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Case No. 68426-4

**COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON**

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

HALEY-MORGAN JONES,

Plaintiff (Appellant),

v.

**PABLO E. HUARACHA-ANGEL and CYNTHIA HUARACHA, husband and wife,
and the marital community composed thereof; and JOHN DOE and JANE DOE,
husband and wife, and the marital community composed thereof; and RICHARD
ROE; and ABC CORPORATION; and XYZ CORPORATION,**

Defendants (Respondents).

BRIEF OF APPELLANT

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INTRODUCTION

The plaintiff Haley-Morgan Jones filed the present litigation as a result of a motor vehicle collision that occurred on Interstate 5 southbound near Mount Vernon, Washington, on November 18, 2007. An unidentified vehicle in the lane beside her moved across her path of travel, clipping the front end of her car.¹ The Jones vehicle wobbled and came to rest. Defendants Pablo and Cynthia Huaracha, who had been following behind the plaintiff's car in their SUV, subsequently collided with the side of the Jones vehicle. Ms. Jones hit her head in the collision and suffered a constellation of other injuries, including post-incident amnesia.¹ Her amnesia significantly compromises her ability to serve as fact witness regarding the mechanics of the collision. The Huarachas do not dispute Ms. Jones was injured.²

In October 2011, the Huarachas filed a motion for summary judgment dismissal of the plaintiff's claim. As the moving party, the Huarachas bore the initial burden of establishing the absence of any issue of material fact based on the evidence presented.

The motion was heard on February 7, 2012, by Skagit County Superior Court Judge Meyer. In support of their motion, the Huarachas proffered evidence that strongly suggested their vehicle had left inadequate following distance behind Ms. Jones. They also presented inconsistent versions of how the collision occurred, raising clear issues of material fact as to whether Mr. Huaracha's pre-crash conduct complied with legal obligations for safe operation of a "following vehicle" pursuant to RCW 46.61.145.

Despite the movant Huarachas' own evidence, the judge shifted the burden of proof to Ms. Jones and challenged her to give evidence of non-liability. He granted summary dismissal without considering whether the Huarachas' uncontroverted evidence regarding their own speed and following distance presented triable issues of negligence upon which reasonable persons could disagree.

¹ CP 138, 139

² CP 154

Ms. Jones contends that the evidence on the record before the court did not suffice to meet the Huarachas' initial burden of persuasion as the moving party on summary judgment, because facts before the court wholly within their knowledge and control created evident material issues of fact unsuitable for determination by summary judgment.

Ms. Jones seeks reversal of the court's summary judgment dismissal order, vacation of the prevailing party attorney's fee award issued on behalf of the defendants, and remand to the Skagit County Superior Court for further proceedings.

ASSIGNMENTS OF ERROR

- A. Did the trial court err in dismissing the plaintiff's claim upon summary judgment, when the defendants' own evidence in support of their motion created issues of disputed material fact?
- B. If dismissal of the plaintiff's claim constitutes reversible error, should the trial court vacate the defendant's award of prevailing party attorney's fees?

STATEMENT OF THE CASE

The 2007 Crash and Its Aftermath

The motor vehicle collision giving rise to this litigation occurred on I-5 southbound just north of the State Route 20 interchange in Mount Vernon, Skagit County. Interstate 5 at that location is a divided highway with two southbound travelling lanes, and a right-side deceleration and exit lane to SR 20.

Ms. Jones, then age 23, was driving her 2000 Toyota Celica southbound in the right hand travel lane. She had two passengers with her in her vehicle, Tamra Mulvihill and Kayla Hochstetter. They were driving to Seattle to shop. Mrs. Huaracha deposed that Ms. Jones was driving properly.³ The state trooper attending at the scene agreed.⁴ No fault is ascribed to Ms. Jones.

³ CP 147

⁴ CP 337

The Huarachas were a “following vehicle” behind the plaintiff in the same lane. Pablo Huaracha declared they were travelling at about 58-60 miles per hour.⁵

At this speed, Pablo Huaracha says he was keeping 5 or 6 car lengths separation between their vehicle and Ms. Jones’ in the moments immediately prior to the collision.⁶ Cynthia Huaracha says it was 5 car lengths.⁷ She also says that before the collision they had full control of their truck and were not interfered with by any other vehicle.⁸

A third vehicle, described as a pick-up truck, unexpectedly moved from the left lane of through travel across to the deceleration/exit lane for SR 20. In the course of its sudden maneuver across her lane of travel, this unidentified vehicle crossed in front of Ms. Jones and clipped the left front corner of her car. Viewing the initial collision from their vantage point in their following vehicle, Cynthia Huaracha said this put Ms. Jones’ car into a wobble or a snake-like movement, eventually coming to rest on the side of the highway perpendicular to the direction of travel.⁹ Police were not able to locate the “phantom” pick-up truck that caused the initial collision, and the driver of that car remains unidentified.

Mr. Huaracha said his reaction at seeing Ms. Jones was to reduce his speed.¹⁰ Mrs. Huaracha, rather, says she yelled at her husband to slam on the brakes.¹¹ They went into a skid, and hit Ms. Jones on her exposed, driver’s side.

Application of simple mathematics combined with an approximate sense of the length of the defendants’ vehicle makes it plain that the defendants were leaving minimal stopping distance between themselves and the plaintiff’s car. The Huaracha’s 2003 GMC Yukon was manufactured by General Motors Corporation. This Court may take judicial

⁵ CP 274

⁶ CP 206-207

⁷ CP 213

⁸ CP 150

⁹ CP 146, 156, 166, 215

¹⁰ CP 275

¹¹ CP 151, 153

notice of the fact that GMC in its published marketing material¹² says the vehicle is 199 inches long, about 16.5 feet. Taking Cynthia Huaracha's estimated following distance of five car lengths, and a vehicle length of 16.5 feet, the Huarachas evidence is they were following by only of 82.5 feet. At 60 mph they were travelling 88 feet per second.¹³ Thus, the defendants had kept less than a one-second closing time between themselves and the Jones vehicle, on their own evidence.

Cynthia Huaracha corroborates this following-time calculation. She says that everything happened "in one second."¹⁴ Nonetheless she says they were keeping a safe distance¹⁵.

The defendants rammed the side of Ms. Jones' stationary vehicle. She was knocked unconscious and has consistently, including through her deposition, testified to a significant period of amnesia surrounding the accident.¹⁶

Washington State Patrol Trooper Mike Rudy attended at the scene. He did not witness the collision. He interviewed Pablo Huaracha, who told him that Ms. Jones' vehicle was in a spin when he hit her, not standing still. He drew a sketch which the defendants put in evidence for its truth.¹⁷ Cynthia Huaracha says that Trooper Rudy questioned her and her husband at the same time, as a single conversation. Trooper Rudy in later deposition said that he did not speak Spanish, which was Pablo Huaracha's native language; thus, Cynthia Huaracha was both being interviewed by Trooper Rudy, and acting as an interpreter for the interview of her husband.¹⁸

¹² <http://www.cars.com/gmc/yukon/2003/specifications/>. While RAP 9.11 would allow this Court to take additional evidence as to the exact length of the Huaracha vehicle, the plaintiff contends such a procedure would be burdensome and unnecessary given the precise point in issue. Evidence Rule 201 permits this court to take judicial notice of facts at any point in a proceeding. If this Court does not accept that GMC's own calculation of the length of a 2003 Yukon is the type of evidence suitable for a finding of judicial notice, the plaintiff would in the alternative urge this Court to substitute its own estimate for the length of an American model SUV of like vintage. Whether this Court's "judicial" estimate was 15 feet, 20 feet, or somewhere in between, we contend that the assumption from the evidence remains that the defendants were leaving *approximately* one second's worth of "following distance" between themselves and the plaintiff's vehicle in the moments just before the collision occurred.

¹³ 60 miles/hr. = 1 mile/min. = 5280 feet/min. = 88 feet/second.

¹⁴ CP 151

¹⁵ CP 319

¹⁶ CP 138, 139

¹⁷ CP 243

¹⁸ CP 142, 143

Trooper Rudy said he saw skid marks adjacent to the collision site which he believed were made by the vehicles involved¹⁹. The alleged skid marks were not photographed or measured. The vehicles were photographed, but not measured.

The Huarachas do not deny Ms. Jones was hurt.²⁰ She suffered a concussion and loss of memory of incidents surrounding the collision. She pled and has deposed to several other injuries include photophobia, ongoing dizziness, damage to her chest musculature, asymmetrical and deformed breast growth which will require surgery, and facial scarring from broken glass.

Procedural History of the Skagit County Litigation

Ms. Jones brought her action in negligence in Skagit County Superior Court on November 12, 2010. Plaintiff's counsel initially took instructions from Ms. Mulvihill and Ms. Hochstetter, the passengers in the Jones vehicle, to include them as claimants, to protect their interests prior to the running of the limitation period. They subsequently became self-represented, and are not before the Court as parties in the present action.

On October 16, 2011, the Huarachas filed their motion for summary judgment. They asserted the collision between their SUV and the Jones vehicle was unavoidable, and that there was nothing they could have done to avoid hitting the stationary Jones vehicle.²¹

Trooper Rudy was deposed by defense counsel on November 16, 2011, with lengthy redirect by plaintiff's counsel. He said he interviewed both the Huarachas in one conversation, with Mrs. Huaracha serving both as a witness and interpreter of her husband's evidence.²² Trooper Rudy did a drawing of the incident for the Huarachas. It cannot be determined from the record which of the defendants told him what, and which of them instructed him as to the drawings.

¹⁹ CP 339 - 340

²⁰ CP 154

²¹ Answer p. 4, CP 29

²² CP 361

Curiously, in his deposition under questioning by the Huarachas' counsel, Trooper Rudy said he did not think Ms. Jones was swerving.²³ He was not an eyewitness and contradicts the evidence of the persons he interviewed. The only possible explanation for Trooper Rudy's opinion is confusion as between the versions of events presented by the Huarachas, and his misunderstanding of their evidence.

Plaintiff's counsel initiated a dialog with defense counsel to fix a pre-trial schedule for all discoveries and trial.²⁴ Defense counsel declined and insisted the summary judgment matter proceed before Ms. Jones could fully probe the ramifications of the Huarachas sworn testimony respecting following distances, based on scientific analysis.

Because of the critical need to isolate all time and motion evidence and subject it to scientific inquiry at trial, plaintiff's counsel deposed the Huarachas on January 4, 2012.

The Huarachas' summary judgment motion was heard on February 6, 2012, with the Clerk's notes indicating judgment was reserved and would be rendered by letter to counsel. The next day, February 7, the court endorsed a form of order substantially in the form sought by defense counsel, with the addition of manuscript notes holding Ms. Jones not at fault for the collision and acknowledging that the evidence before the court suggested that physical contact between the "phantom" pick-up truck and the Jones vehicle had occurred.²⁵

Ms. Jones appeals from the portion of the order dismissing the claim against the Huarachas. Errors in the course of the summary judgment hearing are set out in detail, below.

²³ CP 333

²⁴ CP 11

²⁵ CP 236

ARGUMENT

A. **The trial court erred in dismissing the plaintiff's claim upon summary judgment, because the defendants' evidence on the record created issues of disputed material fact.**

Simply put, the plaintiff contends that the moving party's uncontroverted evidence suggesting they were following "five car lengths" behind her vehicle at 60 miles per hour raises a triable issue of material fact as to whether they were "following too closely" for speed and conditions as defined in RCW 46.61.145. Again, this Court could elect to take judicial notice of the fact that the Washington State Driver Manual urges drivers to apply a "four second" following distance rule.²⁶ Based on that standard, at 60 m.p.h. the Huarachas would be required to keep a following distance of 352 feet (88 ft./sec. x 4 seconds).

Instead, the evidence viewed in the light most favorable to the non-moving party suggests they followed a "one-second rule" leaving only 82.5 feet (five car lengths) of separation. Whether such a modest following distance complies with the requirements of RCW 46.61.145 is unquestionably an issue upon which reasonable minds could differ, thus presenting a disputed issue of material fact and rendering this case unsuitable for summary dismissal under Civil Rule 56.

1. **Applicable Standards of Review of Summary Judgment.**

a) *Review from Summary Judgment is a trial de novo.*

The purpose of summary judgment is to avoid a useless trial. A trial is not useless, but absolutely necessary, where there is a genuine issue of any material fact. Preston v. Duncan, 55 Wn.2d 678, 681-82 349 P.2d 605 (1960).

In reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court. Summary judgment is proper only if the pleadings, depositions and affidavits show there is no genuine issue as to any material fact and that the moving

²⁶ <http://www.dol.wa.gov/driverslicense/docs/driverguide-en.pdf>, at page 71.

party is entitled to judgment as a matter of law. Gossett v. Farmers Ins. Co., 82 Wn. App. 375, 381, 917 P.2d 1124 (1996), rev. in part, 133 Wn.2d 954, 948 P.2d 1264 (1997).

In the course of conducting this *de novo* review, the appellate court must consider all material facts in the light most favorable to the non-moving party. Hayes v. City of Seattle, 131 Wn.2d 706, 711, 934 P.2d 1179 (1997), modified on other grounds, 943 P.2d 265 (1997). This presumption extends to all evidence presented in support or opposition to the motion, and all reasonable inferences drawn therefrom. Marino Property v. Port of Seattle, 88 Wn.2d 822, 824, 567 P.2d 1125 (1977).

The reviewing court is entitled to affirm the judgment of dismissal only if reasonable persons could reach but one conclusion from all the evidence. Condor Enterprises, Inc. v. Boise Cascade Corp., 71 Wn. App. 48, 54, 856 P.2d 713 (1993), quoting Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

b) The burden of proof is on the moving party.

Civil Rule 56 requires the moving party to prove affirmatively the absence of dispute about any material facts. CR56(c) reads in part:

... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Washington Supreme Court's decision in Young v. Key Pharmaceuticals, Inc. et al., 112 Wn.2d 216 (1989), explained how this burden of proof operates in practice:

In a summary judgement motion the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant and meets this initial showing, then the enquiry shifts to the party with the burden of proof at trial, the plaintiff. *Id.* at 225 (internal citations omitted).

The burden of proof is on the party moving for summary judgment to establish its right to judgment as a matter of law. Hansen v. Horn Rapids O.R.V. Park, 85 Wn. App. 424, 429, 932 P.2d 724, rev. denied, 133 Wn.2d 1012, 946 P.2d (1997).

This burden requires the movant to cross the initial threshold of showing there are no issues of material fact requiring trial. Hash v. Children's Orthopedic Hospital & Med. Ctr., 49 Wn. App. 130, 132, 741 P.2d 584 (1987), aff'd, 110 Wn.2d 912, 757 P.2d 507 (1988).

The movant must prove by uncontroverted facts that no genuine issue exists. Ashcraft v. Wallingford, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977). If the movant fails to sustain this initial burden, it is unnecessary for the nonmoving party to submit affidavits or any other materials in opposition, as the motion must fail.

The non-moving party does not bear this initial burden. The burden of proof shifts to the non-moving party only if the moving party affirmatively proves the absence of dispute about any material facts.

Further, if the movant relies upon uncontroverted facts susceptible of more than one reasonable interpretation, summary judgment may be improper. Hash, supra; see also Graves v. P.J. Taggares Co., 94 Wn.2d 298, 303, 616 P.2d 1223 (1980)(accord).

c) *Liability for following too closely.*

Pablo Huaracha was a "following driver" in respect to his position *vis à vis* the plaintiff's vehicle. RCW 46.61.145 (1) establishes a duty of care on a following driver, who has an affirmative duty to keep a safe following distance:

"The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

A following driver must keep such distance from the car ahead and maintain such observation that a stop may safely be made even in emergent circumstances. Ritter v. Johnson, 163 Wash. 153, 300 P. 518 (1931). It follows that a following driver pleading "emergency" must be without fault themselves.

A following driver has the primary responsibility of avoiding a collision, and is negligent in the event of a collision during any action of the lead car, including emergency actions, which might be anticipated under the circumstances. The conditions and practicalities of driving on a high-speed limited-access highway should be considered by the trier of fact, where applicable, in determining what actions of a lead driver might reasonably be anticipated: Ryan v. Westgard, 12 Wn. App. 500, 530 P.2d 687 (1975).

The degree of care required by a following driver is that care which a reasonably prudent person would exercise in like or similar circumstances: Tackett v. Milburn, 36 Wn.2d 349, 218 P.2d 298 (1950) and Johnson v. Watson, 11 Wn.2d 690, 120 P.2d 515 (1941).

In determining each case under this section, conditions of highway traffic, acts of parties and all surrounding circumstances must be taken into consideration: Nelson v. Brownfield, 21 Wn.2d 898, 153 P.2d 877 (1944); Johnson, supra.

Vanderhoff v. Fitzgerald, 72 Wn.2d 103, 431 P.2d 969 (1967) affirms that the duty of care upon a following driver persists whether there is an emergent situation, or not. Put conversely, even where an emergent situation exists, the following driver is not absolved. Instead, the reasonableness of their conduct remains a question of fact on which the court must hear evidence.

In the case at bar, the collision occurred on an interstate highway in an urban area, near an off-ramp where other vehicles normally would, and could be expected to, make lane changes and exit the highway. A following driver should operate their vehicle accordingly, including leaving adequate following time and distance.

d) *Factual inferences are to be made in the light most favorable to the non-moving party.*

The court in Young, supra, repeated the rule that inferences must be made only in a light most favorable to the non-moving party:

... the evidence and all reasonable inferences therefrom is considered in the light most favorable to the plaintiff, the nonmoving party. An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. *Young* at 226.

e) *Facts exclusively within the movant's knowledge are best left to trial.*

Summary judgment may be inappropriate when material facts are particularly within the knowledge of the moving party. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 429, 788 P.2d 1096 (1990), citing *Felsman v. Kesler*, 2 Wn. App. 493, review denied (1970). The reason is to protect the nonmoving party from precisely the thrust of the defendant's argument that the plaintiff must swear to facts she cannot possibly know. Justice requires that she be allowed the tools of civil proof of facts, which requires trial.

The Huarachas knocked Ms. Jones unconscious. She plead this fact from the outset²⁷ and she was questioned at length in deposition.²⁸ Her evidence is clear and consistent on that point. Accordingly, material facts informing their breach of duty of care are exclusively within their knowledge. In turn, their evidence supports a conclusion they were following too closely. Their motion must fail.

The Huarachas argue that because Ms. Jones, who sustained a loss of memory, cannot enunciate a legal theory of the Huaracha's negligence from her own visual observations, she has failed to prove her case.²⁹ This is incorrect both as to the substantive law of negligence and rules respecting proof of facts. Moreover, it is not a legal analysis that can be entertained on a summary judgment motion.

In Sur-Reply, despite Ms. Jones' pleadings and her evidence, the defendants said she "now claims amnesia," improperly and unfairly intimating fabrication.³⁰ The defendants had been offered her medical records early in the proceedings,³¹ and declined to receive them.

²⁷ CP 20

²⁸ CP 132-139

²⁹ CP 250

³⁰ CP 172

³¹ CP 7

The Huaracha's own evidence overwhelmingly establishes there are significant live issues for trial. They failed to prove "no material facts" as they must, and their summary trial motion must be dismissed.

f) Hearsay and evidence outside personal knowledge are not permitted.

The moving party may not rely upon affidavit evidence that is not based on personal knowledge, as they do not provide facts that constitute competent evidence. State v. Dan J. Evans Campaign Comm., 86 Wn.2d 503, 506, 546 P.2d 75 (1976).

Likewise, hearsay evidence contained in an affidavit either supporting or opposing summary judgment is not competent evidence and does not meet the requirements of CR 56(e). Charbonneau v. Wilbur Ellis Co., 9 Wn. App. 474, 477, 512 P.2d 1126 (1973).

In submissions below, plaintiff's counsel indicated the problem of multiple hearsay posed by Trooper Rudy's evidence of interviewing Mr. Huaracha through his wife, that account then being appended to a declaration sworn by defence counsel. This evidence would not be admissible at trial and was not competent to support the summary judgement motion.³²

2. The trial court shifted the burden of persuasion to the plaintiff to refute the movants' right to summary judgment, which constitutes reversible error based on the quantum of evidence presented for the court's review.

The hearing below began with several pretrial matters, including Ms. Jones' counsel's attempt to have the Huarachas produce a prior written statement they had made.³³

The oral hearing of the summary judgment motion began with the court inquiring what evidence Ms. Jones could proffer. Contrary to the burden of proof under CR 56, the judge did not call first on the Huarachas. The substantive part of the hearing began this way:

³² CP 100

³³ RP 1-9

MR. RICHARDSON: ... I would suggest we can proceed with the application on its merits. I have not asked for a continuation, in the alternative should it be necessary.

But the extraordinary difference of evidence, even between clients and the police officer, defendants and police officers on the face of it indicates all of the factual issues that are disputed at trial, causation, closing statements.

THE COURT: What have you provided? And I guess we're getting into the merits now, but what in all of your pleadings or all of your affidavits present admissible disputed material fact?³⁴ (Emphasis added.)

In response to this question counsel for Ms. Jones immediately urged the court to note it was applying the wrong burden of proof:

MR. RICHARDSON: Well, first it's the defendant's primary initial burden to show an absence of any material fact. Then I move my client –

THE COURT: The defendant says that it was an unavoidable accident.

MR. RICHARDSON: Which is a conclusion of law, yes.

THE COURT: He says there's nothing I can do about it.³⁵

The Huarachas' assertion paraphrased by the court as "there's nothing I can do," and evidently accepted as proof of fact in and of itself, is a conclusion of fact and law to be found by the trier of fact. It is not evidence. The judge accepted a bald denial of liability as sufficient to shift the burden of proof – despite uncontroverted evidence presented by the movants themselves that cast doubt upon the merits of their assertion.

With the wrong burden of proof in play, the judge undertook to hear the matter on the merits first requiring Ms. Jones to make a case, not the Huarachas as required by law. The court continued:

THE COURT: Then that would seem to me to put the burden on you to say that's not how it happened. I'm going to hear it on the merits. Let's hear your position. Tell me what you have provided that can lead me to conclude that there's a dispute as to how this accident occurred.³⁶ (Emphasis added.)

³⁴ RP 9

³⁵ RP 10

³⁶ RP 10

Plaintiff's counsel thus spoke to the issue first. The Court only then heard from movant's counsel. Despite the order of proof being reversed by the judge, the Huaracha's counsel affirmed their evidence on the record. This evidence, when viewed in the light most favorable to the non-moving party, indicated they were following far too closely – a one second gap at about 60 miles per hour.

The Huarachas' counsel, in her oral submissions at the summary judgment hearing, herself put her clients' speed and following distance squarely before the court, and invited the connection to potential negligence. She said:

Here's what that conglomerate [sic] of evidence produces. Mr. Huaracha was driving between 55 and 58 in the slow lane³⁷, which matches the speed of Ms. Jones. His following distance, according to him, is six cars. His wife says five to six car lengths back. As to distraction, maybe you've got speed and distance, distraction would be the only other factor I can think of that might serve to pin negligence to.³⁸

The trial judge erred – because he had earlier reversed the burden of proof – in not immediately apprehending that the Huarachas had failed to prove absence of any disputed material fact. The evidence cited by defence counsel arguably would suffice to support a motion for judgment in favor of Ms. Jones.

In Sur-Reply, defence counsel asserted:

“... *there is no evidence* that Huaracha was following too closely, going too fast, or otherwise acting unreasonably”.³⁹ (Emphasis in original.)

On her clients' evidence, this was simply incorrect and did not guide the court correctly on the evidence.

“Following too closely” was explicated at length in Ms. Jones' Response to Summary Judgment Motion.⁴⁰ The court was on notice this was a theory of negligence to be determined on the facts. To grant summary judgment the court must have concluded that no reasonable person would find that a "one second rule" for following distance was

³⁷ He in fact had declared up to 60 mph. CP 274

³⁸ RP 15

³⁹ CP 176

⁴⁰ CP 98 *et seq.*

negligent. The plaintiff contends reasonable minds could clearly differ on this key issue. In the final result, the trial judge passed though both branches of the test, on a reversed burden of proof, without turning his mind to the Huarachas' own evidence indicating a high likelihood of following too closely – evidence on which the court was obligated to dismiss the motion as a matter of law.

3. The trial court overlooked significant problems with the Huarachas' credibility on issues wholly within their knowledge and control, leading to a dismissal order which improperly invaded the province of the trier of fact.

The Huarachas initially asserted in their answer to the plaintiff's complaint that Ms. Jones caused the collision.⁴¹ The trial judge found as an issue of fact that she was not at fault.

Ms. Jones's uncontroverted evidence is that she suffers from a period of post-accident amnesia as a result of a head injury sustained in the collision. Recalling Gingrich, supra, this fact alone mandates meticulous evaluation of the Huarachas' evidence, as they provide key eyewitness evidence which the plaintiff cannot proffer on her own behalf. Yet their story is in many aspects inconsistent. The defendants cannot even agree whether Ms. Jones was stopped still, or spinning in a circle as they reported to Trooper Rudy, when they hit her.⁴² This is a contradiction that cannot be overlooked.

The facts upon which the defendants do agree points squarely in support of their own negligence, fatally undermining their summary judge motion. Their evidence on speed of travel and separation of vehicles establish they were driving much closer to Ms. Jones than the standard of care likely requires. At a minimum, this issue should have been properly left to the trier of fact, not summarily resolved as a matter of law.

In addition to the clear issues of material fact raised by their own evidence regarding following distance, the Huarachas' case is fraught with several collateral issues of credibility. Trooper Rudy's opinions as to how the accident occurred and who was at fault are not credible or admissible evidence in support of summary judgment. He was not

⁴¹ CP 28

⁴² CP 142, 143, 243, 333, 361

an eyewitness. He did no calculations based on his observations of skid marks or vehicle damage.

Moreover, when he wrote his report in 2007 and was deposed in 2011, he had not heard the Huarachas' January 2012 testimony on following distance and speed. Trooper Rudy's evidence also is not assistful. He said he took measurements of skid marks but produced no record of it.

The case is one which calls out for professional accident reconstruction and trial on the merits. But such reconstruction should not have been a requirement merely to survive summary judgment, when the Huarachas' evidence regarding following distance was clearly inculpatory, and in light of the numerous collateral contradictions and evidentiary problems presented by other elements of their version of events.

B. As dismissal of the plaintiff's claim constituted reversible error, the trial court award of prevailing parties' attorney fees must also be vacated.

A party is entitled to obtain review of a trial court decision on attorney's fees, costs and litigation expenses in the same review proceeding as that challenging the judgment without need to file a separate notice of appeal. RAP 7.2(i); see also RAP 2.4(g).

As prevailing party below, the defendants were entitled to an award of reasonable attorney's fees and costs pursuant to the Revised Code of Washington and applicable court rules. An order and judgment to that effect was entered by the trial court on March 6, 2012. Should this Court conclude that the trial court committed reversible error in granting summary judgment dismissal of this action, the statutory rationale underlying the award of fees and costs would be extinguished. In that event, the plaintiff would be entitled to have the judgment for fees and costs vacated, and seeks an order from this Court to that effect.

The plaintiff further seeks costs of this appeal pursuant to RAP 14 as this Court deems just, with a costs bill to follow the cause pursuant to RAP 14.4.

CONCLUSION

The plaintiff asks that this Court of Appeal:

- (a) reverse the decision of the Superior Court granting the defendants' summary judgment motion;
- (b) vacate the order for attorney's fees in the Superior Court;
- (c) order the trial of the action;
- (d) vacate the award of attorney's fees at the hearing below; and,
- (e) award attorney's fees of this appeal to the plaintiff.

DATED this 14th day of August 2012.

Respectfully submitted,



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