

66233-3

66233-3

No. 66233-3-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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JOHN BOILEAU, Respondent,

v.

SANG RYONG YOO (aka Sam Yoo), Appellant,  
CITY OF SEATTLE, Respondent, ANNA MARIE  
SECRETO, MARK R. GREGG and JANE DOE  
GREGG, AMANDA MCGARTY and JOHN DOE  
MCGARTY, Defendants,

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BRIEF OF APPELLANT

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2011-03-03  
COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON  


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A. Assignments of Error

Assignments of Error

No. 1. The trial court erred in entering the order of September 15, 2010, granting defendant City of Seattle's motion in limine excluding plaintiff's trial exhibits 10-14 and 16-17.

No. 2. The trial court erred in entering the order of September 15, 2010, granting defendant City of Seattle's motion in limine excluding testimony about enforcement activity regarding the intersection in question, and lay witness testimony about previous accidents.

Issues Pertaining to Assignments of Error

No. 1. On June 14, 2006, respondent John Boileau collided with appellant Sam Yoo at the intersection of North 80<sup>th</sup> Street and Fremont Avenue North in Seattle. Yoo contends that the stop sign controlling his direction was obstructed by branches from plum trees on property owned by defendant Amanda McGarty. Is evidence of a previous accident in 2002, and subsequent enforcement action by the City and remedial action by the property owner along with lay witness testimony about previous accidents in 2005 all involving the same trees and intersection, admissible to show a dangerous or defective condition and notice of a defect existing at the time of Mr. Yoo's accident of June 14, 2006?

No. 2. Are photographs of the subject intersection taken in July 2003 and lay witness testimony about personal observations of the subject intersection and tree involved in this action from 2003 to 2006 admissible to show a dangerous or defective condition and notice of a defect existing at the time of Mr. Yoo's accident of June 14, 2006?

B. Statement of the Case

This appeal concerns a motor vehicle accident at the intersection of North 80<sup>th</sup> Street and Fremont Avenue North, in Seattle, that occurred on June 14, 2006. North 80<sup>th</sup> Street had no traffic control lights at the intersection with Fremont Avenue North. RP, Testimony of Officer Karen Pio, p. 19-20, September 27, 2010. Stop signs were posted on the northwest and southeast corners of the intersection controlling travel on Fremont Avenue North. RP, Testimony of San Ryong Yoo, p. 6, 8-9, September 20, 2010.

Respondent John Boileau was traveling eastbound on North 80<sup>th</sup> when the accident occurred. RP, Testimony of Officer Karen Pio, p. 6, 16, September 27, 2010. Appellant Sam Yoo was traveling southbound on Fremont Avenue North. RP, Testimony of San Ryong Yoo, p. 6, September 20, 2010. Mr. Yoo failed to stop at the stop sign, continued onto North 80<sup>th</sup> Street, and was struck by Mr. Boileau. RP, Testimony of Officer Karen Pio, p. 6, September 27, 2010. After impact, Mr. Yoo was pushed through the

intersection, struck the stop sign on the southeast corner of the intersection and came to rest against a retaining wall. RP, Testimony of San Ryong Yoo, p. 8, September 20, 2010.

Defendant Amanda McGarty owned the property located on the northwest corner of the intersection at the time of the June 14, 2006 accident. RP, Testimony of Amanda McGarty, p. 5-6, September 29, 2010. She personally had resided there from 1999 through the beginning of 2002, and thereafter rented the premises. RP, Testimony of Amanda McGarty, p. 13, September 29, 2010. She regularly maintained the plum trees located in the planting strip on the southeast corner of her property up until the accident of June 14, 2006. RP, Testimony of Amanda McGarty, p. 14, September 29, 2010. The southeast corner of her property abuts the northwest corner of the intersection of North 80<sup>th</sup> Street and Fremont Avenue North. RP, Testimony of Amanda McGarty, p. 5-6, September 29, 2010. Prior to June 14, 2006, Ms. McGarty testified that she never had any concerns whatsoever with the trees on her property obstructing the stop sign near the southeast corner of her property nor was she aware of anyone else who had any such concerns about the stop sign. RP, Testimony of Amanda McGarty, p. 5-6, September 29, 2010.

On May 14, 2002, a citizen submitted a complaint to the City of Seattle indicating as a pedestrian crossing Fremont he had been struck by a

motorist who had failed to see the stop sign due to tree limbs encroaching on the street and blocking the stop sign on the southeast corner of Ms. McGarty's property. CP 24. The City inspected the intersection on May 17, 2002, and found that two fruit trees were blocking the view of the stop sign on the corner of North 80<sup>th</sup> Street and Fremont Avenue North. CP 25. The City issued a correction notice to the property owner that same day and returned on June 11, 2002 to confirm that corrective action had been taken. CP 23, 25.

Andrew Finseth resided on the southeast corner of North 80<sup>th</sup> Street and Fremont Avenue North at the time of the June 14, 2006 accident. RP, Offer of Proof re: Testimony of Andrew Finseth, p.4, September 20, 2010. He had lived at that location since 2003 and regularly drove southbound on Fremont Avenue North. RP, Offer of Proof re Testimony of Andrew Finseth, p. 4, September 20, 2010. In 2005 Mr. Finseth observed that the tree on the northwest corner of the intersection near the stop sign was becoming more and more overgrown. RP, Offer of Proof re Testimony of Andrew Finseth, p. 5, September 20, 2010. He stated that accidents began happening at a frequency of approximately once a month during the months of June, July, August and September of 2005. RP, Offer of Proof re Testimony of Andrew Finseth, p. 5, September 20, 2010. All these accidents involved vehicles traveling southbound on Fremont Avenue North

which collided with vehicles on North 80<sup>th</sup> Street. RP, Offer of Proof re Testimony of Andrew Finseth, p. 5, September 20, 2010. Based on his observations and experience, he believed that all the collisions he was aware of in 2005 occurred because of tree limbs blocking the view of the subject stop sign. RP, Offer of Proof re Testimony of Andrew Finseth, p. 7, September 20, 2010.

Two days following the June 14, 2006 accident, Mr. Yoo returned to the intersection approaching from the same direction. RP, Testimony of San Ryong Yoo, p. 9-10, September 20, 2010. He noted that until he got to within 10-15 feet of the intersection his view of the stop sign was blocked by tree limbs. RP, Testimony of San Ryong Yoo, p. 9-10, September 20, 2010.

On September 15, 2010, the court granted the City's motions in limine to exclude all exhibits and lay opinion testimony regarding any prior accidents and enforcement activity related to the stop sign and trees located on Ms. McGarty's property. CP 57-60. Mr. Boileau offered this evidence to show that a dangerous condition existed at the intersection on June 14, 2006, and that the City and Ms. McGarty were on notice of that defect or condition at the time of the subject accident. CP 49. With respect to the car/pedestrian accident of May 14, 2002, the property owner's remedial action, and the City's corrective action, the court reasoned that those circumstances did not constitute prior notice to the City or Ms. McGarty.

RP, Excerpt of Proceedings, Motions in Limine, p. 33, September 15, 2010. In response to the court's rulings, Mr. Boileau submitted an offer of proof of proposed testimony from witness Andrew Finseth to establish his knowledge of the stop sign and tree prior to June 14, 2006. RP, Excerpt of Proceedings, Motions, Offer of Proof re Testimony of Andrew Finseth, p. 4-7, September 20, 2010. Mr. Yoo also requested the court reconsider its rulings with regard to all exhibits and lay opinion testimony regarding any prior accidents and enforcement activity related to the stop sign and trees located on Ms. McGarty's property. CP 61-63. The trial court rejected the offer of proof of witness Finseth and denied Mr. Yoo's motion to reconsider its previous rulings on the basis that the proffered evidence did not involve substantially similar circumstances as the June 14, 2006 accident. RP, Excerpt of Proceedings, Offer of Proof re Testimony of Andrew Finseth, p. 7-10, September 20, 2010.

C. Argument

1. Standard of Review

The trial court's admission or exclusion of evidence of prior accidents is reviewed for abuse of discretion. *Stewart v. State*, 92 Wn.2d 285, 304, 597 P.2d 101 (1979). The trial court's decision will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion that is manifestly unreasonable, or exercised on untenable

grounds, or for untenable reasons. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). Mr. Yoo contends here that the trial court's conclusion that evidence of the prior accident was not substantially similar to justify admission was an abuse of discretion.

## 2. Evidence of Prior Accidents Is Admissible

Evidence of a prior accident is often admissible to establish a dangerous or defective condition and notice of a defect. *Porter v. Chicago, M., St. P. & P. R. Co.*, 41 Wn.2d 836, 841-42, 252 P.2d 306 (1953). Because there is an injection of collateral issues into the case, as a predicate for admission, there must be a substantial similarity shown between the proffer and the case at bar. *Blood v. Allied Stores Corporation*, 62 Wn.2d 187, 189, 381 P.2d 742 (1963). Each case presents a question ad hoc and leaves all collateral requirements as to similarity to the trial court's informed discretion. *Id.*

With respect to the issue of substantial similarity, the case of *Boeing Co. v. State*, 89 Wn.App. 443, 572 P.2d 8 (1978) is instructive. In *Boeing* the plaintiff's equipment was damaged when the truck and trailer upon which they were being carried was driven through an underpass on State Highway 167. *Boeing*, 89 Wn.App at 444-45. Regarding the issue of whether the previous accidents were sufficiently similar to justify admission, the *Boeing* court stated:

It appears that the respondent had to rely on appellant's records for evidence of past occurrences, and those records did not reveal the nature of the signs which were in place at the time of each accident, the time of day or night, or the direction in which the vehicle involved was traveling. We do not think these defects were sufficient to render the evidence inadmissible for the purpose for which it was offered. It was designed to show that a dangerous condition existed at the underpass. Other evidence showed that the appellant understood that all or most of these accidents were of the type experienced by the respondent's carrier.

*Boeing*, 89 Wn.App at 449. It is clear that the *Boeing* court did not require the type of similarity that the trial court required here to justify admission of evidence of previous accidents at the intersection of North 80<sup>th</sup> Street and Fremont Avenue North.

a. The 2002 accident

The accident in 2002 happened at the same part of the intersection as the June 14, 2006 accident. A motorist traveling south on Fremont Avenue North failed to yield the right of way and struck a pedestrian because tree limbs were blocking the stop sign located at the southeast corner of Ms. McGarty's lot. CP 24. The City inspected the site and confirmed that tree limbs were indeed blocking the view of the stop sign. CP 25.

The 2002 accident was substantially similar in that a motorist failed to yield the right of way just as Mr. Yoo failed to yield the right of way to

Mr. Boileau. At the time of both accidents, the tree on the southwest corner of Ms. McGarty's property was blocking the view of the stop sign. CP 25; RP, Testimony of San Ryong Yoo, p. 9-10, September 20, 2010. Lastly, the accidents happened at roughly the same time of year (the growing season).

The similarities here are greater than those present in the *Boeing* case. In *Boeing* was no evidence that the previous accidents occurred in the same direction involving the same warning signs, and still the evidence was admitted. Here, the accident involved the same direction, the same stop sign, and the same tree obstructing the view of the stop sign all at the same time of the year.

Moreover, the trial court stated that the basis for excluding evidence related to the 2002 accident was not because there was a lack of similarity, but rather, because that incident did not constitute notice to the City or Ms. McGarty, and. RP, Excerpt of Proceedings, Motions in Limine, p. 33, September 15, 2010. The 2002 accident, however, demonstrated that a dangerous condition existed at that time, and that the City and Ms. McGarty were aware of it then, and therefore it was probative of whether the condition existed at the time of this accident. The evidence should have been admitted.

b. The 2005 Accidents

In his offer of proof, Mr. Finseth stated that there were four other accidents in 2005 all involving motorists traveling south on Fremont Avenue North colliding with motorists traveling on North 80<sup>th</sup> Street. RP, Offer of Proof re Testimony of Andrew Finseth, p. 5, September 20, 2010.

All of the accidents involved a motorist failing to stop at the stop sign on the southeast corner of Ms. McGarty's property. The accidents all happened during the same time of year as Mr. Yoo's accident. Mr. Finseth concluded, based on his observations, that the accidents were caused drivers being unable to see the stop sign because of tree limbs blocking the view.

Mr. Finseth's observations are consistent with the fact that the tree blocked the stop sign in 2002, was pruned, became more and more overgrown by 2005, and blocked the vision of drivers up to the time of June 14, 2006. His observations would be admissible under Evidence Rule 701 which states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 701. His opinions were solely based upon his perception of the intersection over several years and his testimony clearly would have assisted the jury in determining if the stop sign blocked Mr. Yoo's view of the stop sign. He should have been allowed to testify about his observations of the intersection and accidents he was personally was aware of. His observations established substantially similarity of the previous accidents to the June 14, 2006 accident.

c. The 2003 Photographs

Photographs of the tree and stop sign taken in July 2003 show their proximity to the intersection in question. CP 7. The trial court excluded them on the basis that the photographs did not show a view of the direction Mr. Yoo was traveling. RP, Excerpt of Proceedings, Motions in Limine, p. 33-34, September 15, 2010. The photographs were not offered for that purpose, but rather for the purpose of illustrating the type of tree involved in the accident here and its proximity to the stop sign.

The admission or rejection of photographs lies in the sound discretion of the trial court. *Toftoy v. Ocean Shores Properties, Inc.*, 71 Wn.2d 833, 836, 431 P.2d 212 (1967). Since the photographs were to be identified by Mr. Finseth as accurately representing the intersection in July 2003, which was probative as to the issue of the growth of the tree Mr.

Finseth noted in 2005, and the accidents at that time, they should have been admitted.

d. The Trial Court Abused Its Discretion Here

The trial court's conclusion that the previous accidents were not sufficiently similar to justify admission was manifestly unreasonable, and exercised on untenable grounds and for untenable reasons. The 2002 accident was sufficiently similar to have placed the City and Ms. McGarty on notice of a dangerous condition then and that may have continued up to the time of this accident. Moreover, there was actual proof at that time that the tree limbs did in fact block visibility of the stop sign.

Regarding Mr. Finseth's offer of proof, the trial court stated that there was absolutely no evidence that the vision of the drivers in 2005 was obstructed, and yet the accidents happened in the same direction of travel, at the same time of the year, and at a time when Mr. Finseth noticed that the same tree near the same stop sign was becoming more and more overgrown. Given these facts, the only reasonable inference is that the stop sign was obstructed. Moreover, the *Boeing* court did not require proof of causation as to prior accidents. It required proof of substantially similar circumstances. Given the similarities to the prior accident and the purposes for which the evidence was offered, the evidence should have been admitted under the rationale of the *Boeing* case.

Finally, evidence of the prior accidents regarding the issue of the existence of a dangerous condition or notice of a dangerous condition and its importance to this case cannot be overstated. See, for example, *Evans v. Miller*, 8 Wn.App. 364, 507 P.2d 887 (1973). In *Evans*, a case involving a motorcycle collision with a cable gate across an access road, the court stated:

Both Miller and the Trout Club denied notice of a dangerous condition and the law does not charge them with notice in the absence of formal proof. Furthermore, the plaintiff could not adequately portray the alleged defective condition of the rusty cable except by proving the prior accident. Because the trial court's granting of the motion in limine precluded plaintiff from proving either the existence of a dangerous condition or that the defendants had notice of a dangerous condition, both being essential to the plaintiff's case, and because the established law specifically allows such proof when the circumstances surrounding the two accidents are similar, the granting of the motion was an abuse of discretion.

*Evans*, 8 Wn.App. at 367-68.

After the trial court granted the City's motions in limine, the only evidence remaining upon which Mr. Boileau could prove the existence of a dangerous condition or that the defendants had notice of a dangerous condition was Mr. Yoo's testimony that he went back to the intersection two days later and noted that the stop sign was obstructed by tree limbs. The trial court's rulings on the City's motions in limine therefore prevented Mr. Boileau and Mr. Yoo from proving that a dangerous condition existed

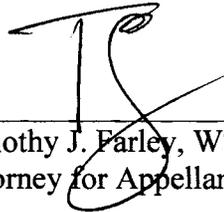
at North 80<sup>th</sup> Street and Fremont Avenue North, and that the City and Ms. McGarty were on notice of that condition at the time of the June 14, 2006 accident.

D. Conclusion

Mr. Yoo respectfully requests that the court reverse the trial court's judgments entered in favor of the City against Mr. Boileau, and in favor of Mr. Boileau against Mr. Yoo, and remand the case back to the trial court for a new trial on the issue of liability as to Mr. Boileau's claims against Mr. Yoo, the City, and Ms. McGarty.

DATED this 6<sup>th</sup> day of May 2011.

**FARLEY & DIMMOCK LLC**



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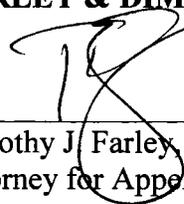
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**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that I mailed a copy of the foregoing Brief of Appellant to the parties listed below, postage prepaid, on May 6, 2011.

DATED this 6<sup>th</sup> day of May, 2011, at Everett, Washington.

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