Iwai, 76 Wn. App. at 312.
[11] 89 Wn. App. 277, 948 P.2d 870 (1997).
[12] Bresina, 89 Wn. App. at 279.

"ABC Corporation." Relying on Sidis, the plaintiff argued that the statute of limitations was tolled as to Ace Paving because she served a defendant who had been named in her original complaint. The court decided that despite the Iwai court's purported rejection of the Sidis dicta, the court in fact adopted it and determined that the plaintiff's description of the unnamed defendant was insufficient to satisfy Sidis. The Bresina court likewise assumed "that a plaintiff can toll the period for suing an unnamed defendant by timely filing and serving a named defendant—if, but only if, the plaintiff identifies the unnamed defendant with 'reasonable particularity' before the period for filing suit expires."[13]

Only the Bresina court has elaborated on the meaning of "reasonable particularity," stating that a major factor in the "reasonable particularity" determination is

> the nature of the plaintiff's opportunity to identify and accurately name the unnamed defendant; if a plaintiff identifies a party as "John Doe" or "ABC Corporation," after having three years to ascertain the party's true name, it will be difficult to say, at least in the vast majority of cases, that the plaintiff's degree of particularity was 'reasonable.'"[14]

The court in Bresina noted that the plaintiff offered no reason for not obtaining Ace Paving's true name during the three-year limitations period and that she could have obtained its name at almost any time during that time by proper investigation, or, if necessary, by filing a complaint and seeking discovery. The court concluded that under the circumstances, naming "ABC

[13] Bresina, 89 Wn. App. at 282.
[14] Bresina, 89 Wn. App. at 282.

Corporation" did not involve a degree of particularity that was "reasonable."[15] Accordingly, the trial court did not err by ruling that the statute of limitations was not tolled.

The circumstances here are very similar to those in Bresina. Geary had three years to ascertain the name of the person pushing the cart that struck her, but failed to do so. Neither Geary nor anyone representing her attempted to do so until April 2010, when her attorney contacted Sedgwick Claims Management. It was not until November 2010, after Geary filed her complaint and received Home Depot's answers to interrogatories, that she obtained the name "Jerry Scott." And, it was not until February 2011 that Geary ascertained Scott's correct name and address. Geary offers no reason for not obtaining Scott's identity during the three years following the incident at Home Depot. Under these circumstances and under Bresina, naming "John Doe and Jane Doe" did not involve a degree of particularity that was "reasonable."

We are confident that the Sidis court would have likewise found Geary's description of the defendants insufficient under the circumstances. In Sidis, unlike in this case, all of the defendants were named and all of the defendants, were, therefore, aware of their status as defendants in the lawsuit. Here, the Scotts were not named and had no idea that they were potential defendants in a personal injury action. Geary's description of the defendants is far less particular than the description the Sidis court found acceptable.

Geary argues that the Bresina court improperly conflated the reasonable

[15] Bresina, 89 Wn. App. at 282.

particularity requirement with the excusable neglect requirement applicable to the relation back of amendments to complaints. While Geary may be correct that the Bresina court conflated the requirements, the conflation was not, as she claims, improper. The circumstances of this case illustrate why these requirements are necessarily conflated. "[T]he substitution of a true name for a fictitious party constitutes an amendment substituting or changing parties. When that is the case, CR 15(c) is triggered and the amended complaint must meet the specific requirements of the rule."[16] Accordingly, the statute of limitations is not tolled under RCW 4.16.170 where a named party is later substituted for a fictitious one. In such circumstances, the plaintiff is required to comply with CR 15(c)'s requirements for the relation back of amendments.[17]

Even if Geary met the Sidis reasonable particularity requirement, Geary still had to comply with CR 15(c) in order to substitute the Scotts for the fictitious defendants. She conceded both below and at oral argument before this court that the requirements for relation back in CR 15(c) are not met. Summary

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[16] Kiehn v. Nelsen's Tire Co., 45 Wn. App. 291, 295, 724 P.2d 434 (1986) (citations omitted). CR 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

[17] Iwai, 76 Wn. App. at 312.

judgment dismissal of Geary's claim against the Scotts was proper.

Defendant Home Depot

The fact that an accident and an injury occurred does not, by itself, necessarily give rise to an inference of negligence.[18] Geary, as a plaintiff alleging negligence, was required to establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach of duty and the resulting injury.[19] The trial court granted Home Depot's motion for summary judgment because it found no genuine issue of material fact as to cause in fact.[20]

Cause in fact is, in addition to legal causation, an element of proximate cause. It "refers to 'the physical connection between an act and an injury.'"[21] Cause in fact is usually a question for the jury, but it may be decided as a matter of law if the causal connection between the act and the injury is "'so speculative and indirect that reasonable minds could not differ.'"[22] "'The cause of [the] accident [is] speculative when, from a consideration of all the facts, it is as likely

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[18] Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 377, 972 P.2d 475 (1999).
[19] Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 605, 257 P.3d 532 (2011).
[20] In its motion for summary judgment and on appeal, Home Depot alleges not only the absence of cause in fact, but also the absence of both a duty and legal causation. Although we may affirm a trial court's grant of summary judgment on any grounds supported by the pleading and proof, Niven v. E.J. Bartells Co., 97 Wn. App. 507, 513, 983 P.2d 1193 (1999), we need not and do not address the issues of duty and legal causation because we affirm the trial court on the ground of lack of cause in fact.
[21] M.H. v. Corp. of Catholic Archbishop of Seattle, 162 Wn. App. 183, 194, 252 P.3d 914 (2011) (internal quotation marks omitted) (quoting Ang v. Martin, 154 Wn.2d 477, 482, 114 P.3d 637 (2005)).
[22] Moore, 158 Wn. App. at 148 (internal quotation marks omitted) (quoting Doherty v. Mun. of Metro. Seattle, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996)).

that it happened from one cause as another.'"[23]

The situation here is analogous to that in Tortes v. King County,[24] an action by a passenger on a Municipality of Metropolitan Seattle (Metro) bus that plunged off the Aurora Avenue Bridge when another passenger shot and killed the driver. The cause in fact of the accident was the other passenger's shooting the bus driver. There was no claim that Metro was the cause in fact of the accident. "Rather, there was only speculation as to what Metro should have done to prevent the shooting and the accident."[25] This was insufficient to establish cause in fact. Similarly, here, Geary's theory of liability against Home Depot consists of only speculation as to what it should have done to prevent the accident. As in Tortes, such speculation does not establish cause in fact.

Geary's arguments are also similar to arguments that have been repeatedly rejected in accident cases where the plaintiff seeks to hold a government body liable on the ground of failure to provide a safe roadway. In Miller v. Likins,[26] Johanson v. King County,[27] and Kristjanson v. City of Seattle[28] the most the plaintiff could show was that the accident might not have happened had the governmental body taken certain steps, such as installing raised pavement markings, lowering the speed limit, posting additional road signs, or

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[23] Moore, 158 Wn. App. at 148 (internal quotation marks omitted) (quoting Jankelson v. Sisters of Charity of House of Providence in Territory of Wash., 17 Wn.2d 631, 643, 136 P.2d 720 (1943)).
[24] 119 Wn. App. 1, 84 P.3d 252 (2003).
[25] Tortes, 119 Wn. App. at 9.
[26] 109 Wn. App. 140, 34 P.3d 835 (2001).
[27] 7 Wn.2d 111, 109 P.2d 307 (1941).
[28] 25 Wn. App. 324, 606 P.2d 283 (1980).

removing old road lines. In each case, the courts decided that the plaintiff failed to meet his or her burden of showing that the governmental body's negligence was the cause in fact of the plaintiff's injuries. The same is true with respect to Geary's claims against Home Depot. The most she can show is that the accident might not have happened if Home Depot had policies requiring, for example, that lumber carts be moved only by store employees or that store employees supervise customers while moving lumber carts. This is insufficient to show cause in fact. Home Depot was entitled to summary judgment dismissal of Geary's negligence claim.

Affirmed.

Grosse, J

WE CONCUR:

Cox, J.