IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DON MILLS, a married man,	)	**No. 27335-1-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
COSTCO, a corporation,	)	**UNPUBLISHED OPINION**
	)	
Respondent.	)	
	)	

Kulik, A.C.J.—Don Mills appeals two Yakima County Superior Court orders granting Costco Wholesale Corporation's motions for summary judgment. The orders dismissed his negligence and breach of warranty claims against Costco. Mr. Mills argues that he presented sufficient evidence to preclude summary judgment on both claims. We conclude that the minimal evidence Mr. Mills produced did not raise a genuine issue of material fact as to whether his injuries were proximately caused by Costco. Accordingly, we affirm the summary judgments.

FACTS

In the mid-1990s, Mr. Mills purchased a bicycle from Costco in Union Gap,

Washington. A sign placed near the bicycles read "'PROFESSIONAL ASSEMBLY INCLUDED IN PRICE.'" Clerk's Papers (CP) at 55. The first time Mr. Mills rode the bicycle, he was injured when the front tire blew out.

After the accident, Mr. Mills did not notice anything amiss on the bicycle that might have caused the accident. Mr. Mills's son took the bicycle to Valley Cycle for a repair estimate. The bicycle was inspected and someone at Valley Cycle told Mr. Mills's son that the brakes were not properly assembled. Mr. Mills was later told the same thing by someone at Valley Cycle. Mr. Mills did not produce the bicycle for inspection by Costco. Apparently, at some point after the accident, the bicycle was stolen from the place where Mr. Mills had it stored.

On July 23, 1999, Mr. Mills filed an action for damages against Costco for negligence and breach of warranty. He alleged Costco was liable to him on the following grounds: (1) he purchased the bicycle in reliance on Costco's sign, which he believed was an assurance of the bicycle's "professional assembly," (2) the bicycle was incorrectly assembled, and (3) his injuries were a direct result of the incorrect assembly.

On February 17, 2004, Costco moved for summary judgment. It argued it had no responsibility for any manufacturing defect under the Washington product liability act, chapter 7.72 RCW, because it was a "product seller." CP at 70. In support, Costco filed

the affidavit of David Greek, a Costco buyer, who stated that the bicycle purchased by Mr. Mills was manufactured and assembled by Specialized Bicycles of Morgan Hill, California.

Mr. Mills argued that Costco was liable for his injuries as a product seller under the Washington product liability act. Mr. Mills provided an affidavit in opposition to Costco's motion for summary judgment. He attested to discussing assembly with a Costco employee before purchasing the bicycle. Mr. Mills's "recollection [was] that the staff person stated that Costco hired an 'outside assembler' to assemble the bicycles." CP at 55. Mr. Mills further stated as follows:

> After the accident, I had the bicycle examined. At that time, I discovered that the bicycle had been assembled incorrectly. The brake shoes and brake assembly had been installed and adjusted incorrectly causing the brake shoes to wear on the front tire. The wear on the tire caused the front tire to blow out. After the inspection, I also examined the front brake shoes and brake assembly. The front brake shoes and brake assembly were positioned differently from the rear brake shoes and in a place which would cause damage to the front tire.

CP at 55.

In May 2004, the court dismissed the negligence claim because the only evidence of negligence was the inadmissible hearsay statement of the unknown Costco employee. The court did not dismiss the breach of warranty claim. The court reasoned that the sign posted at Costco stating that professional assembly was included in the price, raised a

factual question as to whether Costco had warranted the assembly.

On September 19, 2005, Mr. Mills was deposed by Costco. Mr. Mills testified that before taking the bicycle to Valley Cycle, he had not noticed anything that would cause the tire to blow out. He testified that Valley Cycle had inspected the bicycle and concluded that the brakes were installed "backwards or improperly or something." CP at 22. He also stated that the people at Valley Cycle explained to him what was wrong, but he did not "know the facts" or "what was backwards." CP at 23. When asked if he had an understanding of what exactly was wrong with the bicycle, Mr. Mills said, "They wrote it down and I don't -- you know, it's been years. I'd have to look at that piece of paper and see what they wrote." CP at 23.

In 2008, Costco again moved for summary judgment as to the warranty claim. It argued that Mr. Mills had not offered any evidence that the brake assembly proximately caused the accident. The court granted the motion and Mr. Mills appealed.

ANALYSIS

Mr. Mills contends that the trial court erred in granting summary judgment on his negligence and breach of warranty claims. Summary judgment is appropriate if the record before the court shows that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruff v. County of King*, 125

Wn.2d 697, 703, 887 P.2d 886 (1995). A material fact is one upon which the outcome of the litigation depends. *Barrie v. Hosts of Am., Inc*., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). When reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court, considering all the facts and reasonable inferences in the light most favorable to the nonmoving party. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

A defendant in a civil action is entitled to summary judgment if the defendant shows that the plaintiff lacks evidence to support an element essential to the plaintiff's claim. *Las v. Yellow Front Stores, Inc*., 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (citing *Young v. Key Pharms., Inc*., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). In response to a motion for summary judgment, the plaintiff may not simply rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. *Id*. An affidavit must contain facts within the affiant's personal knowledge and which are admissible at trial. *Id*.

Mr. Mills alleges that Costco is liable to him for damages under RCW 7.72.040(1)(b), the Washington product liability act. This statute states that "a product seller . . . is liable to the claimant only if the claimant's harm was proximately caused by . . . [b]reach of an express warranty made by such product seller." RCW 7.72.040(1)(b).

Consequently, Costco should succeed on its motion for summary judgment if it shows that Mr. Mills lacks evidence to support an essential element of RCW 7.72.040(1)(b). Costco concedes that it is a product seller but argues there is no evidence that any alleged breach of warranty proximately caused Mr. Mills's injuries.

Proximate cause requires a showing of both cause in fact and legal causation. *Ayers v. Johnson & Johnson Baby Prods. Co*., 117 Wn.2d 747, 753, 818 P.2d 1337 (1991). "'Cause in fact refers to the but for consequences of an act—the physical connection between an act and an injury.'" *Hiner v. Bridgestone/Firestone, Inc*., 138 Wn.2d. 248, 256, 978 P.2d 505 (1999) (internal quotation marks omitted) (quoting *Ayers*, 117 Wn.2d at 753). In contrast, legal causation "rests on policy considerations as to how far the consequences of defendant's acts should extend [and] involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact." *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). Both elements must be satisfied. *Ayers*, 117 Wn.2d at 753.

Proximate cause is ordinarily a jury question but may be determined on summary judgment if reasonable minds could reach only one conclusion. *Ruff*, 125 Wn.2d at 703-04. Yet proof of proximate cause must rise above speculation or conjecture. *See Seven Gables Corp. v. MGM/UA Entm't Co*., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). A jury will

not be permitted to conjecture how an accident occurred. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999). Further, mere assertions that material issues of fact exist are inadequate to overcome a motion for summary judgment. *Meyer v. Univ. of Wa.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). Evidence is sufficient if it allows "reasonable minds to conclude that there is a greater probability that the thing in question . . . happened in such a way as to fix liability on the person charged." *Home Ins. Co. of N.Y. v. N. Pac. Ry. Co*., 18 Wn.2d 798, 803, 140 P.2d 507 (1943).

Costco argues that it is pure speculation that the bicycle tire went flat due to a breach of warranty. Costco relies on *Hiner* for support. In *Hiner*, the court found no proximate cause where there was insufficient evidence that proper warnings would have been read or heeded. 138 Wn.2d at 257-58. It was, therefore, speculative to conclude the failure to warn caused the injuries. *Id*. at 258.

Similarly here, any connection between the alleged improper brake assembly and Mr. Mills's accident is speculative. In his 2005 deposition, Mr. Mills stated that he did not inspect the bicycle on the day of the accident. He did not know why the bicycle tire blew out or if the brakes were assembled improperly. In fact, Mr. Mills conceded that he did not "know the facts" regarding the alleged deficient assembly. CP at 23. We note that in a 2004 affidavit, Mr. Mills stated that after talking with someone at a bicycle

repair shop he noticed that the front brakes were positioned differently than the rear brakes.

However, this evidence, viewed in a light most favorable to Mr. Mills, is not sufficient to present an issue of causation to the jury. There are many reasons why a bicycle tire may go flat. Here, there is no evidence that suggests the brakes caused or contributed to the accident. It is pure speculation that the tire went flat as a result of any breach of warranty by Costco.

Summary judgment in favor of a defendant is appropriate if the plaintiff fails to establish a prima facie case concerning an essential element of his claim. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). In light of Mr. Mills's failure to raise a genuine issue of material fact as to proximate causation, summary judgment was properly granted.

We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, A.C.J.

WE CONCUR:

Brown, J.

Korsmo, J.