

FILED
Court of Appeals
Division I
State of Washington
11/5/2020 3:23 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
11/9/2020
BY SUSAN L. CARLSON
CLERK

NO. 99102-2

[Court of Appeals No. 79933-9-1]

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

JUSTIN HELMBRECK,

Petitioner,

vs.

PAULA MCPHEE and JOHN DOE MCPHEE, LAURA
ELLIOTT and JOHN DOE ELLIOTT, CITY OF DES MOINES,
WASHINGTON,

Respondents.

RESPONDENT ELLIOTT'S ANSWER TO
PETITION FOR REVIEW

FALLON McKINLEY PLLC
By Eden E. Goldman, WSBA #54131
Attorneys for Respondent Elliott

Address:
155 NE 100th Street, Suite 401
Seattle, WA 98125
(206) 682-7580

TABLE OF CONTENTS

	Page
I. IDENTITY OF RESPONDENT	1
II. CITATION TO COURT OF APPEALS DECISION.....	1
III. ISSUES PRESENTED FOR REVIEW.....	1
IV. COUNTER STATEMENT OF THE CASE.....	2
V. ARGUMENT.....	3
A. STANDARD FOR REVIEW	3
B. THE PETITION DOES NOT IDENTIFY ANY CONFLICT BETWEEN THE COURT OF APPEALS DECISION REGARDING THE MITIGATION INSTRUCTION AND ANY OTHER COURT OF APPEALS DECISION.....	5
C. THE PETITION DOES NOT INVOLVE A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION	6
D. THE PETITION DOES NOT CONFLICT WITH A DECISION OF THE SUPREME COURT NOR DOES IT RAISE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST REQUIRING DETERMINATION BY THIS COURT	7
VI. CONCLUSION	7

TABLE OF AUTHORITIES

Rules

CR 68	2
RAP 13.4.....	4, 7
RAP 13.4(b)	1, 3
RAP 13.4(b)(1)	7
RAP 13.4(b)(2)	4, 5
RAP 13.4(b)(3)	4, 6
RAP 13.4(b)(4)	7

I. IDENTITY OF RESPONDENT

The respondent is Defendant Laura Elliott.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the September 14, 2020 Court of Appeals, Division I, unpublished opinion in *Helmbreck v. McPhee et. al.*, Court of Appeals No. 79933-9-I. The Court of Appeals, Division I Court of Appeals affirmed the trial court's decision for all issues raised on appeal. No motion for reconsideration of the Court of Appeals' opinion was filed. Petitioner fails to demonstrate that the criteria of RAP 13.4(b) are met under the circumstances of this case. Accordingly, Respondent Elliott respectfully requests this Court deny review of the issues raised by Petitioner.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: The trial court did not err in holding prior notice is a required element of a negligence claim against The City of Des Moines.

ISSUE 2: The Court of Appeals' decision does not conflict with the Supreme Court's prior decisions identified by Petitioner.

ISSUE 3: The Court of Appeals did not erroneously conclude substantial evidence at trial supported a failure to mitigate instruction.

ISSUE 4: The trial court did not err in affirming the trial court's jury instruction on the duty of a property owner

IV. COUNTER STATEMENT OF THE CASE

This Petition for Review arises out of a negligence action filed by Plaintiff/Appellant Justin Helmbreck ("Helmbreck") against Defendant/Respondent The City of Des Moines, WA ("Des Moines"), Defendant/Respondent Paula McPhee ("McPhee"), and Defendant/Respondent Laura Elliott and John Doe Elliot ("Elliott") in King County Superior Court.

On June 7, 2015, Elliott's vehicle was hit by Helmbreck's vehicle when Helmbreck failed to yield the right-of-way to Elliott's vehicle at an unmarked intersection in Des Moines, WA. Helmbreck claimed his view of the intersection was obstructed by vegetation located on the corner property owned by McPhee.

Des Moines was dismissed prior to trial through a Motion for Summary Judgment. Helmbreck filed a Motion for Reconsideration of the trial court's dismissal of Des Moines, which was denied. Also before trial, Elliott made a CR 68 offer to Helmbreck, which he did not accept. The matter then proceeded to trial with McPhee and Elliott, where the jury found Helmbreck 85% liable, Elliott 15% liable, and McPhee 0% liable for Helmbreck's alleged injuries. Because Helmbreck's award at trial was

less than Elliott's CR 68 offer and McPhee obtained a defense verdict, both Elliott and McPhee were entitled to their costs. Elliott's costs exceeded that of the jury award to Helmbreck, so judgment was ultimately entered in favor of both Elliott and McPhee.

Helmbreck then appealed the Superior Court's granting of Des Moines' Motion for Summary Judgment as well as the Superior Court's judgment at trial. The Washington Court of Appeals correctly affirmed all decisions of the Superior Court in an unpublished opinion. Des Moines moved to publish the opinion. Helmbreck then filed a Petition for Review to the Washington Supreme Court, and also joined in Des Moines' Motion to Publish the Opinion he is seeking to have reversed by the Washington Supreme Court.

V. ARGUMENT

A. STANDARD FOR REVIEW

Pursuant to the Washington Rules of Appellate Procedure, Rule 13.4(b), a petition for review to the Washington Supreme Court is accepted only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Only the third of the “Issues Presented for Review” in Helmbreck’s Petition applies to Elliott. In the “Issues Presented for Review” section of his Petition, Helmbreck identifies RAP 13(b)(2) and RAP 13.4(b)(3) as the basis for why review of the trial court’s decision to give a failure to mitigate instruction is warranted. This is the sole reference he makes to RAP 13.4 with regards to the mitigation instruction.

Helmbreck does not provide any reasonable argument to support his contention that the issues in this case present a conflict with a published decision of the Court of Appeals or a significant question of law under the Constitution of the State of Washington or of the United States. Moreover, although not identified as the basis for his request to review the mitigation instruction, Helmbreck’s Petition is not in conflict with a decision of this Supreme Court, nor does it involve an issue of substantial public interest requiring further guidance by this Court. The Court of

Appeals' unpublished opinion on the issue of the mitigation instruction is fact-specific, addresses the issue clearly, is entirely consistent with settled Washington law, and establishes no new precedent. Accordingly, Helmbreck's Petition for Review should be denied.

B. THE PETITION DOES NOT IDENTIFY ANY CONFLICT BETWEEN THE COURT OF APPEALS DECISION REGARDING THE MITIGATION INSTRUCTION AND ANY OTHER COURT OF APPEALS DECISION

The first basis Helmbreck identifies for why this Court should accept review is RAP 13.4(b)(2). As outlined above, per RAP 13.4(b)(2), this Court will accept a petition for review if the decision of the Court of Appeals is in conflict with a decision of any other Washington Court of Appeals. Helmbreck fails to refer to a single authority in the section regarding mitigation on pages 12 – 17 of his Petition. Not one citation to a Court of Appeals case appears on those pages. It is therefore unclear what other decision of the Court of Appeals Helmbreck alleges is in conflict with the Court of Appeals decision in this case.

In his Petition, Helmbreck merely regurgitates the same unavailing arguments he made at the trial court level and then argued again on appeal regarding why he does not think the trial court should have given a failure to mitigate instruction. There is no legal merit to these arguments. Again, not a single case – from the Court of Appeals or otherwise – is identified.

The Court of Appeals' decision in this matter involves straightforward application of settled principles of Washington law to the facts of this matter. Without identification of a Court of Appeals' case that conflicts with the Court of Appeal's opinion in this case, the Court should not accept review of this issue on this basis.

C. THE PETITION DOES NOT INVOLVE A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION

The second basis Helmbreck identifies for why this Court should review the failure to mitigate instruction is RAP 13.4(b)(3). As indicated above, this Court will accept a petition for review if a significant question of law under the Constitution of the State of Washington or of the United States is involved.

Helmbreck does not use the word Constitution a single time in his Petition, so it is unclear which article, section, or amendment to either the United States or Washington Constitution he believes is implicated by the Court of Appeals' decision in this matter. Because Helmbreck fails to identify how a significant question of law under the State of Washington or United States Constitution is involved, this Court should not grant Helmbreck's Petition on this basis either.

D. THE PETITION DOES NOT CONFLICT WITH A DECISION OF THE SUPREME COURT NOR DOES IT RAISE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST REQUIRING DETERMINATION BY THIS COURT

Although not raised in his Petition with regards to the mitigation instruction, this Court will accept a petition for review if the decision of the Court of Appeals conflicts with a decision of the Supreme Court, or if the decision raises an issue of substantial public interest requiring determination by this Court. RAP 13.4(b)(1); RAP 13.4(b)(4).

Because Petitioner does not even allege either RAP 13.4(b)(1) or RAP 13.4(b)(4) apply to this issue, the Court should not consider granting review based on either criteria. Petitioner does not identify a Supreme Court opinion that is in conflict with the Court of Appeals' decision in this matter. At the end of the day, this matter involves a relatively run-of-the-mill motor vehicle accident. Helmbreck does not allege, nor are there, any issues of substantial public interest that would warrant review by this Court.

VI. CONCLUSION

Just because Helmbreck does not like the outcome of this case does not mean there are any issues that *rise* to the level required by RAP 13.4 for Supreme Court review. Accordingly, this Court should deny Helmbreck's Petition for Review.

DATED this 5th day of November, 2020.

FALLON MCKINLEY PLLC

By s/ Eden E. Goldman

R. Scott Fallon WSBA #2574

Eden E. Goldman WSBA #54131

Attorneys for Respondent Laura and
John Doe Elliott

155 NE 100th St Ste 401

Seattle, WA 98125

Tel: 206-682-7580

CERTIFICATE OF SERVICE

I, Cheryl Erickson, hereby certify that I filed the foregoing with the Supreme Court of the State of Washington, and served same upon the following counsel of record:

Via Electronic Service via Washington State Supreme Court's Portal

Brian P. Russell
17820 1st Ave S Suite 102
Normandy Park, WA 98148
Attorneys for Plaintiff

bwinchell@millsmeyers.com
khuebner@millsmeyers.com
bmacintyre@millsmeyers.com

Robert W. Novasky
Forsberg & Umlauf, P.S.
1102 Broadway, Suite 510
Tacoma, WA 98402
Attorney for City of Des Moines

jhampton@bpmlaw.com
jschulze@bpmlaw.com
kboling@bpmlaw.com

George Mix
Jackie Jensen
Colton J. Arias
Mix Sanders Thompson, PLLC
1420 Fifth Ave Suite 2200
Seattle, WA 98101

george@mixsanders.com
jackie@mixsanders.com
colton@mixsanders.com

DATED this 5th day of November, 2020.

s/ Cheryl Erickson
Cheryl Erickson
Fallon McKinley PLLC
155 NE 100th St Ste 401
Seattle, WA 98125
Tel: 206-682-7580
Email: cheryl@fallonmckinley.com

FALLON MCKINLEY PLLC

November 05, 2020 - 3:23 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 79933-9
Appellate Court Case Title: Justin Helmbreck, Appellant v. Paula McPhee, et al., Respondents

The following documents have been uploaded:

- 799339_Answer_Reply_to_Motion_20201105151713D1383269_6641.pdf
This File Contains:
Answer/Reply to Motion - Answer
The Original File Name was Respondent Answer to Petition.pdf

A copy of the uploaded files will be sent to:

- Jackie@mixsanders.com
- arosenberg@williamskastner.com
- bfallon@fallonmckinley.com
- bprattorney@msn.com
- bprparalegal@comcast.net
- cheryl@fallonmckinley.com
- colton@mixsanders.com
- george@mixsanders.com
- jhager@williamskastner.com
- kgill@foum.law
- kristi@fmwlegal.com
- rnovasky@FoUm.law

Comments:

Sender Name: Eden Goldman - Email: egoldman@fallonmckinley.com

Address:

155 NE 100TH ST STE 401
SEATTLE, WA, 98125-8010
Phone: 206-682-7580

Note: The Filing Id is 20201105151713D1383269