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No. 62770-8-I

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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COURT OF APPEALS
STATE OF WASHINGTON
2009 NOV 20 PM 4:21

STEVEN HERNANDEZ and CLEONA
HERNANDEZ, husband and wife,

Respondents/Cross-Appellants.

vs.

TIMOFEY FEDORCHENKO and JANE DOE FEDORCHENKO,
husband and wife, and the marital community thereof,

Appellants/Cross-Respondents.

Reply Brief of Cross-Appellant Hernandez

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I. ARGUMENT IN REPLY ON CROSS-APPEAL

A. This Court can and should review the denial of summary judgment regarding third party fault because the denial was based on a substantive legal issue – the application of a presumption of negligence.

Fedorchenko virtually admits that summary judgment should have been granted regarding Wendy Warmenhoven's third party fault. He principally argues this Court may not review the denial of summary judgment under a "factual dispute" rule. However, this summary judgment was decided by application of a presumption of negligence. This is a legal issue which allows and requires this Court to review the denial of summary judgment.¹

The rules governing review of a denial of a summary judgment motion are not as categorical as Appellant/Cross-Respondent contends. It is true that a "denial of a summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact." *Johnson v. Rothstein*, 52 Wn. App.

¹ Fedorchenko correctly points out that the notice of cross-appeal was not designated in the Clerk's Papers. However, there is no claim the notice of cross-appeal was untimely, incomplete, that Hernandez has exceeded the bounds of his notice of cross-appeal or that the absence of the notice of cross-appeal in the record created any prejudice for this appeal. For anyone concerned, the original notice of cross-appeal timely filed and served on Fedorchenko is attached as Appendix D.

303, 304, 759 P.2d 471 (1988). However, Division I has also recognized the reverse, that denials of summary judgment motions for other reasons are appealable. In *McGovern v. Smith*, 59 Wn. App. 721, 734-35, 801 P.2d 250 (1991), this Court held that where the denial of summary judgment was based on a legal issue, that denial is reviewable post-verdict. This Court reached that decision by distinguishing *Johnson* from the situation in *McGovern*. *McGovern* concerned the post-judgment review of a denial of summary judgment based on a substantive legal issue. *Id.* at 735 n.3.

This Court again recognized the distinction made in *McGovern* and again held that the denial of summary judgment may be reviewed after entry of final judgment “if the decision on summary judgment turned on a substantive legal issue.” *Bulman v. Safeway*, 96 Wn. App. 194, 198, 978 P.2d 568 (1999), *rev’d on other grounds*, 144 Wn.2d 335, 27 P.3 1172 (2001). Division II has similarly agreed, holding that the denial of summary judgment following a trial can be reviewed if the denial was based on substantive legal issue. *In re Custody of A.C. and M.C.*, 124 Wn. App. 846, 852, 103 P.3d 226 (2004).

Here, the trial court's denial of summary judgment was based on a legal issue – a legal determination that a presumption or inference of negligence from the fact of impact was applicable to Warmenhoven as the following driver under the facts of this case. CP at 91-92, 934-37.² The trial court denied the motion, stating “[w]ith respect to third party fault the court found that presumptions or inferences exist that require trial.” CP at 92.³

² The original order denying plaintiff's motion for partial summary judgment did not contain the court's reasoning. See CP at 87-89. However, the trial court issued a “Corrected and Amended Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment on Liability, Causation and Dismissal of Affirmative Defenses” which does contain an explanation of the trial court's reasoning for denying summary judgment with respect to third party fault. CP at 91-92. The briefing of Fedorchenko as well as Hernandez in the motion for reconsideration also sheds light on the court's reasoning. See CP at 934-37 (Hernandez's motion for reconsideration regarding third party fault), 938-40 (defendant Fedorchenko's response to reconsideration motion).

³ In his response to the cross-appeal, Fedorchenko mischaracterizes the trial court's ruling on summary judgment regarding third party fault, stating that the judge denied Hernandez's motion because “presumptions or factual inferences existed that required trial.” Reply Br. And Response to Cross-Appeal at 2 (emphasis added). In fact, the trial court's order said nothing about “factual” inferences. See CP at 91-92. The addition of the word “factual,” while seemingly minor, changes the meaning of the trial court's order. A factual inference is different from the evidentiary devices of inferences and presumptions used by parties to shift the burden of persuasion. See *State v. Cantu*, 156 Wn.2d 819, 825-26, 132 P.3d 725 (2006) (explaining the purpose and differences between presumptions and inferences). As the language of the amended order and the briefing on the motion for reconsideration make clear, the trial court based its decision on its mistaken belief that an inference of negligence existed arising out of the fact that a collision occurred.

Fedorchenko essentially concedes on appeal that the trial judge relied on the presumption at summary judgment: “at the time of the motion the trial court apparently thought that a presumption might apply.” Reply Br. and Response to Cross-Appeal at 5. Similarly, in briefing that opposed reconsideration of the denial of partial summary judgment, Fedorchenko recognized the trial court’s reliance on the presumption of negligence: “As the trial court pointed out, in the absence of ‘facts,’ [proving or disproving Warmenhoven’s negligence] then the presumption that a following driver who rear-ends the car ahead of him is negligent applies.” CP at 939.

Whether the inference of such negligence that arises from impact by a following driver is to be applied under a specific set of facts is a question of law. See *Ripley v. Lanzer*, ___ Wn. App. ___, 215 P.3d 1020, 1027 (2009) (citing *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003) (noting that whether the *res ipsa loquitur* inference of negligence is applicable to a specific case is an issue of law.) Accordingly, the trial court’s application of the presumption regarding third party fault can and should be reviewed by this Court and it is determinative of this cross-appeal.

Fedorchenko cites to *Adcox v. Children's Orthopedic Hospital and Medical Center*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993) to argue the summary judgment decision may not be reviewed. His reliance on *Adcox* is misplaced. As the Supreme Court notes in its opinion, *Adcox* applies only to a summary judgment denied because of a factual dispute: "When a trial court denies summary judgment due to factual disputes, as here, and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the denial of summary judgment." *Id.* (citing *Johnson*, 52 Wn. App. 303, 759 P.2d 471 (1988)) (emphasis added). Because the trial court here denied summary judgment not because of a factual dispute, but because of the trial court's mistaken belief that a presumption created inferences of negligence, as discussed above, the *Adcox* rule does not apply. Thus, this Court should review the denial of summary judgment based on the record before the trial court at the time of summary judgment.

B. The trial court improperly denied summary judgment because no inference or presumption of negligence applied to the following driver, and Fedorchenko's evidence required further speculation to find negligence.

This Court reviews summary judgment de novo. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). The trial court should have ruled there was insufficient evidence to support negligence and granted summary judgment. Fedorchenko did not provide affirmative evidence of any negligence at summary judgment. Instead, the trial judge erroneously relied upon the presumption of negligence. Certainly the general rule is that an inference of negligence arises when the following driver hits the car ahead: "in the absence of an emergency or unusual condition, the following driver is prima facie negligent if he runs into the car ahead." *Vanwagenen v. Roy*, 21 Wn. App. 581, 584, 587 P.2d 173 (1978). However, this Court in *Vanwagenen* also recognized that when the leading car's action is "not reasonably anticipated, such as a sudden stop at a place where none is to be anticipated" there must be an affirmative showing that the following driver was negligent, and no presumption or inference of negligence applies. *Id.* Our Supreme Court also held that in some settings the driver of a following car is not negligent as a matter of law for simply

colliding with the car in front of her. *James v. Niebuhr*, 63 Wn.2d 800, 802, 389 P.2d 287 (1964).

As required by CR 56, the moving party must first demonstrate the absence of an issue of material fact, but may point out there is an absence of evidence to support an issue which the other side bears the burden to prove. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The nonmoving party must “make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial,” or the trial court should grant the summary judgment motion. *Id.* at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 225, 327, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)). That Wendy Warmenhoven encountered the unexpected stop in a thru lane at an intersection with a green light was undisputed. See Reply Br. and Response to Cross-Appeal at 7. To meet the requirements of *Vanwagenen* and *James*, the burden was on Fedorchenko to prove Warmenhoven’s negligence by affirmative evidence other than the act of colliding itself.

As Hernandez’s opening brief demonstrated, the few facts presented by Fedorchenko at summary judgment were not sufficient on their own and to support negligence required further

speculation about unaddressed points. Br. of Respondent/Cross-Appellant at 20-22. Fedorchenko essentially admits in his response that he did not meet his burden: “On the motion for partial summary judgment, the court was presented with very limited evidence, including brief excerpts of Warmenhoven’s deposition testimony.” Reply Br. and Response to Cross-Appeal at 6. Fedorchenko’s response pointed to no particular facts at the summary judgment that actually required denial of summary.

“The purpose of a summary judgment is to avoid a useless trial when there is no genuine issue of any material fact.” *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). As the US Supreme Court noted, summary judgment is an “integral” part of the system that is designed “to secure the just, speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 1).

Instead of presenting facts that would support Warmenhoven’s negligence, Fedorchenko relied on the presumption that a driver who rear-ends someone must be negligent. See CP at 51-77. Later, on reconsideration, Fedorchenko explicitly adopted the trial court’s mistaken reliance on the presumption of negligence: “As the

court pointed out, in the absence of “facts,” [facts proving or disproving Warmenhoven’s negligence] then the presumption that a following driver who rear-ends the car ahead of him is negligent applies.” CP at 939.

Because Fedorchenko could not provide independent evidence of Warmenhoven’s fault at summary judgment, that is dispositive of the cross-appeal. The lack of evidence to defeat summary judgment is solely the fault of Fedorchenko who had the burden of providing the court affirmative evidence that demonstrated Warmenhoven’s negligence. By admitting there was so little evidence for the trial court to consider and pointing to no evidence that independently supported negligence, Fedorchenko essentially concedes that summary judgment should have been granted. The presumption should not have been used, the motion should have been granted and third party fault would not have been on the verdict form.

C. Even looking to the trial evidence, Fedorchenko did not remove the speculation needed to support Warmenhoven negligence.

Regardless of summary judgment there was also insufficient evidence at trial to support a finding that Warmenhoven was negligent. Fedorchenko points out that more facts came before the

jury than were before the trial judge on summary judgment but made no analysis of how these are sufficient to support the verdict. The new facts have the same infirmity as those at the summary judgment – negligence could not have been found without further speculation about additional points not in the evidence before the jury. Where speculation is required, an issue may not be submitted to the jury. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 781-82, 133 P.3d 944 (2006).

Fedorchenko simply states without analysis that two pieces of the testimony of Wendy Warmenhoven and the testimony of Hernandez’s accident reconstructionist supported a finding of Warmenhoven’s negligence. Reply Br. and Response to Cross-Appeal at 6-7. This is not an accurate portrayal of the record. Warmenhoven testified that she was stopped in the right lane of traffic. The left thru lane was flowing freely by her, first Fedorchenko’s car, then the car behind him, and then Hernandez. Fedorchenko cites Warmenhoven’s statement of impatience but she did not testify that she did something negligent because she was impatient. What she stated was that after she had to stop again “she looked to the left because she was being impatient.” RP (10/16/09 PM) 72. In other words, her impatience moved her to

want to change to a lane that was free flowing and not sit in the stalled lane. Though this likely impressed a jury, it does not support negligence. There is nothing negligent about wanting to change to a lane one may legally enter. Impatience could potentially lead to negligent conduct during the lane change, but the impatience is not negligence. Neither is looking to the left before moving to the other thru lane negligence. Actually, it would be negligent not to look to ascertain that no other cars were approaching too closely to move into that lane. If combined with other testimony that she looked too long left, or missed something before she looked left, then there could be negligence. However, there was no other such testimony – leaving only speculation. This testimony cited by Fedorchenko does nothing to support a finding of negligence.

Similarly, the accident reconstructionist's testimony did not support a finding of Warmenhoven negligence. The testimony actually did the opposite. The reconstructionist, Paul Olson, concluded that Hernandez was "way" past Warmenhoven before he started braking, at least 28 feet. RP (10/14/08) at 39, 41. This supports that Warmenhoven had nothing untoward to see before she looked back left and started her turn. Olson testified Warmenhoven would not have had sufficient perception and

reaction time to process the new information that Hernandez was not continuing on through the green light, but instead was stopping. She had only 1.2 seconds to process and do what the best case scenario required 1.6 seconds to do. See *id.* at 41–48. Mr. Olson testified Ms. Warmenhoven would have been only about six feet from Hernandez when she would have been able to begin braking. *Id.* at 55. He testified that drivers assume that if they hit the car ahead they must have missed something. *Id.* at 39. But here his conclusion was that there are some circumstances where the following driver gets trapped “and this is one of those.” *Id.* at 40.

In the only other testimony cited, Warmenhoven was actually asked whether if Hernandez had already been stopping before she started to pull out whether she would have pulled out. She did not say he was already stopping. She responded using the same assumption from the fact that she hit him, that she must have somehow missed something -- “when I looked I must not have looked very well.” RP (10/16/08) at 76. That would be fine if there was any evidence that Hernandez was already stopping when she looked. But there is no such evidence. Warmenhoven did not supply such testimony there, or in any other part of her testimony. She did not say or imply she saw that Hernandez was already

stopping before she first looked left, or before she started over, or anything else affirmative. She inferred only the same natural assumption that usually applies when a following car hits the car ahead, that she somehow “must have” missed him. Her assumption is natural, but assumptions are not affirmative evidence. This assumption is not supported by any evidence and is contradicted by the only testimony on the subject - which was from Paul Olson. Hernandez would not have started braking until at least 28 feet after he went by Warmenhoven. RP (10/14/08) at 39. Such an assumption cannot support a verdict for negligence where there is no evidence that there was something for her to see.

D. Conclusion

Because Fedorchenko did not meet his burden of production regarding Warmenhoven’s negligence, Hernandez was entitled to summary judgment on that issue. Instead, the trial court erroneously relied upon the presumption or inference of her negligence because she was the following driver and struck him. That issue should not have gone to trial because a rational trier of fact could only speculate about whether there was or was not negligence. At trial the additional evidence was not sufficient to remove the necessary speculation, either. Third party fault should

not have been submitted to the jury. For either reason Hernandez is entitled to have judgment for all damages without reduction for any third party fault. This Court should reverse the trial court's denial of summary judgment and the denial of plaintiff's motion for full judgment and direct the trial court to enter judgment for the full verdict without any reduction for third party fault.

RESPECTFULLY SUBMITTED, this 30th day of November, 2009.



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that: I am over the age of 18 years, a citizen of the United States, not a party to this action, and competent to be a witness herein. On November 30, 2009, I caused to be served a copy of the attached document to the following via e-mail and ABC Legal Messengers:

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I certify that the preceding statements are true and correct under the laws of the State of Washington and under penalty of perjury.

DATED this 30th day of November, 2009, at Bellevue, Washington.



CHAROLETTE MACE, *paralegal*

APPENDIX D

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Honorable Doug McBroom

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STEVEN HERNANDEZ and CLEONA
HERNANDEZ, husband and wife,

No.: 03-2-24359-1SEA

Plaintiffs,

NOTICE OF CROSS-APPEAL TO THE
COURT OF APPEALS

v.

TIMOFEY FEDORCHENKO and JANE DOE
FEDORCHENKO, husband and wife, and the
marital community thereof

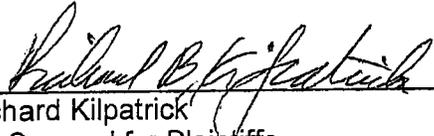
Defendants.

Plaintiffs Steven Hernandez and Cleona Hernandez seek cross-review by the designated appellate court of: 1) the order denying summary judgment regarding third party fault entered September 30, 2008; 2) review of the order denying reconsideration regarding third party fault entered October 9, 2008; 3) review of the oral ruling denying a directed verdict on third party fault at the close of defendants case; 4) review of jury instructions 2, 3, 7 and the Special Verdict Form to the extent

1 they submitted third party fault to the jury; and 5) the Findings, Order and Judgment
2 entered on December 16, 2008, to the extent it reduced plaintiffs' judgment by fault
3 allocated to the non-party (copies of the four written orders are attached).

4 In addition, plaintiffs cross-appeal from the giving of instruction no. 5.

5 Respectfully submitted, January 13, 2009.

6
7 
8 Richard Kilpatrick
9 Co-Counsel for Plaintiffs
10 WSBA #7058

11 Co-Counsel for Plaintiffs:

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14 4409 California AVE SW #100
15 Seattle, WA 98116

16 Attorney for Defendants:

17 James R. Cushing, Esq.
18 535 Dock Street #108
19 Tacoma, WA 98402

ORDER, dated 9/30/08

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STEVEN HERNANDEZ and CLEONA
HERNANDEZ,

Plaintiffs,

v.

TIMOFEY FEDORCHENKO and JANE DOE
FEDORCHENKO, husband and wife, and
the marital community thereof,

Defendants.

NO. 03-2-24359-1 SEA

**CORRECTED AND AMENDED ORDER
GRANTING IN PART AND DENYING IN
PART PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
LIABILITY, CAUSATION AND
DISMISSAL OF AFFIRMATIVE
DEFENSES**

The Court had phone argument from both counsel today.

During the September 26, 2008 hearing the Court orally agreed there was no
sufficient opposition on ^{the} ~~the~~ ^{of Fedorchenko's negligence DDM} issue except third party fault. The parties proceeded to argue
third party fault and the Court ultimately denied the motion with respect to third party
fault. The Court requested an order that denied the motion with respect to third party
fault, which the parties interlineated and provided and the Court signed. That order
inadvertently overlooked the other issues having it appear that the other portions of .

AMENDED ORDER - 1

THE FLECK LAW FIRM, PLLC
4409 California Avenue, SW Suite 100
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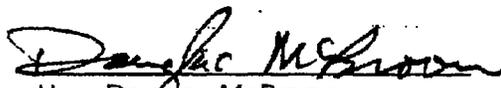
1 plaintiffs' motion were also denied which was not accurate. This Order is therefore
2 needed to correct, amend and supersede the Court's Order dated September 26, 2008
3 with respect to plaintiffs' motion for partial summary judgment only. This order does not
4 affect defendant's motion for reconsideration.

5 The Order of September 26, 2008 regarding plaintiffs' motion for partial summary
6 judgment is superseded, corrected and amended and shall now state:

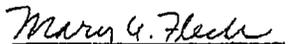
7 "IT IS, THEREFORE, HEREBY ORDERED that reasonable minds cannot differ
8 that defendant Fedorchenko was negligent ^{PDM} and was a cause of the collision. ~~The~~
9 ~~motion is therefore granted with respect to defendant's liability for the collision.~~ ^{PDM}

10 Reasonable minds cannot differ on all affirmative defenses except third party fault.
11 Summary judgment is granted with respect ^{to PDM} ~~each~~ and every affirmative defense except
12 third party fault. With respect to third party fault the court found that presumptions or
13 inferences exist that require trial so the motion is denied with respect to the alleged third
14 party fault of Wendy Warmenhoven Ayer. Motions in limine shall be determined at 9:00
15 am Thursday, October 9, 2008. Trial shall commence with jury selection on 9:00 am.
16 Monday, October 13, 2008.

17 Dated this 30th day of September, 2008.

18 
19 Hon. Douglas McBroom

20 Presented by:

21 
22 Mary K. Fleck
23 Co-Counsel for plaintiffs
24 WSBA # 24639

AMENDED ORDER - 2

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ORDER, dated 10/9/08

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Honorable Doug McBroom

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STEVEN HERNANDEZ and CLEONA
HERNANDEZ, husband and wife,

Plaintiffs,

v.

TIMOFEY FEDORCHENKO and JANE DOE
FEDORCHENKO, husband and wife, and the
marital community thereof

Defendants.

No.: 03-2-24359-1SEA

ORDER ON MOTIONS IN LIMINE AND
MOTIONS FOR RECONSIDERATION OF
SUMMARY JUDGMENT

On October 9, 2008 the Court took up motions in limine and motions for
reconsideration.

The Court hereby makes the following rulings:

1. Neither party, their lawyers nor any witness shall directly or indirectly
mention, refer to, interrogate concerning, or attempt to convey to the jury in any
manner any of the following subjects and/or documents or portions of documents

1 without first obtaining the permission of the Court outside the presence and hearing
2 of the jury. Defense and plaintiffs' counsel shall warn and caution his or her client,
3 and each and every witness to strictly follow this order:

4 a. Plaintiffs' Motion Number 1 is granted including no reference to
5 Ms. Warmenhoven Ayer as ever a party, that any claim was made against her
6 or any settlement or the like.

7 b. Plaintiffs' Motion Number 2 is Granted including no reference to
8 Dr. Billington, an IME, or Dr. Billington's report or the like. With proper medical
9 foundation Mr. Cushing may cross-examine Dr. Massey regarding any
10 relevant medical issues, without reference to Dr. Billington, his exam, his
11 report and the like.

12 c. Plaintiffs' Motion Number 3 is Granted, including no reference of
13 a doctor visit on the day of the accident.

14 d. Plaintiffs' Motion Number 4 is reserved for further authorities.

15 e. Plaintiffs' Motion Number 5 is Granted including no reference to
16 who else was or was not hurt in the accident

17 f. Plaintiffs' Motion Number 6 is granted. Without medical support
18 not yet shown that they demonstrate some ongoing problem from the 1993
19 fusion there will be no reference to the strain injuries in 1998 and 1999 or
20 reference to roller skating or other accidents than the 1993 accident and the
21 2000 accident.

1 f. Plaintiffs' Motion Number 7 is Granted in part. There shall be no
2 references about referrals to any physical medicine healers and not granted as
3 to referrals to mental health treaters.

4 g. Plaintiffs' Motion Number 8 is Granted. There shall be no
5 references to Mr. Hernandez' emotional state or his conduct at the scene after
6 the accident.

7 h. Plaintiffs' Motion Number 9 is Granted and there shall be no
8 suggestion or reference to Dr. Massey's treatment or outcomes having been
9 poor or substandard or suggestion in any way that Dr. Massey did something
10 poorly in Steve Hernandez' treatment or any other matter referenced in the
11 motion. This does not preclude evidence of what physical conditions Steve
12 Hernandez had, but no suggestion Dr. Massey caused some condition.
13 Counsel may state Dr. Massey performed fusion surgery and after surgery
14 there was not a full union or other fair descriptive term.

15 i. Plaintiffs' Motion Number 10 is denied with respect to Dr.
16 Massey's opinions or how Mr. Cushing may question about those opinions, but
17 it is granted with respect to any reference to Dr. Massey's supposed
18 disappearance, any passage of time or time-frame of his opinions, the reasons
19 this case has not come to trial, who asked for continuances or the like.

20 j. Plaintiffs' Motion Number 11 is Granted. There shall be no
21 reference to Dr. Massey's failure rate, complaints of any type or any other
22 matter referenced in the motion.

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k. Plaintiffs' Motion Number 12 is reserved pending medical testimony.

l. Plaintiffs' Motion Number 13, 14, 15, 17, 18, 19, 20 and 21 were agreed and are granted.

m. Plaintiffs' Motion Number 16 is granted but plaintiffs' health insurance is admissible to explain his switch of doctors during part of his treatment.

n. Plaintiffs' Motion Number 23 is Granted. There shall be no reference to the existence of Dr. Billington or court rulings to exclude Dr. Billington or any other motion and any part of this motion in limine. The parties may refer to the fact the Court found Mr. Fedorchenko negligent in opening and during the trial.

o. Defendant's Motion in Limine Number A is granted except with respect to the Court's summary judgment of negligence of Mr. Fedorchenko, already mentioned in the last paragraph above.

p. Defendant's Motion Number B is denied.

q. Defendant's Motion Number C is granted in part but plaintiffs may introduce evidence about changing doctors caused by health insurance changes. Exhibits shall be properly redacted with respect to insurance and mention of settlement and the parties shall confer and agree (or the Court shall rule) before any letters are mentioned or introduced into evidence.

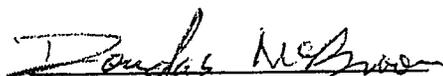
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r. Defendant's Motion Number D is moot as the two stipulations regarding reasonableness and necessity of the wage loss and medical specials are the only stipulations, which of course may be referenced.

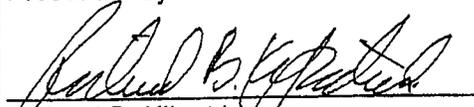
s. Defendant's Motion Number E was agreed and is granted with respect to Fedorchenko's employer's conduct but this does not preclude the mention of Mr. Fedorchenko's driving experience and such references in his deposition.

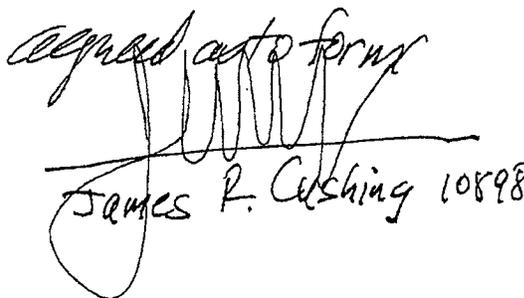
2. Both plaintiffs' and defendant's motions for reconsideration of summary judgment rulings are denied.

Done in open court this 9th day of November 2008


Judge Douglas McBroom

Presented by:


Richard B. Kilpatrick
Co-counsel for Plaintiffs
WSBA #7058


James R. Cushing 10898

JUDGEMENT, dated 12/16/08

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Honorable Doug McBroom

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STEVEN HERNANDEZ and CLEONA
HERNANDEZ, husband and wife,

No.: 03-2-24359-1SEA

Plaintiffs,

JUDGMENT ON VERDICT

v.

Clerk's Action Required

TIMOFEY FEDORCHENKO and JANE DOE
FEDORCHENKO, husband and wife, and the
marital community thereof

Defendants.

Judgment Summary

- A. Judgment Creditors: Steven and Cleona Hernandez, husband and wife
- B. Judgment Debtor: Timofey Fedorchenko
- C. Principal Judgment Amount: \$412,500.00
- D. Interest to Date of Judgment \$0.00
- E. Attorney Fees: \$200.00

JUDGMENT ON VERDICT
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Bellevue, WA 98004
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Kilpatrick.d@comcast.net

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- F. Costs: \$877.95
- G. Other Recovery Amount: \$ - 0 -
- H. Principal Judgment shall bear interest at 3.935% from the date of this judgment.
- I. Attorney fees, costs, and other recovery amounts shall bear interest at 3.935% per annum from the date of this judgment.
- J. Attorneys for Judgment Creditors: Richard B. Kilpatrick and Mary Fleck
- K. Attorney for Judgment Debtor: James Cushing

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FINDINGS AND ORDER

1. This case proceeded to trial October 13, 2008.

2. The Court submitted the issues to the jury and the jury returned a Special Verdict October 21, 2008.

3. The Special Verdict found for the plaintiffs with damages of \$500,000.00 for Steven Hernandez and \$50,000.00 for Cleona Hernandez.

4. The plaintiff contended before and during trial that the issue of Ms. Warmenhoven's negligence should not be in the trial. The full jury discussed the case with the Court alone immediately after the verdict before discussing it with the parties lawyers, and clearly found Ms. Warmenhoven was negligent for not staying in her own lane, finding her 25% of the combined negligence. The Court finds there was sufficient evidence or inference from evidence to support this jury finding.

5. There is no joint and several liability between defendant Timofey Fedorchenko and Wendy Warmenhoven so no set-off is appropriate for the earlier settlement with Ms. Warmenhoven.

6. Steven and Cleona Hernandez, husband and wife are therefore entitled to judgment against Timofey Fedorchenko for his share of the damages awarded

1 which totals \$412,500.00.

2 DONE IN OPEN COURT this 16th day of December 2008.

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Honorable Douglas McBroom

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Presented by:

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Richard B. Kilpatrick, WSBA #7058
Co-counsel for Plaintiffs

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JUDGMENT ON VERDICT
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