

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

Colin Bowers, Appellant,

v.

Pamela M. and Jerry Marzano, Respondents

BRIEF OF APPELLANT

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STATE OF WASHINGTON
BY DEPUTY

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TABLE OF CONTENTS

Identification of Parties5

Introduction.....6-7

Assignments of Error.....7-8

Issues relating to Assignments of Error.....8-10

Statement of the Case.....11-21

 Procedural history11

 Underlying facts and reasonable inferences.....11-14

 Opinions of Colin Bowers’ Accident Reconstruction and Traffic Safety Expert ... 14-16

 Opinions of Colin Bowers’ Biomechanical Engineer.....16-18

 Court’s Rationale for Summary Judgment..... 18

 Colin Bowers’ explanation of point of notice in terms of distance during Reconsideration...19-21

Argument.....21-50

(Issue 1 a) There is nothing in the law precluding a disfavored driver from proving the crash wouldn’t have happened but-for the 21-25

favoring driver's fault by showing a measure of time before the accident when a reasonable driver should have noticed the failure to yield and acted to avoid to avoid the collision

(Issue 1.b) Colin Bowers adduced sufficient facts to support issues for trial regarding a) when Ms. Marzano should have been on notice that the Subaru had failed to yield and b) that reasonable actions after that point would have avoided the accident, and c) due to her negligence Ms. Marzano failed to either notice the Subaru's failure to yield or take reasonable actions to avoid the accident. 26-38

(Issue 2.a) The evidence supports issues for trial that Ms. Marzano was speeding at the time of the accident, and that her excessive speed enhanced Colin Bowers' injuries by a quantifiable amount. 38-42

--Evidence supporting conclusion that excessive speed caused quantifiable injuries 38

--Argument that evidence would support conclusion that there would have been **no** injuries but-for excessive speed 39-42

(Issue 2.b) Washington authority does not clearly hold that proof that the accident would have been completely avoided but-for the excessive speed is a prerequisite for claims for enhanced injuries from excessive speed where there is competent evidence relating the degree 42-46

of enhancement to the excessive speed .

(Issue 2.c) Allowing such a claim is consistent with Washington tort law in other areas and with Washington’s policy of holding parties responsible for damages caused by their negligence. 46-50

Conclusion.....50

TABLE OF AUTHORITIES

WASHINGTON CASELAW

<i>Channel v. Mills</i> , 77 Wn. App. 268 (1995)...	22,23,25,26,42
<i>Doherty v. Metro. Seattle</i> , 83 Wn. App. 464... (1996)	25,26, 41, 45, 46, 49
<i>Felsman v. Kessler</i> , 2 Wn. App. 493 (1970)...	38
<i>Grobe v. Valley Garbage Service</i> , 87 Wn.2d.. 217 (1976)	24, 25, 42, 43
<i>Hough v. Ballard</i> , 108 Wn. App. 272 (2001)	30, 31
<i>Jenkins v. Snohomish Cty PUD. 1</i> , 105 Wn.2d 99 (1986)	27
<i>Holmes v. Wallace</i> , 84 Wn. App. 156 (1996)...	29

<i>McCormick v. Hannenberg</i> , 170 Wn. 133... (1932)	25
<i>Morris v. McNichol</i> , 83 Wn.2d 491 (1974)...	26
<i>Riley v. Andres</i> , 107 Wn. App. 391, 398 (2001)	38
<i>Tao v. Bin</i> , 140 Wn. App. 825 (2007).....	26, 49
<i>Theonnes v. Hazen</i> , 37 Wn. App. 644 (1984)...	34, 42, 43
<i>Whitchurch v. McBride</i> , 63 Wn. App. 272... (1991)	22, 23, 25

WASHINGTON STATUTES

RCW 46.04.220	31
RCW 46.04.611	32
RCW 46.61.400	30, 31

I. Identification of Parties

Appellant and plaintiff below is Colin Bowers, the passenger in an auto intersection collision. He is referred to by his full name to distinguish him from Walter Bowers, a party

below and is a person whose actions must be described in relating the facts of the case.

Walter Bowers is not a party to this appeal. He was the driver of the Subaru in which Colin Bowers was passenger and is a defendant below.

Respondents and defendants below are the Marzanos. Pamela Marzano was the driver of the Chevrolet Silverado truck which collided with the Subaru. When referring to her actions as a driver or her testimony as a witness she is referred to as Ms. Marzano.

II. Introduction

On a clear summer day in 2008 Colin Bowers suffered severe head injuries when a massive Silverado extended cab pickup barreled into the passenger side of the Subaru where he was sitting. The Subaru's driver had run a stop sign and was at fault, but had woefully inadequate resources to compensate Mr. Bowers for his losses. Mr. Bowers is asking this court to let a

jury decide whether the driver of the Silverado shared any blame for not seeing and heeding a warning sign and not proceeding with due care and noticing and reacting to the clearly visible slow moving Subaru within the time when a reasonable careful person would have been able to avoid the crash.

Even if he can't prove that the Silverado driver should have completely avoided the crash, Mr. Bowers is also asking this Court to let a jury decide whether the Silverado driver bears responsibility to the extent he can prove that her excessive speed measurably worsened his injuries.

II. Assignments of Error

Error 1: It was error to grant summary judgment of dismissal where the evidence supported issues for trial whether a) Ms. Marzano was negligent in speeding and driving inattentively, b) as a result of her negligent inattention Ms. Marzano failed to

observe a hazard that would otherwise have come to her attention within the time when reasonable actions would have avoided the accident, and c) due to her negligence Ms. Marzano failed to make any attempt to avoid the crash.

Error 2. Regardless of whether there was an issue for trial whether reasonable care under the circumstances by Ms. Marzano would have completely avoided the crash, it was error to dismiss the claim for enhanced injuries where the evidence supported issues for trial regarding both the excessiveness of Ms. Marzano's speed and the extent of enhancement of Colin Bowers' injuries due to the excessive speed

IV. ISSUES RELATED TO ASSIGNMENTS OF ERROR

Issue 1 a. For a disfavored driver or to prove that fault of a favored driver proximately caused injury he must prove a) "point of notice" when the favored driver should

reasonably have recognized that the disfavored driver had not yielded the right of way, and b) that reasonable actions taken after the point of notice would have avoided the accident. Can “point of notice” be proven in terms of a period of time before the crash when the failure to yield should have been noticed and when action would have been effective to avoid the crash, or must “point of notice” be proven in terms of physical distance from collision where notice occurred and where avoidance measures should have been undertaken?

Issue 1.b: Did Colin Bowers adduce sufficient facts to support issues for trial regarding a) when Ms. Marzano was on notice that the Subaru would fail to yield, b) that reasonable actions after that point would have avoided the accident, and c) due to her negligence Ms. Marzano failed to either notice the Subaru’s failure to yield or take reasonable actions to avoid the accident?

Issue 2.a: Does the evidence support issues for trial whether Ms. Marzano was speeding at the time of the accident, and whether her excessive speed enhanced Colin Bowers' injuries by a quantifiable amount.

Issue 2.b: Does Washington authority preclude a claim for enhanced injuries from excessive speed where there is competent evidence relating the degree of enhancement to the excessive speed unless it can also be shown that the accident could have been completely avoided but for the excessive speed?

Issue 2.c: Would allowing such an enhanced injury claim be consistent with Washington tort law in other areas and in furtherance of Washington's policy of holding parties responsible for damages caused by their negligence?

V. STATEMENT OF THE CASE

Procedural history: In this collision case passenger Colin Bowers sued drivers of both of the involved vehicles. The claim against the Marzanos was Dismissed on April 30, 2010 (CP 307-309; 341-344) and Reconsideration Denied on May 28, 2010 (CP 377-378). The remaining action against Walter Bowers was Stayed (CP 434) and CR 54 b) Judgment of Dismissal (with finding of no just reason for delay) was entered on behalf of the Marzanos¹ on October 14, 2010. CP 437-441. Colin Bowers timely appealed. CP 442-444.

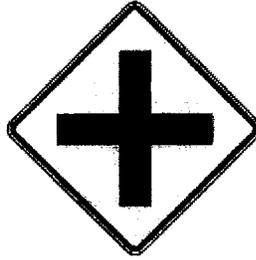
Underlying facts and reasonable inferences: The crash occurred on a clear sunny day at ~ 6 pm on August 31, 2008 at the intersection of 66th Ave. E. and 152nd St. E. in rural Puyallup. See overhead view, Ex A, CP86. An eyewitness

¹ Although policy limits had been tendered as to his driver's liability, Colin Bowers believed he could not dismiss Walter Bowers without destroying joint and several liability in the action against the Marzanos that would follow successful appeal. CP 380, In 3-12. Colin Bowers therefore sought and was granted stay of the action against Walter Bowers and appealable judgment against defendants Marzano.

saw a Subaru outback wagon going north on 66th Ave. E. slowing to 10 mph or less for the stop sign at 152nd St. CP 168 In 10 – CP 169 In 5. After making a “California stop” (CP 284, para 4) the Subaru headed across 152nd St. E., gradually accelerating to ~ 15 mph. CP 315, RP 54.²

Meanwhile Ms Marzano had been proceeding west on 152nd St. E. driving a Chevrolet Silverado 2500 HD extended cab pickup truck (CP 32) at a speed of 41 mph. CP 185 In 1-4. The posted speed was 35 mph. CP 59 In 11-13. A yellow cross road warning sign of the type shown below was ~ 200 feet from the crossroad in Ms Marzano’s lane. CP 185 In 14-17, Ex I (CP 112); Ex G, CP 107.

² While the Subaru’s 15 mph speed at impact was initially an estimate, after the Subaru driver was deposed and testified to speed Ms. Marzano stipulated on the record during Reconsideration hearing that the trial court could “assume ...the Bowers’ vehicle is moving from 10 to 15 miles per hour” RP 54. Colin Bowers believes issues over adequacy of foundation for his initial estimate and his CR 56 f) motions for delay to depose the Subaru driver are now out of the case. However, the basis for the estimate was succinctly summarized at CP 315 In 2-13, and a copy of that page with the citations converted to CP references is provided at Appendix A1.



Cross Road

The sign was intended to warn vehicles approaching the cross road to “**slow down and be prepared to stop if necessary**”.

CP 185 ln 20-21; Ex I, CP 112.

Ms. Marzano did not notice the yellow warning sign, did not slow down and was not prepared to stop if necessary. Instead she kept her Silverado truck in cruise control at 41 mph as she bore down on the cross road. CP 186 ln 11-13.

Although the stop sign and the roadway between it and her lane were fully visible from Ms. Marzano’s lane of travel (CP 137, CP 298) Ms. Marzano’s only reaction before the accident was a tap on her brake and a slight swerve ~ 5’ (or ~ .086 sec) before she rammed her oversized Silverado pickup truck into the front

passenger side of the Subaru wagon in the spot where passenger Colin Bowers was sitting. CP 186 ln 6-10.

The eyewitness who had seen the Subaru approaching the stop sign had turned away for 3.5 – 4 seconds, and then turned back just in time to see and hear the crash. CP 168 ln 10 – CP 169 ln 5. The Subaru took ~ 2.53 seconds from the time it started through the stop sign until the crash (CP 187 ln 1-10³) and had been visible to a driver in Ms Marzano's lane that entire time. CP 137, CP 298.

Opinions of Colin Bowers' Accident Reconstruction and Traffic Safety Expert: The qualifications of Walter Becinski as an Accident Reconstruction and Traffic Safety Expert (CV at CP 91-95, CP 183 ln 19 – CP 184 ln 2) went unchallenged. After reviewing all police investigative materials, doing his own scene and vehicle examination/investigation, reviewing Silverado Crash Data

³ See also FN 2 re Marzanos' stipulation to the speed underlying the 2.53 second calculation.

Recorder, reviewing witness depositions and Declarations, and running an accident simulation program using Pierce County Sherriff's department scene measurements (CP 184 ln 7 – CP 186 ln 13, CP 187 ln 1-10) Mr. Becinski rendered the following opinions:

- After the Subaru rolled through the stop sign it gradually accelerated over a period of ~ 2.53 seconds to the time of collision, starting at 10 mph or less through the stop sign and reaching a speed of ~ 15 mph at collision. CP 187 ln 1-10.
- Ms. Marzano was driving inattentively based on her failure to see the warning sign, leaving her truck in cruise control while approaching the cross road, and her failure to react until she was 5' from the accident. CP 186 ln 3-5, 11-13.
- a reasonably careful and attentive driver would have noticed the warning sign and would have approached the cross road a) after slowing to 30 mph or less, and b) with heightened vigilance for crossing traffic. CP 186 – 187.

- Such a reasonable driver in a state of heightened vigilance appropriate to the circumstances would have noticed the Subaru running the stop sign and would have begun to brake .67 seconds after seeing the Subaru going through the stop sign. CP 186 ln 16-22.
- Such a reasonable driver noticing the hazard of the Subaru going through the stop sign and starting to brake within .67 seconds thereafter would have stopped the Silverado short of the path of the Subaru whether beginning to brake from a speed of 41 mph or 30 mph. CP 187 ln 11-17.

Opinions of Colin Bowers' Biomechanical Engineer:

The qualifications of Colin Daly, PhD as an expert in biomechanical engineering, including the medical consequences of varying impacts on the human brain in cases like these (CP 164 ln 19-22; CV at Ex R, CP 152-7) went unchallenged. After reviewing all police investigative materials, doing his own vehicle examination, reviewing Silverado Crash Data Recorder, Colin Bowers' medical record, and crash reconstruction

program data Dr. Daley assumed the vehicles met at a 270 degree angle with the Silverado traveling 41 mph at impact. CP 165 ln 3-10. Dr. Daly determined from the medical record that Colin Bowers sustained a closed head injury at level 3.5 on the Abbreviated Injury Scale (AIS), explaining that this corresponds to moderate permanent neurological consequences⁴. CP 165 ln 11-13. Dr. Daley opined the probable damage to Colin Bowers from the same directional impact and same Subaru speed, but with Ms Marzano was driving at lesser speeds would be:

- 35 mph -- head injury of AIS 1.6 (minor concussion with no permanent effects)
- 30 mph -- head injury of AIS 0.3 (very slight dizziness)

⁴ Note that this dry terminology hardly begins to describe the severity of Colin Bowers' head injuries, of which the trial court was well aware from having been the sentencing judge sentencing the Subaru driver Walter Bowers for Vehicular Assault requiring the perpetrator to have caused "substantial bodily injury to another". CP 48, 56. See also 4/27/10 Life Care Plan at CP 417-420 indicating that at age 20 due to cognitive impairments suffered in the 8/31/08 auto accident Colin Bowers remained unemployable and was not expected to become employable.

- 25 mph or less-- head injury of less than AIS 0 (no symptoms).

CP 165 ln 14-17

Thus if Dr. Daley assumed only that Ms. Marzano was driving at 30 mph (based on Mr. Becinski's opinion) rather than 41 mph and further assumed she made no attempt to brake, in Dr. Daley's opinion Colin Bowers' head injury would have been reduced by a factor of 3.2 on the Abbreviated Injury Scale (AIS), from moderate permanent neurological consequences to slight dizziness. Dr. Daley's graphic representation of his findings is at Ex S (CP 159).

Court's rationale for granting summary judgment:

I think that it is absolutely critical to establish the point of notice, and I don't think what Becinski does is the right methodology to do that

RP 39.

Colin Bowers' explanation of point of notice in terms of distance during Reconsideration: Colin Bowers' initial argument was that he had sufficiently satisfied point of notice requirements by factually supporting issues for trial whether a) there was a period of time before the collision when a reasonably attentive driver should have noticed the hazard posed by the Subaru , b) the notice of the hazard should have caused a reasonable person to brake, and c) the period of notice minus the delay to begin braking left enough time that a reasonable person would have been able to stop short of the accident within the time remaining. See, e.g. RP 30 ln 16 - RP 31 ln 22. Ms. Marzano had argued that proof of point of notice using a point in time before the accident rather than a measure of distance before the accident was legally deficient, and the trial court seemed to base its ruling on this rationale.

Therefore on Reconsideration Colin Bowers introduced an additional Declaration of Walter Becinski clarifying the exact stopping distances inherent in his opinions at the initial

hearing about the ability of a reasonably careful driver to stop before the accident. Mr. Becinski's additional opinions were :

- starting at 30 mph, or 44 fps, braking would begin 81.8 feet before collision ($1.86 \text{ sec} * 44 \text{ feet/sec}$) and would stop the vehicle in 40.1 feet, with 41.7 feet to spare. CP 334 ln 9-11.
- starting at 41 mph, or 60.133 fps , braking would begin 111.8 feet before collision ($1.86 \text{ sec} * 60.133 \text{ feet/sec}$) and would stop the vehicle in 75 feet, with 36.8 feet to spare. CP 334 ln 12-14.

Mr. Becinski made clear that these were inherent in his previous opinions (found at CP 187 ln 15-17), which he was simply spelling out in more detail. CP 332 -334, especially CP 332 ln 19- 22.

Based on evidence already in the summary judgment record as to a) notice of hazard in seconds before the accident, b) vehicle speeds, and adding exact stopping distances from the new Becinski Declaration Colin Bowers submitted Ex AA and

BB (CP 329, 330) to illustrate a) Ms. Marzano's position on the road when he claimed she should have noticed the hazard, b) her position on the road where she should reasonably have started braking after the point of notice in a), and c) where she would have stopped if she had she been going 30 mph and had started hard braking at point b). See Ex AA, BB; CP 329, 330. All the points made in these exhibits could have been argued to the trier of fact at trial from speeds and times already in the record at Summary Judgment, except that from the evidence previously submitted at Summary Judgment stopping place would have had to be shown in terms of being somewhere before the point of impact rather than an exact point. CP 187 ln 15 -17.

VI. ARGUMENT

(Issue 1 a) There is nothing in the law precluding a disfavored driver from proving the crash wouldn't have happened but-for the favored driver's fault by showing a measure of time before the accident when a reasonable driver should have noticed the failure to yield and acted to avoid to avoid the collision

Channel v. Mills, 77 Wn. App. 268 (1995) and other cases disallow claims of negligence against a driver with the right of way based solely on an assertion that the favored driver was speeding and that if the favored auto had been moving slower the cars would have missed colliding. However *Channel* does not disallow claims based a showing that the favored driver should have avoided the accident if he had been driving with reasonable care.

Nothing said so far means that a claimant cannot prove causation (*i.e.*, both cause in fact and legal cause) by showing that but for excessive speed, the favored driver, between the point of notice and the point of impact, would have been able to brake, swerve or otherwise avoid the point of impact. [FN omitted] To make this showing, however, a claimant must produce *evidence from which the trier of fact can infer the approximate point of notice*, [citing *Whitchurch v. McBride*, 63 Wn. App. 272 (1991) at 275-77],

Channel v. Mills, 77 Wn. App. 268, 278 - 279 (1995)

(emphasis added)

[In *Whitchurch*] plaintiff failed to produce *evidence from which to infer the point of notice*, and without such evidence, a rational trier of fact could not infer that the favored driver, but for

excessive speed, could have braked, swerved or otherwise avoided the point of impact. Thus, plaintiff failed to prove cause in fact, in the sense of proving that the favored driver could have braked between point of impact and point of notice, but for his speed. *See Whitchurch*, at 275-77.

Channel, supra, FN 11.

There is nothing in the quoted passages from *Channel* or *Whitchurch* that would prohibit use of a measure of time before collision when the favored driver should have noticed the disfavored driver's failure to yield and taken measures that would have avoided the accident. Moreover, using the time it took for the Subaru to roll through the stop sign to the point of impact plus the known speed of the Marzano vehicle the physical point of notice could be readily inferred, and this was emphasized on Reconsideration.

If a physical location had to be graphically shown, this was done at Reconsideration with Ex AA and BB; (CP 329, 330) using 30 mph as the reasonable speed for the Silverado when it should have started braking, and this could have been

done by Colin Bowers at argument to the trier of fact based on the evidence submitted on summary judgment.

Another intersection collision case illustrating the proper analysis of the point of notice issue is *Grobe v. Valley Garbage Service*, 87 Wn.2d 217 (1976). In *Grobe*, as at bar, the favored driver who didn't see the disfavored driver until the last moment was being sued by the disfavored driver. Defendant challenged the jury instruction "that a favored driver is allotted a reasonable reaction time to take evasive action when it became apparent to him in the exercise of ordinary care the disfavored driver will not yield the right-of-way". *Id* 226. Defendant argued that such a rule only should apply when the favored driver actually sees the disfavored driver approaching. In rejecting the challenge and holding that the rule applies whether or not the favored driver sees the disfavored driver approaching, the court discussed the possibility that the jury could rule against a favored driver who did not notice the disfavored driver until the last moment based on this instruction

It is quite possible, of course, that "in the exercise of ordinary care" plaintiff should have become aware, before she reached the intersection and when there was still time to avoid the accident, that the driver of the truck would not yield the right-of-way to her. This, however, is the question of fact properly left to the jury. *McCormick v. Hannenberg*, 170 Wn. 133, 136 (1932).

Grobe v. Valley Garbage Service, 87 Wn.2d 217, 226, 227 (1976)

As in *Channel* and *Whitchurch*, *Grobe* contains no requirement that the disfavored driver's evidence of "point of notice" must involve proof of the physical location of the favored driver when she should have noticed the failure to yield. Note that the above quoted passage from *Grobe* describes exactly what happened at bar. Plaintiff has factually supported an issue whether "'in the exercise of ordinary care' [Marzano] should have become aware, before she reached the intersection ...when there was still time to avoid the accident, that the [Subaru] would not yield the right-of-way to her" *Grobe*, supra, at 226, 227 [names from case at bar substituted].

(Issue 1.b) Colin Bowers adduced sufficient facts to support issues for trial regarding a) when Ms. Marzano should have been on notice that the Subaru had failed to yield and b) that reasonable actions after that point would have avoided the accident, and c) due to her negligence Ms. Marzano failed to either notice the Subaru's failure to yield or take reasonable actions to avoid the accident.

All facts and all reasonable inferences from the record must be viewed most favorably to the party resisting summary judgment. *Tao V. Bin*, 140 Wn. App. 825 (2007); *Doherty v. Metro. Seattle*, 83 Wn. App. 464 (1996). The issue on which *Channel v. Mills*, supra, was decided was the aspect of proximate cause known as "cause in fact". *Doherty*, supra, at 469. "Generally, cause in fact is a question for the jury. *Doherty*, supra at 469.

The courts generally indulge some latitude in viewing evidence of non-movant. *Morris v. McNichol*, 83 Wn.2d 491 (1974). Here the trial court declined to grant any of Ms. Marzano's numerous motions to strike Mr. Bowers' evidence (RP 39), which was within the trial court's discretion and

reviewable only for abuse of discretion. *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 105 Wn.2d 99 (1986). Moreover, Ms. Marzano's most vehement objections were based on the inadequacy of the foundation for estimate of the Subaru's speed and Mr. Becinski's opinions based on the Subaru's speed, but those issues were removed from the case by Ms. Marzano's stipulation in open court to the Subaru's speed⁵. Thus all the evidence submitted to the trial court should be considered by this court.

The trier of fact could reasonably conclude from Colin Bowers' evidence that had Marzano been driving with due care

- She would see the warning sign and reduce her speed to 30 mph.
- She would have been vigilant for cross traffic and prepared to stop if necessary as she approached the cross road.

⁵ See FN 2 for more details of stipulation.

The trier of fact could further conclude that Ms. Marzano acted negligently as she approached the cross road

- when she did not drop her speed to 30 mph,
- when she did not proceed with increased vigilance,
- when she was not prepared to stop if necessary, and
- when she instead bore down on the cross road with her large Silverado pickup truck going 41 mph in cruise control.

The trier of fact could further conclude that but for Ms. Marzano negligence the accident would have been avoided because had Ms. Marzano been acting with due care under the circumstances

- she would noticed 2.53 seconds before the accident that a Subaru had run a stop sign, and
- in her state of heightened vigilance and preparedness to stop she would have started braking .67 seconds later, and

- Ms. Marzano would have stopped short of the accident, by 42 feet if she had dropped her speed to 30 mph⁶

Although Ms. Marzano provided expert opinion disputing Mr. Becinski's opinions regarding point of notice and perception/reaction time, those disputes should have been resolved by the trier of fact. In *Holmes v. Wallace*, 84 Wn. App. 156 (1996) plaintiff was a disfavored pedestrian who had encroached into the driving lane and was hit hard enough that she had no memory. The issue was whether her accident reconstruction evidence had been sufficient to make an issue for trial whether, but-for the favored driver's speed of 43 mph in a 35 mph zone, the favored driver would have stopped short of her. The denial of motion to dismiss at the close of plaintiff's case and jury verdict for plaintiff were upheld. *Id* p. 162-163.

⁶ The evidence before Reconsideration would have supported the same conclusion as to a starting speed of either 30 mph or 41 mph, except it would have been a conclusion of stopping short of the collision point rather than an exact number of feet short of the collision point.

This Court has recognized failure to appropriately reduce speed when approaching an intersection as a ground for reversing summary judgment of dismissal for the favored driver. In *Hough v. Ballard*, 108 Wn. App. 272 (2001) two vehicles had collided in an intersection where the traffic lights were out and the evidence supported the conclusion that Hough, the favored driver had failed to slow for the intersection.

Whether Hough's excessive speed was a proximate cause of an accident is a question of fact for the jury and is not to be resolved by the trial court as a matter of law. [citation omitted] Even a favored driver must slow down when approaching an intersection and must exercise reasonable care under the conditions present. RCW 46.61.400(3), for example, provides in pertinent part: The driver of every vehicle shall, consistent with the requirements of subsection (1) of this section, drive at an *appropriate reduced speed when approaching and crossing an intersection . . . and when special hazard exists* with respect to . . . other traffic or by reason of . . . *highway conditions*. (Emphasis added.) . . .RCW 46.61.400 imposes a duty to drive at a prudent speed, not only for known conditions, but also for 'potential' hazards.

Hough, supra at 284.

The cross road involved at bar was an “intersection” as defined in RCW 46.04.220 (1)⁷. Thus Mr. Becinski’s opinion that a careful driver should have slowed from 35 mph to 30 mph while approaching the cross road in light of the warning sign is bolstered by both RCW 46.61.400(3) and the holding of *Hough supra*.

Ms. Marzano’s evidence is particularly weak on this point. Her expert admitted Ms. Marzano was going 39 mph and did not slow down for the cross road. More importantly, her expert did not directly contest the proposition that the yellow warning sign before the cross road should have prompted a reasonable driver to slow to no more than 30 mph. Instead her expert took the untenable position that “There is not traffic

⁷ RCW 46.04.220 (1) "Intersection area" means the area embraced within the ... lateral boundary lines of the roadways of two or more highways which join one another at, or approximately at, right angles...

RCW 46.04.197 Highway means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

control for vehicles traveling in Ms. Marzano's direction" approaching the accident cross road. CP 59 ln 13-15. This is untenable because a) there was a warning sign on Ms. Marzano's side of the road ~ 200' or more before the accident cross road (Ex G, CP 107; CP 185 ln 14-17), and b) the law defines traffic control devices to include warning signs. RCW 46.04.611.⁸

Ms. Marzano's expert was weak in other areas material to the point of notice issue. Her expert never disagreed with the following key points of Mr. Becinski's opinions

- that a yellow warning sign before a cross road should prompt a reasonable driver to be vigilant for crossing traffic in approaching the cross road

⁸ RCW 46.04.611 Official traffic-control devices means all signs, signals, markings and devices not inconsistent with Title 46 RCW placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning or guiding traffic.

- that if hard braking had commenced 1.86 sec before collision⁹ the Silverado would have stopped short of the accident whether braking from 41mph or 30 mph.

Two other “soft” areas of Ms. Marzano’s expert’s opinion:

- Based on his crash program he had the Subaru traveling 36 mph at impact (CP 59 ln 21-22), but this was contradicted by photos showing the Subaru in 1st gear immediately after the crash (CP 97, CP 99, CP 161 ln 3-10, CP 185 ln 5-7) and testimony that its maximum speed in 1st gear was 22 mph. CP 160 ln 3- CP 161 ln 2.
- Ms. Marzano’s expert offered no variation on the 1.5 second perception-reaction he claimed was applicable to general driving conditions. CP 59 ln 25- CP 60 ln 7. This is significant in light of his failure to contest Mr.

⁹ This is time Mr. Becinski’s opined that hard braking should have started based on notice of hazard 2.53 seconds before collision and braking started 0.67 seconds thereafter. $2.53 \text{ sec} - 0.67 \text{ sec} = 1.86 \text{ sec}$. See CP 334 ln 9-14.

Becinski's opinion that drivers subject to a warning sign before a cross road should proceed with heightened vigilance for cross traffic, which was Mr. Becinski's basis for concluding that a 0.67 second perception reaction time was reasonable under these circumstances¹⁰.

There is no minimum perception-reaction time apparent in the case law. *Theonnes v. Hazen*, 37 Wn. App. 644 (1984) was a highly distinguishable case in which a child darted in front of defendant's car, with much less time for reaction than we have at bar. However, *Theonnes* assumed for the sake of argument that plaintiff Theonnes' expert was correct that there were .75 seconds to react and start braking after seeing the child, though finding there was still too little time to avoid the accident. *Id* at 648.

¹⁰ Mr. Becinski had opined that a quicker reaction time should apply due to the yellow warning sign (CP 186 ln 16-19) which sign was intended to warn drivers to "be prepared to stop if necessary". CP 112.

Mr. Bowers argued that a trier of fact could get a sense of a vigilant driver's perception-reaction time from an online game <http://www.exploratorium.edu/baseball/reactiontime.html> .

Most people playing this "fastball reaction time" game will find that with practice their "honest" (i.e. never jumping the gun) reaction time is 0.35 seconds or less. While this is not a perfect analogy (player knows pitch is coming; vigilant driver approaching cross road only knows they might have to stop) the game is a fair counter to Ms. Marzano's arguments that a 0.67 seconds perception reaction time was "crazy" (RP 9 ln 21) and therefore beyond the bounds of what any reasonable trier of fact could find.

There would be room for Mr. Bowers to prove his case even if the trier of fact "split the difference" between his and Marzano's positions regarding reasonable point of notice and reasonable reaction time. Assume the trier of fact found that notice of the hazard didn't take place until the ~ 15' long Subaru wagon was ~ 7 feet farther forward, or more than half

way through the stop sign, and (assuming the Subaru was going 10 mph the entire time he was running the stop sign) that this would reduce point of notice to ~ 2 seconds pre-collision¹¹. Assume also that the trier of fact found that even proceeding with vigilance and prepared to stop if necessary a reasonably careful driver would need one full second rather than 0.67 seconds from point of notice before starting hard braking. Subtracting 1 second from the 2 second point of notice means that hard braking would start one second before collision. Assuming the trier of fact found Ms. Marzano should have been going 30 mph (or 44 fps) . She would therefore have been 44 feet from the point of collision (1 sec * 44 feet/sec) at the point 1 second before collision when she began hard braking. Per Mr. Becinski hard braking at that speed would stop the

¹¹ 10 mph = 5280*10 ft/60*60 sec= 14.67 fps. If the Subaru moved 14.67 feet in one second, it would move ~ 7.33 feet in half a second. Thus if the Subaru was halfway or more through the stop before putting Ms. Marzano on notice of hazard, that would subtract .5 seconds from the 2.53 second notice of hazard.

Silverado in 41.7 feet. Thus the Silverado would stop 2.3 feet short of the collision ($44 - 41.7 = 2.3$). CP 334 ln 9-11.

Finally, point of notice and attentiveness are facts that rely to significant degree on testimony of Ms. Marzano. She claims she was driving in a cautious and attentive manner, but still didn't see plaintiff until he was right in front of her. If the matter were allowed to go to trial Ms. Marzano would be impeached with various evasions and inconsistencies in deposition. For example, although her own expert said she was going 39mph¹² based on her CDR, but Ms. Marzano wouldn't admit in deposition to going over 35 mph. Ex P, CP 128 (dep p. 84 ln 19-24; p. 85 ln 5-11), CP 129 (dep p. 86 ln 14-16; p. 88 ln 3-10). Similarly when confronted with what she told the police Ms. Marzano testified she saw the Subaru go through the stop sign. Ex P, CP 126 (dep p. 70 ln 10-12). Yet she also swore in Declaration that the Subaru "appeared... and was

¹² Mr. Becinski said she was going 41 based on his crash reconstruction program, but not the CDR mph, which would have required more information (calibration, gear ratio, etc.) CP 185 ln 1-4, CP 310 ln 18-23.

immediately in front of me” (CP 25 ln 19 – 22). Colin Bowers will argue that Ms. Marzano’s claim that she was driving attentively is not worthy of belief, and in fact she was simply not paying attention.

Summary judgment may be denied on the ground that material facts are particularly within the knowledge of the moving party, and the nonmoving party should have the opportunity to expose the moving party's demeanor while testifying at trial. *Riley V. Andres*, 107 Wn. App. 391, 398 (2001); *Felsman v. Kessler*, 2 Wn. App. 493, 496-97 (1970).

(Issue 2.a) The evidence supports issues for trial that Ms. Marzano was speeding at the time of the accident, and that her excessive speed enhanced Colin Bowers’ injuries by a quantifiable amount.

a) Dr. Daley’s opinions quantify the amount of enhanced injury due to excessive speed. As stated supra there was no effective rebuttal to Mr. Becinski’s testimony that the reasonable speed approaching a cross road subject to a cross

road warning sign was 30 mph. Colin Daley, PhD, is a pre-eminent expert on the biomechanics of head trauma from varying forces. See CV at Ex R, CP 152-157. Dr. Daly was able to quantify the difference in injury from the impact to Colin Bowers at 30 mph vs. and 41 mph: from slight dizziness at 30 mph, to moderate permanent neurological consequences at 41 mph. CP 165 ln 11-17.

Thus Colin Bowers would proved that he suffered increased injuries in a quantifiable amount due to Ms. Marzano's excessive speed.

b) Dr. Daley's opinions would also support the conclusion that under certain findings supportable on this record there would still have been a slow speed collision, but *no head injury but-for the excessive speed.* Thus, the facts could support a finding that a reasonable driver would have lessened the impact without entirely avoiding collision, and the lessened impact would have completely avoided injury to Colin Bowers.

This factual scenario assumes the trier of fact believes there was a warning sign that should have caused slowing to 30 mph and extra vigilance in approaching the crossroads.

- Begin with Mr. Becinski's calculation (CP 334 ln 9-11) that at 30 mph, or 44 fps, hard braking would stop the vehicle in 40.1 feet.
- It follows that the time before impact when hard braking would slow the Silverado from 30 mph, or 44 fps, to stop exactly at the impact point is .911 seconds. $(40.1 \text{ ft}) / (44 \text{ ft/sec}) = .911 \text{ sec}$
- Thus if the trier of fact found that [time of notice of hazard in seconds before impact] minus [time from notice of hazard to beginning of hard braking] = [less than .911 seconds time for braking before impact] then the braking would not completely stop the Silverado.
- Unless one makes an absurd assumption that during the .911 seconds of braking there is no slowing until the last nanosecond, it follows that there are some periods of

hard braking beginning less than 0.911 seconds before impact the braking will have slowed the vehicle to less than 25 mph at impact.

- If the Silverado was moving 25 mph or slower at impact then it is the opinion of Dr. Daley that there would have been no head trauma to Colin Bowers. CP 165 ln 14-17 para 6, 7 and Ex S, CP 159.

While the above analysis does not prove the exact time period before impact when application of hard braking would slow the Silverado to less than 25 mph, it does prove that there is some period of hard braking that could yield that result. Based on the discussion of point of notice and perception-reaction time in the previous section Colin Bowers believes he has sufficiently established that the facts could support such a conclusion, and Ms. Marzano has not eliminated the possibility of facts supporting that conclusion, as is her obligation on summary judgment. See discussion in *Doherty v. Metro. Seattle*, supra, at 471,

Under the above scenario Colin Bowers would have established that but-for the excessive speed he would not have suffered an **injury**.

(Issue 2.b) Washington authority does not clearly hold that proof that the accident would have been completely avoided but-for the excessive speed is a prerequisite for claims for enhanced injuries from excessive speed where there is competent evidence relating the degree of enhancement to the excessive speed .

Grobe v. Valley Garbage Service, supra and *Theonnes V.*

Hazen, supra are sometimes cited for the proposition that an enhanced injury claim will not lie based on excess speed without fully satisfying the point of notice proximate cause requirements of *Channel v. Mills*, supra. However neither case is persuasive authority for this proposition because both based their decision on significant alternate grounds.

In *Grobe* the enhanced injury allegation was rejected (as an affirmative defense) because where the evidence was deemed insufficient to support jury questions on either

excessive speed or degree of enhancement (if any) caused by excessive speed. *Id* at 225-226. Reading the opinion, the third reason for denying the instruction based on failure to prove that but-for the speed the accident could have been avoided seems an afterthought.

Theonnes V. Hazen, *supra* also relied on more than one ground for rejecting the claim of enhanced injury. First, the plaintiff had not proven the accident wouldn't have happened but-for the speed given that the accident involved a child darting in front of a car at the last minute. Second, as in *Grobe*, the party asserting the claim provided no evidence of the degree of enhancement related to the excessive speed, which would have required speculation to support any recovery. *Id* at 649.

Unlike both *Grobe* and *Theonnes*, Colin Bowers is able to prove the amount the excessive speed enhanced his injuries. Both *Grobe* and *Theonnes* should be viewed as cases in which there was a failure of probable cause linking the injury and amount of injury to the excess speed rather than cases creating a

hard and fast rule that there can be no recovery for enhanced injuries due to excessive speed if it cannot be proven that but-for the excessive speed there would have been no collision.

The arbitrary harshness of the latter position can be seen by making the facts more extreme. Assume the Ms. Marzano was driving her Silverado 4x4 at 60 mph instead of 41 mph, and that Colin Bowers' head injuries were severe enough to put him into a persistent vegetative state. Assume also that a jury would find that a reasonable speed approaching the cross road was 30 mph, but would also find that a careful driver would have taken enough time between the time when she was on notice and the time when she hit the brakes that less than .91 seconds remained before the accident, and based on expert testimony, that amount of braking would have slowed the Silverado to 10 mph at impact. According to Dr. Daley there would be no head injuries from such an injury. This is scenario b) in the preceding section. In this example, but-for Ms. Marzano's excessive speed Colin Bowers would have a normal life instead

of being hooked to a feeding tube and requiring round the clock care. Yet if it is the “rule” that before proving enhanced injuries in an intersection crash one must prove that but-for the excess speed the accident would have been completely avoided then Ms. Marzano would have no legal responsibility.

That such a harsh rule is not the law can be inferred from *Doherty V. Metro. Seattle*, 83 Wn. App. 464 (1996) . In that case a woman went into hypoglycemic shock and drove out of control for ~ 500 feet, careening wildly while hitting cars, running a red light, and crossing a median until she ran head on into a metro bus which had started to turn left and was stopped blocking one lane while waiting for traffic to clear. The plaintiff’s theory of proximate causes was “that, but for the bus driver's failure to yield, [the] injuries would have been less severe.” *Doherty*, supra, at 470. He argued that the head-on crash significantly increased the severity of the injuries and that but-for the bus being in the wrong lane there would have been no head on crash. The Court of Appeals held “We conclude

that these are genuine issues of material fact and should be determined by a jury.” *Id.* The summary judgment of dismissal was reversed and remanded.

If the plaintiff in *Doherty* had been required to prove there would have been **no** accident but for the negligence of the bus driver as a prerequisite to recovering under an enhanced injury claim the dismissal should have been affirmed. Thus it is implicit in *Doherty* that an enhanced injury claim will lie if the claimant if it is proven that the negligence of the other driver is a cause-in-fact of the enhanced injuries, and there would appear to be no precondition that the plaintiff prove there would have been no accident absent the other driver’s negligence.

(Issue 2.c) Allowing such a claim is consistent with Washington tort law in other areas and with Washington’s policy of holding parties responsible for damages caused by their negligence.

This issue needs to be decided regardless of whether this Court is inclined to reverse on the basis of the trial court’s point

of notice ruling. At trial after remand Colin Bowers will want to properly instruct the jury on his enhanced injury theories because it would be possible for a jury to find that the accident would not have been completely avoided but-for the excessive speed while also finding that there were injuries that would not have occurred but-for the excessive speed.

Mr. Bowers posed two enhanced injury scenarios above; one broader and the second narrower.

- a) Where excessive speed is proven and he can prove a quantifiable degree of enhancement related to the excessive speed, and
- b) Where excessive speed is proven and he can prove that but-for the excessive speed he would have suffered no significant injuries.

A claim for enhanced injuries should be allowed under the broader scenario a) because this is consistent with Washington tort law as it has emerged in other areas. For example, Washington has recognized a claim for enhanced

injuries against an auto manufacturer based on unreasonable failure to minimize risks from accidents involving the product that were part of the foreseeable use of the product. See *Baumgardner V. American Motors*, 83 Wn.2d 751 (1974). Just as in *Baumgardner* where it was not a defense that the manufacturer did not intend that its product should be involved in collisions (*Id* at 757), it should not be a defense that Ms. Marzano did not intend to run into Colin Bowers.

In automobile product liability enhanced injury cases the elements are 1) duty to prevent reasonably foreseeable risk of enhanced injuries, 2) breach of duty, 3), proximate cause, 4) distinct and identifiable enhanced injuries. *Baumgardner* at 758. There is no logical reason why a driver using the roadways should not have a similar duty to minimize enhanced injuries to persons injured in collisions in which the driver may become involved if those injuries were causally related to the driver's excessive speed.

As in all tort cases key to duty is foreseeability of the risk. Because it is foreseeable to an auto manufacturer that their product will be involved in collisions it is reasonable to impose on them a duty to take steps to make crashes reasonably survivable. Similarly Ms. Marzano know when she got behind the wheel of her oversize Silverado pickup that it would do serious damage in a collision, and that it would do more damage if she were exceeding the reasonable speed. Normally foreseeability and concomitant duty are for the trier of fact to decide. *Yong Tao V. Heng Bin*, 140 Wn. App. 825 (2007); *Doherty v. Metro. Seattle*, 83 Wn. App. 464 (1996). Note that Doherty appeared to allow a claim of the type in a) above (i.e. no proof accident would have been completely avoided). As discussed in the preceding section, the other requirements have been satisfied by Colin Bowers' evidence creating issues of fact as to unreasonable speed of Ms. Marzano and directly linking the degree of her speed to the severity of his injuries.

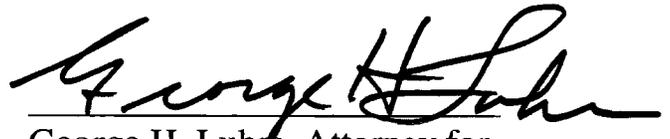
Even if the broader rule in scenario a) is rejected, at minimum a claim should be allowed in the narrower situation posed in scenario b). Under such a rule enhanced injury claims would be allowed only if the claimant could prove that but-for the excessive speed he would have suffered minimal or **no** injury. While a distinction allowing such claims and disallowing all other enhanced injury claims is arbitrary, it has the advantage of being a narrower basis for recovery which would limit tend to limit this type of claim to fairly clear-cut cases.

VII. CONCLUSION

Colin Bowers having shown that the Summary Judgment and Denial of Reconsideration were in error, the case should be reversed and remanded for trial on all issues. The court should also rule on standards applicable to enhanced injury claim to provide guidance to the parties in the retrial following remand.

11 MAR 20 11 2:17
STATE OF WASHINGTON
BY _____
DEPUTY

DATED March 25, 2011


George H. Luhrs, Attorney for
Appellant, WSBA # 7036

CERTIFICATE OF MAILING

Appellant's Brief and Appendix Served on counsel for respondent by
mailing to him at below address on 3/25/11

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ORIG

No. 41362-1-II

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

Colin Bowers, Appellant,

v.

Pamela M. and Jerry Marzano, Respondents

11 MAR 29 PM 2:17
STATE OF WASHINGTON
DEPUTY

APPELLANT'S APPENDIX

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A1: CP 315 with references to CP written in

1 **TIME OF NOTICE TO MARZANO OF HAZARD**

- 2 e. **Subarau took 2.53 seconds from point where its nose was through the stop sign**
3 **to point of collision.** This is derived from Becinski's estimate of Subaru speed at 15
4 *(CP 187 ln 1-10)*
5 between running the stop and impact, Becinki Decl para 10 j; 2nd Becinski Decl para
6 *(CP 311 ln 7-11)*
7 5 [SLAM program shows 15 mph at impact]. It is also supported by evidence that the
8 *CP 97 CP 99*
9 Subaru was in 1st gear immediate after the accident [Plf Ex \hat{E} and \hat{F} , Edwards Decl
10 *CP 161 ln 3-10 CP 185 ln 5-7 CP 311 ln 7-9*
11 para 4-5, Becinski Decl para 7, 2nd Becinski Decl para 5]; that the Subaru couldn't go
12 more than 22 mph in 1st gear *CP 160 ln 3 - CP 161 ln 2* [Edwards Decl para 3] and the eyewitness Johnson
13 estimate that the Subaru was going \leq 10 mph and slowing as it reached the point ~
14 *[CP 168 ln 10 - CP 169 ln 5]*
15 10' south of the stop sign. Thus this time is conservative as it could have taken
16 significantly longer if the car slowed below 10 mph as it ran the stop sign and
17 proceeded toward the 152nd, and if it then accelerated to 15 mph as it got to the
18 intersection.
- 19 f. **In state of vigilance warranted by the yellow warning sign Marzano should have**
20 **noticed the Subaru running the stop sign and failing to yield.** Becinki Decl para
21 10 i.
- 22 g. **Therefore Marzano's time of notice of hazard was 2.53 seconds before collision**

23 **Position of Marzano at Time of Notice**

- h. **Relevant mph conversions to feet per second (fps) are as follows:**

41 mph = 60.1333 fps; ph = 44 fps. Request judicial notice:

1 mph = 5280 feet/60*60 sec = 1.46666 feet/sec.

Thus 30 mph (30 * 1.46666) fps = 44 fps; 41 mph = (41 * 1.46666) fps = 60.1333 fps.

EXCERPTS OF RP

1 declaration, there is nothing in his declaration, in the
2 declaration of Johnson, in the declaration of Edwards, or
3 in the declaration of Breit, that the Court can look at
4 and say, this is the point of notice for Ms. Marzano.

5 By the wildest stretch of the imagination, if
6 you were trying to, if you were trying to extract some
7 kind of information that would enable you to do that, then
8 I would suggest to you, look at Mr. Becinski's declaration
9 at page 3, lines 9 through 10. What he tells you there,
10 Your Honor, is that Ms. Marzano's first physical reaction
11 to Mr. Bowers' vehicle directly in front of her occurs at
12 five feet before impact, five feet. And he gives you how
13 much time before impact that physical reaction is
14 initiated, and this is the beginning of the braking,
15 according to Becinski. I don't think he's got it right
16 there, but regardless of that, even if you look at it,
17 he's saying that there is .08 seconds until impact at that
18 point. Now, what's .08 seconds? That's less than
19 one-tenth of one second. Okay.

20 Becinski also says -- and again, I mean, this
21 is crazy -- that he gives a perception/reaction time of
22 .67 to Ms. Marzano in his declaration. And I know the
23 Court has heard many of these issues before, and nobody
24 ever uses a perception reaction time of that type. But
25 let's assume that here, .67. So, he's saying .67 seconds

1 Real quick, you said you wanted to finish up,
2 I guess, so I am going to move right along. Mr. Hunter
3 was inconsistent in several things, as well. He agreed --
4 he said that there was no traffic control approaching the
5 intersection, and yet, we know that there was this yellow
6 sign. We've got it in evidence. He never -- he says the
7 Subaru is going 36 miles an hour, but he never explains
8 how it could drop to 10 miles an hour, or less, as it goes
9 through the stop sign, and then in three or four car
10 lengths get up to 36 miles an hour in first gear.

11 He doesn't explain that. One thing he doesn't
12 seem to dispute --

13 THE COURT: Let me turn you to where I need to
14 be --

15 MR. LUHRS: Okay.

16 THE COURT: -- which is on this point of
17 notice thing. You've got Mr. Becinski saying that there's
18 better than two seconds of reaction time available to her,
19 but the plaintiff's argument is there's no starting point
20 for that information. It could have been, even if you
21 assume that, how do you assume it, because you don't know
22 where she first would have any notice of him coming
23 through.

24 MR. LUHRS: Well, you know that it takes 2.53
25 seconds for the car to get from the stop sign to where the

1 crash was at 15 miles an hour. Okay.

2 THE COURT: Okay.

3 MR. DANIEL: The Subaru?

4 MR. LUHRS: Right.

5 THE COURT: Okay.

6 MR. LUHRS: You know that the two cars
7 crashed, so you know that she was 2.53 seconds away, when
8 he was 2.53 seconds away, because they both met at the
9 crash point. What Mr. Becinski is saying is that--

10 THE COURT: You work backwards from the point
11 of impact, as opposed to starting from the point of
12 notice.

13 MR. LUHRS: Yes.

14 THE COURT: And you find the point of notice
15 out there somewhere at 2. whatever seconds and that's
16 ample time for somebody to react.

17 MR. LUHRS: Mr. Becinski says that .67
18 seconds, if she was being vigilant, is what she would have
19 needed to drop her foot onto the brake. He says that, if
20 you subtract that from 2.53 seconds, that would be enough
21 time to stop, particularly if you are going 30 miles an
22 hour, which she should have been. And I will point out
23 one thing about Mr. --

24 THE COURT: Let me see if I can summarize it,
25 then. So, the key, from your position, is knowing the

1 filed this motion 35 days ago.

2 THE COURT: I understand.

3 MR. DANIEL: And we were here last time on the
4 motion to continue. I wanted to depose Walter Bowers, and
5 he did nothing.

6 THE COURT: Okay. I think that it is
7 absolutely critical to establish the point of notice, and
8 I don't think what Becinski does is the right methodology
9 to do that, even if you assume he's got information that's
10 not subject to being stricken as subject to hearsay or
11 anything else. So I want to be clear that in making my
12 decision, I am not striking, or disregarding any of the
13 plaintiff's submittals, because I think they are entitled
14 to all of the factual material that they have brought
15 forward, including any disputed material which has to be
16 utilized in their favor. But I think, even with that,
17 even using the methodology Mr. Becinski employs, it
18 doesn't tell us where Ms. Marzano would have had notice
19 that Bowers was going to disregard the signage and was
20 going to enter the intersection. And I think that is
21 fatal under the caselaw, and under logic, too.

22 I just don't see how you can say that it
23 affected causation without knowing where it was that she
24 had some fair notice of the fact that he was going to
25 enter that intersection, so I am prepared to grant summary

1 considering that, so you need to decide how you want to
2 proceed.

3 MR. LUHRS: Well, I just made that oral
4 motion.

5 THE COURT: Mr. Daniels, your response to
6 that?

7 MR. DANIEL: To the oral motion?

8 THE COURT: Yeah.

9 MR. DANIEL: Your Honor, from the very
10 beginning of this thing, in the summary judgment motion, I
11 have conceded to the Court that they can assume
12 plaintiff's theory of the case, that the car is moving 10
13 to 15 miles per hour through this. It doesn't make any
14 difference whether Walter Bowers testified to that, it
15 makes no difference. I mean, certainly it was
16 inappropriate to produce this. It's inappropriate to
17 submit it now. The Court had previously ruled that that
18 wasn't a basis for continuance on the summary judgment
19 motion. So, I mean, you can assume whether it comes from
20 Walter Bowers or it's Becinski that in this matter, that
21 for purposes of this motion, the Bowers' vehicle is moving
22 from 10 to 15 miles per hour. It doesn't make any
23 difference here.

24 THE COURT: Okay. So, we will take that
25 assumption that Bowers is indicating, and I think it does

EXCERPTS OF CP
(with Appellant's Index)

APPELLANT'S INDEX TO CLERKS' PAPERS

Filing Date	DOCUMENT	Ex#	CP #
06/04/2009	Complaint		1-2
06/25/2009	Answer		3-4
10/08/2009	Jury Demand - 6		5-6
02/23/2010	Amended Complaint		7-9
03/15/2010	Motion for Summary Judgment		10-23
03/15/2010	Declaration of Pamela Marzano in Support		24-26
	Pic road	1	27
	Pic road	2	28
	Pic road	3	29
	Pic wreck Silverado	4	30-32
03/15/2010	Declaration of Don G Daniel in Support		33-43
	Pic road	A	44
	Pic road	B	45
	Decl for Prob Cause	C	46-47
	Stm of Def on Guilty Plea	C	48-56
03/15/2010	Declaration of John E Hunter in Support		57-61
	Hunter resume	1	62-71
	Police overhead pic of intersection	2	72
	Model of crash overlaid on intersection pic	3	73-76
03/16/2010	Answer		77-78
04/20/2010	Objections/Opposition		79-84
	Overhead pic of intersection	A	85-86
	Pic of speedometer with road	B	87-88
	“ “	C	89-90
	Curriculum vitae of Becinski	D	91-95
	Pic of interior of wreck	E	96-97
	Pic of interior of wreck	F	98-105
	Pic of road	G	106-107
	RCW 46.04.611 Traffic-control devices	H	108-109
	Dept of Lic Wash driver guide	I	110-112
	Overhead pic of intersection	J	113-114
	Depo of Marzano 3/16/10 pp. 54-61	K	115-117
	Pic of acc scene inc skid marks	L	118-119
	Crash Data Retrieval info	M	120-121
	Depo of Marzano 3/16/10 pp.46-49; 58-65; 70-77; 82-89; 94-101	P	122-131
	Depo of Jennifer Anderson 2/5/10 pp. 66-69; 74-77	Q	132-134
	CD w/ 3 videos of Subaru going through stop sign	N	135
	Pic of speedometer and road	O	136-137
	Depo of Marzano 3/16/10 pp. 46-49; 58-65; 70-77; 82-89; 94-101	P	138-147
	Depo of J. Anderson 2/5/10 pp. 66-69; 74-77	Q	148-150
	Curriculum vitae of Colin Daly	R	151-157
	AIS vs. impact speed of truck	S	158-159

04/20/2010	Declaration of Dawn Edwards		160-163
04/20/2010	Declaration of Colin Daly		164-166
04/20/2010	Declaration of Niccole Johnson		167-173
04/20/2010	Declaration of Kenneth Breit		174-178
04/20/2010	Declaration of George H Luhrs		179-182
	Declaration of Walter Becinski		183-189
04/21/2010	Instructions re Playback of Videos		190-191
04/26/2010	Reply Memorandum in Support		192-200
	(END VOLUME 1)		
	VOLUME 2		
	Reply Memorandum In Support (Incl Channel Case)		201-212
04/26/2010	Motion to Strike		223-235
	Suppl Decl Don Daniel		236-240
	Memo to Daniel 4/19/10	A	241-242
	U.S. postal service tracking 4/20/10 delivery	B	243-244
	Memos to and from Daniel 4/12/10	C	245-251
	Order excusing Bowers from employment for depo	D	252-256
	(Prop Or)		257-258
04/26/2010	Declaration of John E Hunter in Support		259-262
	Crash Data info	1	263-264
04/26/2010	Notice Of Errata		265-266
04/29/2010	Surreply Decl George H. Luhrs		267-271
	Pics of interior of crash	T	272-273
	Screen print of file info for Pierce Co. Sheriff photos taken on 8/31/10 from 6:29 pm to 7: 52 pm	U	274-275
	Pierce Co. 8/31/08 incident report	V	276-296
	Pics of road	W	297-299
	Pierce Co Traffic Division sketch of intersection	X	300
04/29/2010	Declaration 2nd of Kenneth Breit		301-304
04/30/2010	Clerk's Minute Entry		305-306
04/30/2010	Order Granting Summary Judgment		307-309
05/04/2010	Declaration of Walter Becinski		310-312
05/10/2010	Motion for Reconsideration		313-326
	Pierce Co. report noting coefficient of friction for Marzano	Y	327
	Mathematical formula of stopping distance of Marzano	Z	328
	Pierce Co. street diag w/ marking re point of notice drawn in	AA	329
	Pierce Co. diag w/ marking re point of notice and point of stop drawn in	BB	330
	Photo of speedometer and road	CC	331
05/10/2010	Declaration of Walter Becinski		332-335
05/11/2010	Errata to Motion for Reconsideration		336
05/12/2010	Clerk's Minute Entry re Nunc Pro Tunc Or		337-338
05/12/2010	Stip For Order Granting Summary Judgment *Nunc Pro Tunc*		339-340
05/12/2010	Order Granting Summary Judgment *Nunc Pro Tunc*		341-344

05/20/2010	Response to M Reconsid		345-358
	(Prop Or, Cert Svc)		359-362
05/27/2010	Reply to Opp to Motion for Reconsid		363-375
05/27/2010	Errata to Reply to Opposition to M Reconsid		376
05/28/2010	Order Denying Motion for Reconsideration		377-378
09/23/2010	Motion for Judgment		379-382
	(Prop Jmt)		383-387
09/23/2010	Declaration of George Luhrs		388-391
09/28/2010	Statement of Non Opposition		392
09/29/2010	Response		393-400
	(END VOLUME 2)		
	VOLUME 3		
	Response		401
	(Prop Jmt)		402-405
09/30/2010	Reply		406-411
09/30/2010	Declaration of W Bowers		412
09/30/2010	2nd Declaration of George Luhrs		413-415
	Life Care Plan	1	416-420
	Property and vehicle search re Marzanos	2	421-424
	Kelly Blue Book re 2004 Chevrolet Coupe, 2005 Acura, and 2004 Chevrolet Silverado	3	425-428
	Affidavit confirming Dawn Edwards' insurance	4	429-431
10/01/2010	Clerk's Minute Entry		432-433
10/01/2010	Order for Stay of Proceedings		434
10/14/2010	Clerk's Minute Entry		435-436
10/14/2010	Jmt of Dismissal *Partial* *Marzano*		437-441
10/25/2010	Notice of Appeal with Fee		442-444
10/14/2010	Jmt of Dismissal *Partial* *Marzano*		445-449
05/12/2010	Duplicate Order Granting Summary Judgment *Nunc Pro Tunc*		450-453
05/28/2010	Duplicate Order Denying Motion for Reconsideration		454-455
11/24/2010	Designation of Clerk's Papers		456-458

1 At the time of the accident both 66th Avenue East and 152nd Street East consisted
2 of two lanes with one lane for each direction of travel. The posted speed limit for
3 vehicles traveling northbound on 66th Avenue East approaching the intersection
4 with 152nd Street East (Mr. Bowers direction of travel) is 35 m.p.h. A stop sign at
5 the intersection with 152nd Street East requires northbound traffic on 66th Avenue
6 East (Mr. Bower's direction of travel) to stop before entering the intersection.
7 Attached as Exhibits 1, 2 and 3 to my declaration are three photographs depicting
8 the perspective of a driver traveling on 66th Avenue East in the direction of Mr.
9 Bowers (northbound) as they approached the stop sign at the intersection with
10 152nd Street East. A stop ahead sign is located in advance of the stop sign for
11 northbound traffic on 66th Avenue East approaching the intersection with 152nd
12 Street East.

13 4. The posted speed limit for vehicles traveling westbound on 152nd
14 Street East approaching the intersection with 66th Avenue East is 35 m.p.h. There
15 is no traffic control for vehicles traveling westbound on 152nd Street East (my
16 direction of travel) through the intersection with 66th Avenue East. At the time of
17 this accident I had the right of way through this intersection over traffic crossing
18 the intersection on 66th Avenue East.

19 5. All of the sudden, as I entered the intersection with 66th Avenue East,
20 a green car (which I later learned was being driven by Walter Bowers) appeared
21 from my left and was immediately in front of me. The Bower's vehicle appeared
22 in front of me so quickly and with so little time and distance between us to react,
23 that there was no way that I could have avoided this collision. The impact occurred
24 in just about the center of the intersection. There was a significant impact between
25 the two vehicles. The impact was severe enough to turn my vehicle 180 degrees
26 sending it into a ditch in a field on the northwest corner of the intersection.

09.06.2008

1 East. The accident occurred when Walter Bowers failed to stop for the stop sign
 2 for northbound traffic on 66th Avenue East at the intersection with 152 Street
 3 East, entered the intersection, failed to yield the right of way to, and collided with,
 4 Pam Marzano's Silverado.

5 5. The initial point of impact between the vehicles was in the westbound
 6 lane of 152nd Street East, near the center of the intersection with 66th Avenue
 7 East.

8 6. The intersection stop sign and stop ahead warning sign for Walter
 9 Bowers' direction of travel was clearly visible to an approaching driver from a
 10 distance of over 1,000 feet.

11 7. The posted speed limit for the Marzano vehicle as it traveled
 12 westbound on 152nd Street East towards the intersection with 66th Avenue East
 13 was 35 m.p.h. There is no traffic control for vehicles traveling in Mrs. Marzano's
 14 direction of travel on 152nd Street East as they approach the intersection with 66th
 15 Avenue East. At the time of this accident, Mrs. Marzano's vehicle had the right
 16 of way over Walter Bowers' vehicle as they proceeded through the intersection.
 17 Mrs. Marzano's vehicle was traveling at an approximate impact speed of 39
 18 m.p.h.

19 8. The posted speed limit for Walter Bowers' vehicle was 35 m.p.h. as
 20 it proceeded northbound on 66th Avenue East towards the stop sign controlling the
 21 intersection with 152nd Street. Mr. Bowers' vehicle was traveling at an
 22 approximate impact speed of 36 m.p.h. at the time of collision. A vehicle moving
 23 at a speed of 35 m.p.h. can stop in approximately 132 feet, assuming a 1.5
 24 second perception/reaction time. A vehicle moving at a speed of 35 m.p.h travels
 25 at a rate of 51.45 feet per second. A vehicle traveling at a speed of 39 m.p.h. can
 26 stop in approximately 155 feet, assuming a 1.5 second perception/reaction time.
 A vehicle moving at a speed of 39 m.p.h travels at a rate of 57.33 feet per

DECLARATION OF JOHN E. HUNTER
 IN SUPPORT OF DEFENDANT
 MARZANO'S MOTION FOR SUMMARY
 JUDGMENT

- 3

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1 second.

2 9. The time it takes a driver to perceive a stimulus and react to that
3 stimulus by braking is known as the perception reaction time. For example, it is the
4 time it takes for a person to see a stop sign, process the information in their brain
5 that they need to stop, and initiate the physical response of putting their foot on
6 the brake. For purposes of this declaration, I assumed that Walter Bowers would
7 be able to perceive and react to the stop sign in under 1.5 seconds.

8 10. A vehicle traveling at 35 m.p.h. takes 10 seconds to travel 514 feet.
9 A vehicle traveling at 35 m.p.h. would take over 5 seconds to travel 257 feet.
10 The distance between the stop ahead warning sign and the stop sign is
11 approximately 231 feet. Walter Bowers had more than enough time to observe,
12 react to and stop for the stop sign, if he had been attentive to the driving task.

13 11. The cause of this accident was Walter Bowers' failure to stop for the
14 stop sign and to yield the right of way to the Marzano vehicle which was clearly so
15 close to the intersection at the time that it posed an immediate hazard to the
16 Bowers' vehicle if it entered the intersection without stopping and yielding the
17 right of way. If Walter Bowers had stopped for the stop sign and yielded the right
18 of way to the vehicles traveling on 152nd Street East, including the vehicle driven
19 by Pam Marzano, this accident would not have occurred.

20 12. The reconstruction of this accident establishes Mrs. Marzano had less
21 than 1 second to react to the appearance of the Bowers' vehicle as it encroached
22 into the intersection obstructing her right of way and direction of travel. As a
23 result, there was no way for Mrs. Marzano to avoid this collision. Even if Mrs.
24 Marzano was traveling at a speed of 35 m.p.h. this would not have enabled her to
25 avoid this collision since she would have had only 1 second to observe and react
26 to the Bowers' vehicle. This is an insufficient amount of time for her to observe,
react and avoid a collision.

DECLARATION OF JOHN E. HUNTER
IN SUPPORT OF DEFENDANT
MARZANO'S MOTION FOR SUMMARY
JUDGMENT

- 4

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NorthWest P.I.C.

Professional Investigative Consultants, Inc.

Curriculum Vitae**Walter J. Becinski****P.O.Box 98033****Lakewood, WA 98499-0033****(253) 229-6690****Experience:**

Retired as Deputy Sheriff/Collision Reconstructionist of the Pierce County Sheriff's Department February 25, 2005. Appointed as instructor to the Department's Emergency Vehicle Operators Course in 1987. Assigned to the Traffic Division in January 1989. Assigned as a Fatal Traffic Investigator in February 1990. Assigned as the Traffic Accident Reconstructionist for the City of Lakewood, Washington October 1997-2004. Was assigned as one of three, Traffic Accident Reconstructionist for the Pierce County Sheriff's Department. Experience includes the investigation of more than 10,000 accidents. Instructed basic, advanced and technical accident investigation for the Washington Traffic Safety Commission. Coordinated the training of technical accident investigators and Reconstructionists for the Pierce County Sheriff's Department serving the City of Lakewood Washington. Lead collision investigator for the City of Lakewood, Washington. Assignment as a Fatal Traffic Investigator includes minor traffic accident investigations, injury & serious injury accident investigations and fatal accident investigations. Encompasses the primary and follow up investigations for felony accidents resulting from, but not limited to felony pursuits, vehicular assaults, and vehicular homicides. When other investigators within the Traffic Division investigate fatal accidents and felony accidents, the Fatality Investigator supervises and teaches other personnel the proper procedures of the investigation. Included in the Investigators responsibility is to determine engineering hazards to the roadway. Technical advisor for the Sheriff's Department Accident Review Board and Pierce County Accident Review Board. Lead Investigator for Sheriff's vehicles involved in collisions and or vehicle ramming. Instructed Police Officers for more than ten years in Emergency Vehicle Operation, which included driver strategy and tactics. Exceeds the National Highway Traffic Safety Administration standard for Police Reconstructionists. Owned and operated a consulting firm for collision reconstruction for the last Fifteen years.

Education:

Texas A & M University/Texas Engineering	Accident Reconstruction	1995-1996
Northwestern University/The Traffic Institute	Accident Reconstruction	1994-1995
Walla Walla Community College	Criminal Justice	1975-1977
Fort Steilacoom Community College	Criminal Justice	1974

Employment History:

Pierce County Sheriff's Department	Commissioned	1980-2005
State of Washington Department of Corrections/Law Enforcement Liaison	Intelligence	1975-1980
United States Army	U.S.Army Intelligence	1972-1975

Specialized Training:

Car vs. Pedestrian Investigations Test Crashes	Seminar	2002
W.A.T.A.I. Friction Roll over Test Crash ARC Network	Seminar	2002

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Specialized Training: (continued)

Insurance Fraud: It's not just a Civil Mater Puget Sound Special Investigators International Association of Special Investigation Units		1999
Motorcycle Accident Investigation Institute of Police Technology & Management University of North Florida Washington Criminal Justice Training Commission (WCJTC)		1999 Certified
State of the Art Accident Reconstruction: Reconstructing Low Speed Collisions International Association of Accident Reconstruction Specialists Boston, MA		1998 Certified
Accident Fraud Puget Sound Special Investigators International Association of Special Investigation Units		1997 Certified
Insurance Fraud Seminar Puget Sound Special Investigators International Association of Special Investigation Units		1996 Certified
Low Speed Collision/TOPTEC Society of Automotive Engineers		1996 Certified
Biomechanics for Accident Reconstruction Texas A & M/Texas Engineering Extension Washington Criminal Justice Training Commission (WCJTC)		1996 Certified
Staged Auto Accidents Puget Sound Special Investigators International Association of Special Investigation Units		1995
Pedestrian & Bicycle Accident Reconstruction Texas A & M/Texas Engineering Extension Washington Criminal Justice Training Commission (WCJTC)	Reconstructionist	1995 Certified
Microcomputer Accident Reconstruction I, II, III EDCRASH & EDSMAC Northwestern University/The Traffic Institute Washington Criminal Justice Training Commission (WCJTC)	Reconstructionist	1995 Certified
Traffic Accident Reconstruction II Northwestern University/The Traffic Institute Washington Criminal Justice Training Commission (WCJTC)	Reconstructionist	1995 Certified
Occupant Protection Usage & Enforcement Washington Traffic Safety Commission	Instructor	1994
Staged Two Car Collision Test for "TOTAL STATION," "SONIC MEASURING," "SLAM," "EDCRASH" & "VC 2000" Washington Association of Technical Accident Investigators (WATAI)	Research	1994

Specialized Training: (continued)

Traffic Accident Reconstruction I Northwestern University/The Traffic Institute	Reconstructionist	1994 Certified
VC 2000 Braking Test Computer Court Presentation & Justification		1994 Certified
Vehicle Dynamics Northwestern University/The Traffic Institute		1994 Certified
Washington Criminal Justice Training Commission (WCJTC) Snow & Ice Friction Values Accident Fraud Investigations WATAI		1993
Instructor Development Washington Criminal Justice Training Commission (WCJTC)	Instructor	1993 Certified
Traffic Accident Investigations-Technical Washington State Patrol/WCJTC	Investigator Recertification	1992 Certified
Emergency Vehicle Operator Instructors Course Washington State Patrol/WCJTC	Instructor	1990 Certified
Traffic Accident Investigations-Technical Washington State Patrol/WCJTC	Investigator	1990 Certified
Traffic Accident Investigations-Advanced WCJTC	Investigator	1989 Certified
Traffic Accident Investigations-Basic WCJTC	Investigator	1989 Certified
<u>Professional Associations:</u>		
Member, Puget Sound Special Investigators		1996-2005
President, Pierce County Deputy Sheriff's Independent Guild		1995-1997
Appointment as Instructor for Accident Investigations Washington Traffic Safety Commission		1994-2005
Technical Advisor, Pierce County Sheriff's Department Accident Review Board		1990-2005
Technical Advisor, Pierce County Accident Review Board		1990-2005
Member, National Association of Professional Law Enforcement Emergency Vehicle Response Trainers		1992-1998
Vice-President, Pierce County Deputy Sheriff's Independent Guild		1992-1995 2000-2002
Washington State Association of Technical Accident Investigators Member		1990-2005

Professional Associations: (continued)

Association of Law Enforcement Response Trainers (A.L.E.R.T.) Member 1990-1998

National Association of Police Accident Reconstructionists Member 1990-present

Accomplishments:

Expert Witness: Have testified as an Expert Witness for Collisions more than 36 times 1993-present

Key Note Speaker: Oregon Insurance Special Investigators
Collecting and Preserving Evidence from
Low Speed Impacts/Understanding the
Mechanism of Injury-Impact Biomechanics 1998

Key Note Speaker: Puget Sound Special Investigators
Collecting and Preserving Evidence from
Low Speed Impacts/Understanding the
Mechanism of Injury-Impact Biomechanics 1998

Key Note Speaker: Tacoma/Pierce County Bar Association
Determining the Effects of Low Speed Impacts 1997

Key Note Speaker: Metropolitan P & C
Determining the Effects of Low Speed Impacts 1997

Key Note Speaker: ITT Hartford Insurance
Determining the Effects of Low Speed Impacts 1996

Chairperson: Saint Frances Cabrini Parish
Lakewood, WA 98499 2000-2003

Consultant: United States Department of Justice
United States Attorney General's Office 1996-present

Owner/Operator: Pro-Tech Accident Reconstruction, Inc. 1993-1999

Owner/Operator: NorthWest Professional Investigative Consultants 1999-present

Instructor: Washington State Criminal Justice Training Commission
Basic, Advanced, Technical & Fraudulent Collision Investigation 1990-2005





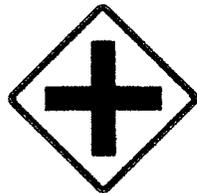
Exhibit
F. 1

157
99

A high-contrast, black and white photograph showing a road intersection. The road on the left is light-colored and leads towards the viewer. The road on the right is dark and appears to be a side street or driveway. The background is mostly black, with some white highlights suggesting trees or buildings. At the bottom center, there is a small white rectangular label with the number '107' written on it.

107

Warning signs—These signs are usually yellow with black lettering or symbols and most are diamond shaped. These signs warn you to slow down and be prepared to stop if necessary. They warn you of sharp curves, special situations, speed zones, or hazards ahead. Some common warning signs are shown below.



Cross Road



Stop Ahead



Speed Zone Ahead



Two-Way Traffic



Yield Ahead



Lane Ends, Merge Left



Advance Warning:
Bicycles



Pedestrian
Crossing



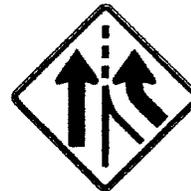
School Crossing



Divided Highway
(Road) Begins



Divided Highway
(Road) Ends



Added Lane



Slippery When Wet



Sharp Curve Right



Hill

Bowers v. Marzano
Deposition of Pamela M. Marzano

Page 74	Page 76
1 MR. DANIEL: She said she didn't have any	1 regulating, warning or guiding traffic.
2 recollection. You are mischaracterizing her testimony.	2 Wouldn't you say this is for the purpose of warning
3 MR. LUHRS: Well, please don't testify for her.	3 traffic?
4 MR. DANIEL: Well, you don't testify for her,	4 MR. DANIEL: Objection; multiple questions.
5 then, too. Okay?	5 A I don't know.
6 MR. LUHRS: I'm trying to set a predicate for	6 Q (By Mr. Luhrs) Okay. When you played racquetball, were you
7 this, to make sure that we are on the same page.	7 in any tournaments?
8 Q (By Mr. Luhrs) Am I correct you are saying you don't remember	8 A No.
9 whether or not there was a warning sign at the time -- on the	9 Q Were you involved in a club that had a ladder? Do you know
10 date of the accident?	10 what a ladder is?
11 A I don't remember.	11 A No.
12 Q Okay. Are you also saying that in your opinion a warning	12 Q Okay. Were you ever ranked as a player?
13 sign is not a traffic control device?	13 A No.
14 A That would be my opinion.	14 Q Okay. Did you have your cruise control on at the time of the
15 Q Okay. And what do you base that on?	15 accident?
16 MR. DANIEL: Asked and answered; objection.	16 A Not that I remember, no.
17 MR. LUHRS: I don't think she has.	17 Q Can you say for sure whether or not you did?
18 MR. DANIEL: She told you it was her opinion.	18 A No, I did not.
19 MR. LUHRS: And I asked her what she based her	19 Q Do you know how to operate the cruise control on the
20 opinion on.	20 Silverado?
21 A It's my opinion.	21 A I don't believe so.
22 Q (By Mr. Luhrs) Why don't you just go ahead and read	22 Q Okay. So you've never operated the cruise control on the
23 RCW 46.04.611 into the record for me.	23 Silverado?
24 MR. DANIEL: Let me see it. (Perusing.)	24 A I don't remember.
25 (Handing document to witness.)	25 Q Do you ever use the cruise control on your car?
Page 75	Page 77
1 A "Official traffic control devices mean all signs, signals,	1 A Sometimes.
2 markings and devices not inconsistent with Title 46 RCW,	2 Q Do you ever use it when you are driving home from your
3 placed or erected by authority of a public body or official	3 daughter's or wherever you would drive from when you are
4 having jurisdiction for the purpose of regulating, warning or	4 going down 152nd?
5 guiding traffic."	5 A I don't know.
6 Q (By Mr. Luhrs) Do you have some reason to believe that this	6 Q Can you tell me what gear you were in, going down towards
7 yellow warning sign in Exhibit 3 doesn't fall within that	7 that intersection?
8 statute?	8 A No.
9 MR. DANIEL: Objection. She's not an expert.	9 Q Do you have any reason to disbelieve or do you know whether
10 She does not have a law degree. She's not qualified to	10 your expert disputes what is in the vehicle data -- onboard
11 respond.	11 data recorder called CDR?
12 MR. LUHRS: I can still ask her.	12 A No, I don't.
13 MR. DANIEL: I didn't say you couldn't. I just	13 Q Have you seen the CDR results?
14 made my objection.	14 A No.
15 MR. LUHRS: Yeah, right.	15 Q I'll tell you what they say. They say you were going between
16 Q (By Mr. Luhrs) And what's your answer?	16 39 and 40, and you were at a constant 1280 r.p.m. for every
17 A I've answered your question.	17 time the CDR -- this data recorder looked at the performance
18 Q No. My question is, do you have some reason to believe that	18 of the car from the time of the airbag deployment going back
19 the warning sign in Exhibit 3 doesn't fall within the signs	19 five seconds. It doesn't cover the entire time. It covers
20 described in that statute that you just read into the record?	20 these little five-second snapshots -- or little snapshots at
21 A I don't know.	21 one-second intervals going back five seconds. But that's
22 Q Okay. It sounds like it is covered by that statute, doesn't	22 what it says.
23 it?	23 Do you have any reason to believe that you weren't
24 A I don't know. I'm not an authority.	24 going a constant 1280 r.p.m.?
25 Q Well, it says all these signs that are for the purpose of	25 A I don't know what 1280 r.p.m. truly means to me, no.

20 (Pages 74 to 77)

March 16, 2010
Capitol Pacific Reporting, Inc. (800) 407-0148

Bowers v. Marzano
Deposition of Pamela M. Marzano

Page 82	Page 84
1 Q Would it surprise you to know that the people that were there	1 MR. DANIEL: Objection. The question is vague.
2 didn't see you losing consciousness?	2 It doesn't provide enough facts for her to answer.
3 A That would surprise me, yes.	3 Q (By Mr. Luhrs) Do you think you would slow down -- if you saw
4 Q That they just heard you complaining about that kid that hit	4 one of those signs and there was a railroad track up ahead,
5 your car?	5 do you think you would slow before you went across the
6 A Is that a question?	6 railroad track?
7 Q Yeah. Would it surprise you to know they didn't see you	7 A Before I went over the railroad track?
8 losing consciousness, they saw you just complaining about the	8 Q Yeah.
9 kid that hit your car?	9 A Possibly.
10 MR. DANIEL: Objection. That's a statement.	10 Q And if there was a yellow light in addition to this sign
11 Argumentative. It's not a question.	11 before the intersection, do you think you would slow before
12 Q (By Mr. Luhrs) Would it surprise you?	12 the intersection -- a blinking yellow light, let me clarify?
13 A It would surprise me if the people weren't aware that I had	13 A Possibly.
14 been knocked out.	14 Q How much would you slow?
15 Q How long do you claim you were knocked out for?	15 A I don't know.
16 MR. DANIEL: Objection; asked and answered. She	16 Q Do you understand that you are required to obey all speed
17 said, "I don't know."	17 limits?
18 Q (By Mr. Luhrs) You don't know?	18 A Yes, I'm aware of that.
19 A I don't know.	19 Q And you don't dispute that you were going faster than the
20 Q Do you recall being cut out of your seat belt by one of the	20 speed limit?
21 people who was there?	21 A At the time of the accident, I wasn't aware I was going over
22 A I wasn't cut out.	22 the speed limit.
23 Q You weren't?	23 Q Okay. But at this point you are not claiming that you were
24 A No. Some people helped me out.	24 not going over the speed limit; are you?
25 Q Okay. You remember them helping you out?	25 A At the time of the accident, I was not aware that I was going
Page 83	Page 85
1 A Vaguely.	1 anything but the speed limit.
2 Q Okay. And after they helped you out, then what happened?	2 Q I know you said that, but I'm saying, what you are alleging
3 A I sat on the ground.	3 now, you are agreeing that you were going over the speed
4 Q And when did you lose consciousness, before or after the	4 limit at at least 39 miles an hour, correct?
5 people helped you out?	5 A No, I'm not aware of that.
6 A Before.	6 Q You are not aware that that's what your expert is stating you
7 Q Okay.	7 were doing in his report?
8 A After impact.	8 A I mean I'm not aware of some details in the report.
9 Q I see. Would you agree that if someone is being cautious and	9 Q Okay. Do you dispute that you were doing at least 39 miles
10 they are warned of a hazard, they should slow down?	10 an hour at the time of the accident?
11 A If they are warned of a hazard, yes.	11 A No, I guess. No.
12 Q If you see a blinking yellow light, do you slow down?	12 Q Well, which is it, yes or no?
13 A Yes.	13 A You are talking about after the accident?
14 Q If you see a sign similar to Exhibit 3, the one that's	14 Q I'm talking about right now, are you disputing that you were
15 circled, only with the cross this way (indicating), what does	15 going at least 39 miles an hour at the time of the accident?
16 that mean? If the cross looks like an X, what does that	16 A I personally am not aware that I was doing 39 miles an hour.
17 mean?	17 Q My question is a little different. I want to know whether
18 A A railroad sign.	18 right now you dispute that you were doing at least 39 miles
19 Q If you see one of those, do you proceed cautiously?	19 an hour at the time of the accident.
20 A Yeah.	20 A Do I dispute who or what?
21 Q I mean, if you saw one of those and there was a railroad	21 Q Your own expert said that. I just want to clarify you are
22 track up ahead, would you just keep going at 40 miles an hour	22 not trying to -- you know, you are going to go along with
23 or would you slow down?	23 that; you agree that was the case.
24 A I don't know.	24 MR. DANIEL: I'm going to object; argumentative.
25 Q You wouldn't slow at all?	25 You asked her if she knew what her speed was. She answered

22 (Pages 82 to 85)

March 16, 2010
Capitol Pacific Reporting, Inc. (800) 407-0148

Bowers v. Marzano
Deposition of Pamela M. Marzano

Page 86	Page 88
1 that. You asked whether she agrees or disagrees. She said,	1 speed limit. I would be surprised to hear that I wasn't
2 "I don't know what speed I was doing." I mean, it's been	2 doing the speed limit at that time.
3 asked and answered.	3 Q Well, your own expert says you were going 39.
4 MR. LUHRS: I think it's appropriate in a	4 Does that surprise you?
5 deposition to ask people to admit to certain things. And	5 MR. DANIEL: Objection; asked and answered.
6 she can't dance around and answer a different question, so	6 MR. LUHRS: Well, she just said something new, so
7 I'm going to try to get her to answer my question.	7 I wanted to see how that squared with that.
8 You guys can take a break if you want.	8 MR. DANIEL: That's fine. I made my objection.
9 MR. DANIEL: I just don't understand why you	9 MR. LUHRS: Yeah.
10 can't ask a clear question.	10 A I would be surprised if I was traveling over the speed limit.
11 MR. LUHRS: My question is whether she is denying	11 Q (By Mr. Luhrs) All right. You look like you are in pretty
12 that at the time of the accident she was going at least 39,	12 good physical condition. It looks like you take pretty good
13 not what she thought then but right now.	13 care of yourself.
14 Q (By Mr. Luhrs) Are you denying that at the time of the	14 Am I correct?
15 accident you were going at least 39 miles an hour?	15 A I try.
16 A I don't know.	16 Q I mean, do you exercise --
17 Q (By Mr. Luhrs) You don't know whether you can admit or deny	17 A I do.
18 that?	18 Q -- every day or every other day --
19 A I don't know what I was driving at the time.	19 A I try. I try to exercise every day.
20 Q That's not my question.	20 Q Okay. Like how much a day?
21 My question is whether you admit or deny right now,	21 A I try to get in cardio every day and then other activities as
22 today, that at the time of the accident you were doing at	22 I have time.
23 least 39.	23 Q So how much cardio do you do a day?
24 MR. DANIEL: Objection; asked and answered. She	24 A I don't know. Twenty to 30 minutes maybe.
25 told you she doesn't know.	25 Q And I notice you have bicycle earrings.
Page 87	Page 89
1 MR. LUHRS: She never answered it.	1 Are you a bike rider along with the other things you
2 MR. DANIEL: Yes, she did. She told you she	2 mentioned?
3 doesn't know.	3 A Mm-hmm.
4 MR. LUHRS: That's not a yes or no.	4 Q Okay. Do you do that, you know, at a distance? How far do
5 MR. DANIEL: Just because you want a yes or no	5 you go?
6 doesn't mean you get a yes or no, George.	6 MR. DANIEL: Objection; multiple questions.
7 MR. LUHRS: All right. Fine.	7 MR. LUHRS: I'll just go with the second
8 Q (By Mr. Luhrs) Did you see the Subaru as he went past the	8 question.
9 stop sign?	9 A Which was?
10 A I don't know. I saw him when he was dead in front of me.	10 Q (By Mr. Luhrs) How far?
11 Q But if you saw him running the stop sign, wouldn't you have	11 A I would say 20 to 40.
12 also seen him as he went through the stop sign?	12 Q Twenty to forty minutes or miles?
13 A I don't know.	13 A Miles.
14 Q Okay.	14 Q Wow. Where do you do that?
15 MR. LUHRS: I need a couple minutes to go through	15 A Down in Orting, to Eatonville.
16 this. If you want to take a break, that's up to you.	16 Q Are we talking bike trails or on the road?
17 MR. DANIEL: Okay. We'll take a break.	17 A On the road.
18 (Recess taken.)	18 Q So you sound like you are a serious bicyclist.
19 MR. LUHRS: Back on the record.	19 A It depends on who you are talking to.
20 Q (By Mr. Luhrs) You said you didn't know how fast you were	20 Q Put it this way: Are you one of these people that ride your
21 going at the time of the accident; is that correct?	21 bike to Portland once a year?
22 A That's correct.	22 A Once in my life.
23 Q So would I be correct you wouldn't be able to say you	23 Q Okay. Do you know what your resting heart rate is?
24 couldn't have been going 43 and a half miles an hour?	24 A I don't.
25 A I would be surprised if I was doing much -- you know, at the	25 Q Do you keep track of things like that, to figure out if you

23 (Pages 86 to 89)

March 16, 2010
Capitol Pacific Reporting, Inc. (800) 407-0148

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TCG +00:00:07;27



Revised 3/2010

CURRICULUM VITAE**Colin H. Daly**

DATE OF BIRTH: 22nd. August, 1940

PLACE OF BIRTH: Glasgow, Scotland

CITIZENSHIP: United States

DEGREES HELD: B.Sc. with 1st. class honours in
Mechanical Engineering, 1963
University of Glasgow
Ph.D. in Bioengineering, 1966,
University of Strathclyde

THESIS TITLE: The Biomechanical Characteristics of
Human Skin

PATENTS & ROYALTIES: Royalty payments for licensing of
Jaw Exercise Device, 1990-92

CURRENT POSITION: Professor Emeritus of Mechanical Engineering,
University of Washington
Box 352600, Seattle, WA 98195-2600
(206) 543-5090
Fax: (206) 685-8047

POSITIONS HELD:

1958-1963	Rolls Royce Student Scholar
1966-1967	Senior Research Fellow, Dept. of Physiology and Biophysics University of Washington
1967-1972	Assistant Professor, Department of Mechanical Engineering University of Washington
1972-1978	Associate Professor, Department of Mechanical Engineering University of Washington
1978-2005	Professor, Department of Mechanical Engineering, University of Washington
1982-1983	Visiting Professor, Hong Kong Polytechnic, Hong Kong
1985-2002	Adjunct Professor in Bioengineering University of Washington

1991-1994	Guest Scientist, Superconducting Super Collider Lab., Dallas, Texas
1992-1994	Lead Engineer, SDC Muon Barrel Measurement System SSCL, Dallas, Texas
1994-2008	Visiting Scientist, CERN, Geneva, Switzerland (Atlas Muon System for LHC)
1995-2008	Lead Engineer, Atlas forward muon system, CERN, Geneva,
1999-2002	Consultant to Dept. of Physics, Harvard University

SOCIETY MEMBERSHIPS:

Member, American Society of Mechanical Engineers
Member, The Institution of Mechanical Engineers (London)

RESEARCH ACTIVITIES

a) Publications (Refereed Papers)

"Development of a Method of Monitoring of Fracture Healing in Patients with External Fixation" (with S.K. Benirschke, A.F. Tencer and R.I. Kawaguchi). *J. Bioengineering* 1989

"A Transducer to Record Normal and Shear Stresses at a Prosthetic Interface" (with J.E. Sanders). *Experimental Techniques* 1992.

"An Angular Alignment Measurement Device for Prosthetic Fitting" (with J.E. Sanders). *Prosthetics and Orthotics International* 1990, Vol. 14 p 143-144.

"Measurement of Stresses in Three Orthogonal Directions at the Residual/Prosthetic Socket Interface" (with J.E.Sanders). *IEEE Transaction on Biomedical Engineering*. 1993, Vol. 1(2), pp 79-85

"Interface Shear Stresses During Ambulation with a Below-Knee Prosthetic Limb" (with J.E.Sanders and E.M.Burgess). *J. Rehab. Research and Dev.* 1992, Vol. 29(4) pp 1-8.

"Comparison of Residual Stability in Thoraco-columbar Spine Fractures Using Neutral Zone Measurements" (with R.P. Ching, A.T. Tencer and P.A. Anderson). *J. Orthopedic Research*, 1995, vol. 13, pp. 533-541..

"Clinical Measurement of Normal and Shear Stresses on a Transtibial Residual Limb" (with J.E.Sanders and E.M.Burgess). *Prosthetics and Orthotics International*, 1993, Vol. 17, pp 38-48.

"Cosmic Ray Tests of SDC Prototype Muon Drift Tubes" (with T. Fukui, H.J. Lubatti, J.

Thunborg, R. Davisson, W. Dougherty, H. Guldenmann, J. Hersch, K. Paulson and T. Zhao).
Nuclear Physics B (Proc. Suppl.), 1993, Vol. 32, pp 236-241

"Normal And Shear Stresses On A Residual Limb In A Prosthetic Socket During Ambulation:
Comparison Of Finite Element Results With Experimental Measurements" (with J E Sanders).
Journal of Rehabilitation Research, 1993, Vol. 30(2), pp 191-204.

"A Measurement Device To Assist Amputee Prosthetic Fitting" (with J E Sanders, W R
Cummings, R D Reed and R J Marks). *J. Clin. Engineering*, 1994, vol. 19, pp. 63-71.

"How Does Vacuum Forming Affect Pelite Properties?" (with J E Sanders). *Prosthetics and
Orthotics International*, 1994, vol. 18, pp. 43-48.

"Comparison of Residual Stability in Thoracolumbar Spine Fractures Using Neutral Zone
Measurements" (with R P Ching, A F Tencer and P A Anderson). *J Orthopaedic Research*, 1995,
vol. 13, pp 533-541.

"Load Fatigue Performance of Two Implant-Abutment Combinations" (with
C. H-J. Basten, J.I. Nicholls and R. Taggart), "*J. Oral & Maxillofacial Implants*", 1996, vol 11(4)
pp 522-528.

"Construction and Test of a Full-Scale Prototype of an ATLAS Muon Spectrometer Tracking
Chamber" (with A Biscossa, M Cambiaghi, C Conta, Ferrari, M Fraternali, A Freddi, G Iuvino, A
Lanza, M Livan, A Negri, G Polesello, A Rimoldi, F Vercellati, V Vercesi, P Bagnaia, C Bini, G
Capradossi, G Ciapetti, P Creti, G De Zorzi, M Iannone, F Lacava, A Mattei, L Nisati, P
Oberson, L Pontecorvo, S Rosati, S Veneziano, A Zullo, R Davisson, H Guldenmann, H J
Lubatti, T Zhao), "*Nuclear Instruments and Methods in Physics Research*", 1999, vol.
425/1-2, pp. 142-166.

"Interface pressures and shear stresses: sagittal plane angular alignment effects in three trans-tibial
amputee case studies", (Sanders JS and Daly CH). *Prosthetics and Orthotics international*, 1999,
vol 23, pp. 21-29.

"Electrical Properties of Carbon Fiber Support Systems" (with W. Cooper, M. Demarteau, J Fast,
K Hanagaki, M Johnson, W Kuykendall, H Lubatti, M Matulik, A Nomerotski, B Quinn and J
Wang), "*Nuclear Instruments and Methods in Physics Research*", 2005

The ATLAS Experiment at the CERN Large Hadron Collider,
The ATLAS Collaboration, G. Aad et al., JINST 3 S08003, 2008

"The Layer 0 Inner Silicon Detector of the D0 Experiment" (with R. Angstadt, L. Bagby, A. Bean,
T. Bolton, D. Buchholz, D. Butler, L. Christofek, W.E.Cooper, M. Demarteau, J. Foglesong1, C.E.
Gerber, H. Gonzalez, J.Green, H. Guldenman, K. Hanagaki, K. Herner, J. Howell, M. Hrycyk,
M. Johnson, M. Kirby, K. Krempetz, W.Kuykendall, F.Lehner, R. Lipton, H.J.Lubatti, D.
Markley, M. Matulik, R.L. McCarthy, A. Nomerotski, D. Olis, Y. Orlov, G.J. Otero y Garzón, M.
Roma1, R. Rucinski, K. Schultz, E. Shabalina, R.P. Smith, D. Strom, R.D. Taylor, D. Tsybychev,
M. Tuttle, M. Utes, J. Wang, M. Weber, T. Wesson, S.W.Youn, T.Zhou, A. Zieminski), *Nuclear
Instruments and Methods in Physics Research*", accepted for publication 2010.

2. Chapters in Books

"Bioengineering Studies of the Human Skin - I" (with R. M. Kenedi and T. Gibson) *NATO Advanced Study Course* June 1964, Butterworths.

"Bioengineering Studies of the Human Skin - II" (with R. M. Kenedi and T. Gibson) p. 174 in *Proceedings Symposium on "Biomechanics and Related Bioengineering Topics"* (ed. R. M. Kenedi) 1965, p. 147, Pergamon, London.

"Quantitative Dermatology" in *Medical Engineering*, (ed. R. R. Rushmer). Academic Press, 1972.

"Biomechanics of the Oral Tissues" (with J. I. Nicholls, W. L. Kydd, and P. D. Nansen), *Perspectives in Biomedical Engineering* (ed. R. M. Kenedi), McMillan and Company, 1973, p. 181.

"Preliminary Studies on the Mechano-Chemical Structure Relationships in Connective Tissues Using Enzymolysis Techniques" (with A. S. Hoffman, L. A. Grande, P. Gibson, J. B. Park, P. Bornstein, and R. Ross), in *Perspectives in Biomedical Engineering* (ed. R. M. Kenedi), McMillan and Company, 1973, p. 173.

"The Effect of Pressure Loading on the Blood Flow Rate in Human Skin" (with J. E. Chimoskey, G. A. Holloway and D. Kennedy). "Bedsore Biomechanics," editors R. M. Kenedi, J. M. Cowden and J. Y. Scales, pp. 69-77, Macmillan, London, 1976.

3. Reports

"Material Properties of Cerebral Blood Vessels" Final Report on Contract No. NIH-69-2232 U of W, Mech. Engr. Dept. Report No. ME 71-11.

"Mechanical Consequences of Tube Layer Ordering in SDC Muon Modules" Superconducting Super Collider SDC Note SDC-92-260, 1992.

"Evaluation of Epoxy Adhesives for Muon Module Assembly" (with I.C. Jeffers). Superconducting Super Collider SDC Note SDC-92-261, 1992.

"Assembly Procedure for Barrel Module", (with R. Davisson, H.J. Lubatti and J. Thunborg). Superconducting Super Collider SDC Note SDC-93-458, 1993.

"Finite Element Analysis of the SDC Barrel Muon System Prototype", (with Per G. Reinhall and T-H Nguyen). Superconducting Super Collider SDC Note SDC-93-594, 1993.

"FEA Analysis of a Large MO Muon Chamber for ATLAS", (with P G Reinhall). ATLAS note MUON-No-48, CERN, Geneva, August 1994

"Assembly Procedures for ATLAS Barrel Muon Modules", (with H Lubatti, B Dennis, R Davisson, H Guldenmann). ATLAS note MUON-No-49, CERN, Geneva, August 1994

"Design Concept for ATLAS Muon Chamber Using MDT Drift Tubes", ATLAS note MUON-No-050, CERN, Geneva, September 1994

"Concepts for the Design and Assembly of Forward Region MDT Chambers for Atlas" (with R Davisson, B Dennis, H Guldenmann, H Lubatti, L Stark). ATLAS Note MUON-No-086, CERN, Geneva, July 14, 1995.

"Geometrical Acceptance Studies for the MDT Muon System in ATLAS" (with A Dell'Acqua, A Rimoldi), ATLAS note MUON-No-096, CERN, Geneva, September 18, 1995.

"The First Full-Scale Prototype of a BIL MDT Chamber for the ATLAS Muon Spectrometer" (with A.Biscossa et al.). ATLAS note MUON-No-136, CERN, Geneva, January 14, 1997

"Mechanical and Thermal Tests on the BIL MDT Chamber Prototype "Calypso" (with G DeZorzi, P Oberon). ATLAS note MUON-No-144, CERN, Geneva, March 25 1997

"Testbeam Results from the Calypso MDT Chamber" (with A. Biscossa, et al). ATLAS note MUON-No-196, CERN, Geneva, June 1997

"Tensile Testing of Tube Materials", ATLAS note MUON-No-217, CERN, Geneva. Nov 1997.

"Finite Element Analysis of the Layers 0 and 1 Support Structures for the Run2b Silicon Tracker." DO Note 5333, Fermilab National Accelerator Laboratory, Batavia, IL, August 2008

CONSULTING

Providing expert testimony and advice on biomechanics of head injury, spinal injury etc. due to trauma in motor vehicle accidents, falls etc. This has also involved motor vehicle accident reconstruction, dynamic modeling of vehicle motions, analysis of failures of mechanical components etc.

Product testing and evaluation for companies working in the biomechanics field.

Providing expert testimony on miscellaneous engineering problems not involving biomechanics.

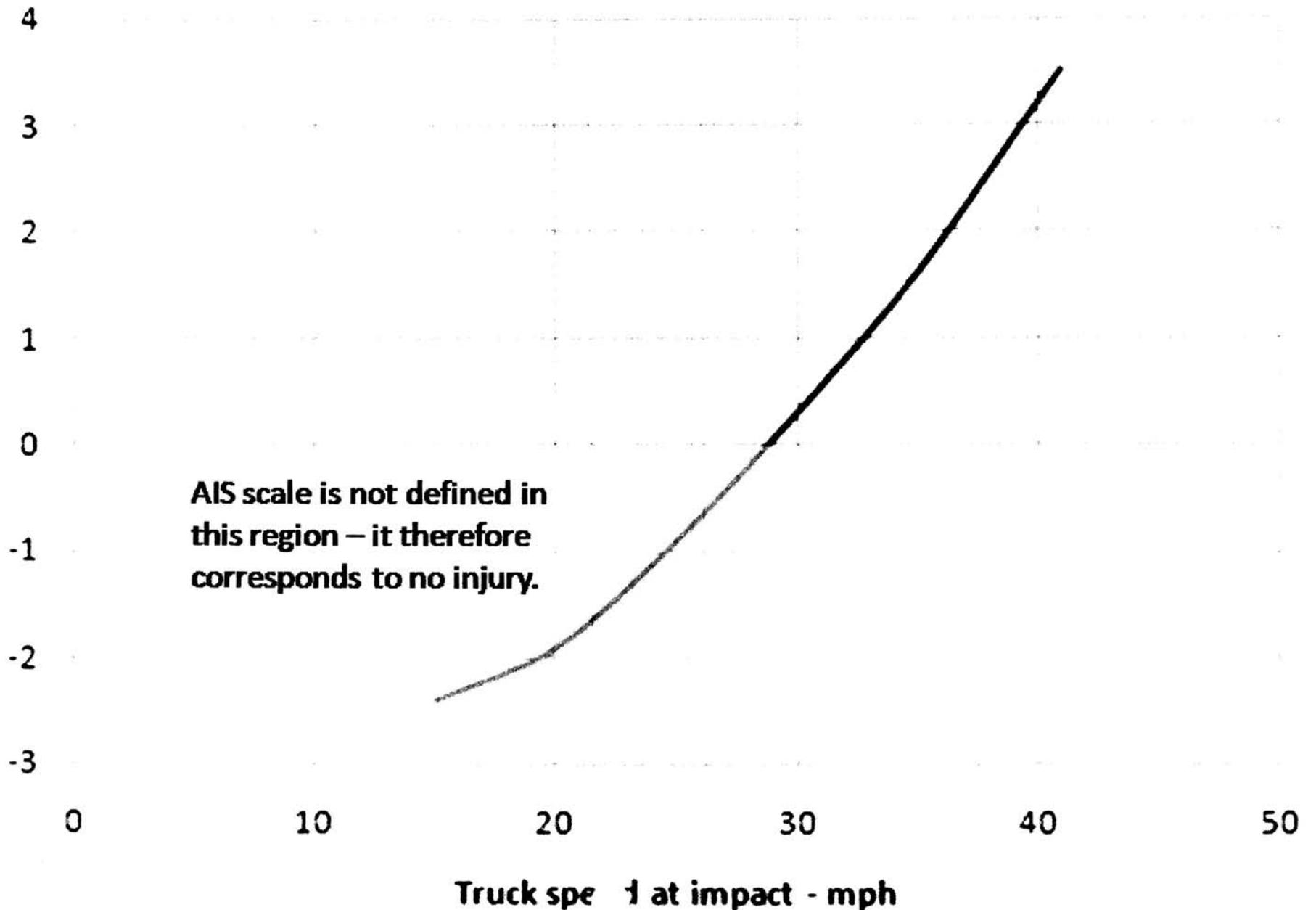
TEACHING ACTIVITIES

Since 1967, this has involved teaching an average of 6 courses per year in the general areas of Applied Mechanics, Materials Science, Mechanical Design and Biomechanics at all levels from sophomore to graduate. Specific subjects taught include:

Engineering Materials
Engineering Statics
Dynamics and Kinematics
Dynamics of Machines
Advanced Dynamics
Mechanical Engineering Design
Machine Design Analysis
Continuum Mechanics
Mechanics of Solids
Applied Viscoelasticity

Measurement and Experimentation
Advanced Mechanical Engineering Lab
Manufacturing Optimization
Microcomputers in Mechanical Engineering
Biomechanics
Histological Basis for Biomechanics
Finite Element Analysis
Experimental Stress Analysis
Manufacturing Processes

AIS vs. Impact speed of truck

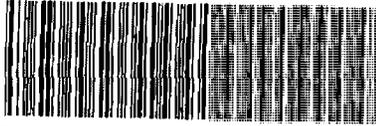


6-51

AIS level

AIS scale is not defined in this region – it therefore corresponds to no injury.

Truck speed at impact - mph



09-2-09689-4 34153593 DCLR 04-20-10

HONORABLE THOMAS FELNAGLE
NOTED 4/30/10, 9:00 a.m.

FILED
IN COUNTY CLERK'S OFFICE

A.M. APR 20 2010 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

Colin Bowers

Plaintiff,

v.

Pamela M. and Jerry Marzano; and Walter S.
Bowers,

Defendants

No. 09-2-09689-4

DECLARATION OF DAWN EDWARDS

DAWN EDWARDS states the under penalty of perjury of the laws of WA.

1. I am of sound mind and competent to testify to the facts and opinions herein, and make this declaration on personal knowledge except where stated to the contrary.
2. I was the owner of the 1997 Subaru Legacy wagon, license # 039TEU, VIN # 453BG6850V6624439 which was involved in the 8/31/08 accident which is the subject of this lawsuit.
3. Although the vehicle records were with the car and were unfortunately destroyed by the effect of the elements during impound, I know it had a 2.5 liter engine and believe the mileage was ~ 300,000. Although I kept it reasonably maintained, it

D. Edwards Decl
No. 09-2-09689-4

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LAW OFFICE OF GEORGE H. LUHRS
701 Fifth Avenue, Suite 4600
Seattle, WA 98104
(206) 632-1100

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could not accelerate as quickly or to as high a speed as a new model and I do not believe it could go more than 22 mph in 1st gear if you pushed it hard.

- 4. I have looked at the photo taken by the police immediately after the accident (Exhibit E) showing the interior and can say with certainty that this photo shows my Subaru in 1st gear.
- 5. Exhibit F.1 -F.5 is 5 pages of photos I took after the crash at the storage yard showing the Subaru in 1st to 5th gear. Exhibit F.6 shows the photos of the first four gears on one page and Exhibit F.7 shows the photo's of the first two gears on one page. These are true and accurate photos and are submitted to demonstrate that Exhibit E clearly shows the Subaru was in 1st gear immediately after the accident.

DATED April 17, 2010



 DAWN EDWARDS



HONORABLE THOMAS FELNAGLE
NOTED 4/30/10, 9:00 a.m.

FILED
IN COUNTY CLERK'S OFFICE
A.M. APR 20 2010 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

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IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

Colin Bowers

Plaintiff,

v.

Pamela M. and Jerry Marzano; and Walter S.
Bowers,

Defendants

No. 09-2-09689-4

DECLARATION OF COLIN DALY

COLIN DALY states the under penalty of perjury of the laws of WA.

1. I am of sound mind and competent to testify to the facts and opinions herein, and make this declaration on personal knowledge except where stated to the contrary. All opinions and conclusions stated herein are my opinions based on my experience and expertise and are expressed on the basis of a reasonable probability.
2. I am an expert in biomechanical engineering, including the medical consequences of varying impacts on the human brain. Exhibit R is a true and correct copy of my Curriculum Vita which sets forth my education, training and experience in this area. I have qualified as an expert in this area in previous Washington superior court trials.

C. Daly Decl
No. 09-2-09689-4

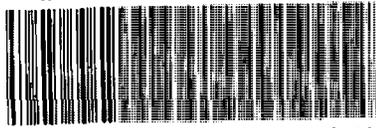
LAW OFFICE OF GEORGE H. LUHRS
701 Fifth Avenue, Suite 4600
Seattle, WA 98104
(206) 632-1100

- 1 3. I was retained to offer opinion on the probable effect on plaintiff Colin Bowers if the
2 Marzano vehicle had been traveling at a lower speed.
- 3 4. For purposes of preparing this declaration I viewed photos taken by police of the
4 scene of the accident, the police investigative report, and the Colin Bowers medical
5 record. In addition I viewed the involved Subaru at an auto storage yard.
- 6 5. For purposes of this Declaration I have assumed that the impact causing the injuries
7 to plaintiff Bowers resulted was from a collision in which the Chevrolet Silverado
8 truck driven by defendant Marzano hit the Subaru in which plaintiff Bowers was
9 passenger at an angle of 270 degrees with the Silverado traveling at 41 mph at impact,
10 and that the vehicles rotated and ended up in the positions shown in the police photos.
- 11 6. From the medical record, I determined that Mr. Bowers sustained a closed head injury
12 at level 3.5 on the Abbreviated Injury Scale. This corresponds to moderate permanent
13 neurological consequences.
- 14 7. I have calculated the probable damage to Mr. Bowers if defendant Marzano was
15 going at various lesser speeds as follows: AIS 1.6 (minor concussion with no
16 permanent effects) at 35 mph ; AIS 0.3 (very slight dizziness) at 30 mph ; less than
17 AIS 0 (no symptoms) at 25 mph or lower.
- 18 8. Exhibit S is a graphic representation of these findings.

19
20 DATED April 19, 2010

21
22 

23
COLIN DALY



09-2-09689-4 34153598 DCLR 04-20-10

HONORABLE THOMAS FELNAGLE
NOTED 4/30/10, 9:00 a.m.

FILED
IN COUNTY CLERK'S OFFICE

A.M. APR 20 2010 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

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IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

Colin Bowers

Plaintiff,

v.

Pamela M. and Jerry Marzano; and Walter S.
Bowers,

Defendants

No. 09-2-09689-4

DECLARATION OF NICCOLE
JOHNSON

NICCOLE JOHNSON states the under penalty of perjury of the laws of WA and on personal knowledge (except where other than personal knowledge is noted) that the following facts are true.

1. I am now and was at the time of the events I am talking about of sound mind and not under the influence of any intoxicants. My year of birth is 1987, and I presently reside in Tacoma, WA.
2. On the late afternoon/evening of 8/31/08 I was with family members and friends on the property of Audra Gordon and Gary Haskins which is located at 15208 66th Ave. E, which is on the southwest corner of the intersection of 152nd Street E. and 66th Ave. E., Puyallup, WA.

N. Johnson Decl
No. 09-2-09689-4

1

LAW OFFICE OF GEORGE H. LUHRS
701 Fifth Avenue, Suite 4600
Seattle, WA 98104
(206) 632-1100

- 1 3. Me, my mom Katherine Nurmikko, my sister Julie, my little sister Karly and my 4
2 year old nephew Devin had gone in two cars to visit my brother Larry Erney who
3 was renting a trailer from Audra and Gary at that time.
- 4 4. Larry was changing the oil in our two cars, and while the oil was draining our family
5 group plus Audra and Gary, and Ryan Mercier and Vickey Judd from across the
6 street, were all standing around visiting.
- 7 5. Just before the accident which is the subject of this Declaration I was standing in the
8 vicinity of the place I have marked "X" on the overhead photo which is Exhibit A and
9 was looking North.
- 10 6. I had been keeping my eye out for a car I liked that frequented that area, so I looked
11 as a green Subaru went past us and saw him clearly. The Subaru was slowing for the
12 stop sign and I heard his brakes squeak and saw his brake lights on. I looked away
13 when he was ~ 10 feet from the stop sign. I estimate he couldn't have been going
14 more than 10 mph when I saw him last, and he was still slowing.
- 15 7. Although the shrubs along the West side of 66th Ave. E look thick on Exhibit A they
16 were actually pretty sparse on the date in question and I could easily see the Subaru as
17 he went past and approached the stop sign
- 18 8. I turned back to respond to something that was said and a moment later as I was
19 looking toward the intersection I saw and heard a crash. Despite what looks like a lot
20 of vegetation in Exhibit A I had a clear view of the western part of the intersection, .
- 21 9. What I specifically saw happened in a split second. The silver/white truck "T boned"
22 the green station wagon from the right, and almost immediately started to rotate away
23 from the Subaru. It was at that point that the crash sound reached me. The truck

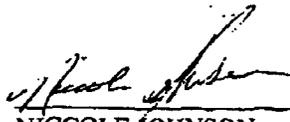
- 1 kept rotating and separated from the Subaru and the Subaru flew through the air over
2 the ditch and into the field before it landed and came to a stop.
- 3 10. I have tried to estimate how long it was between the last time I saw the Subaru, when
4 it was ~ 10' from the stop sign, and the accident. My best estimate is that it was
5 about 3.5 - 4 seconds.
- 6 11. I base this both on my recollection and my comparison of my recollection against
7 four videos taken of a Subaru slowing for the stop sign, doing a "California stop" and
8 proceeding through the intersection in question. In each video I compared my
9 recollection against two things I observed in the video:
- 10 a) The speed of the Subaru when he was ~ 10' in front of the stop sign, and
11 b) The time between the point in a) to the point of the crash.
- 12 12. Of those four videos the one that most resembled what I recall on these two points
13 was the one labeled video 3.
- 14 13. I am advised by Mr. Luhrs that Exhibit B is a still from video 3 with the Subaru at the
15 point ~ 10' in front of the stop sign, and Exhibit C is a still from video 3 with the
16 Subaru at the accident point. These do look like stills from the video I watched.
- 17 14. I am advised by Mr. Luhrs that the time stamp at the bottom of video 3 and Exhibits
18 B and C shows seconds and a video frame count from 1-30 in the right hand place,
19 with the video frames running at ~ 30/sec. I am relying on other witnesses to verify
20 the time stamp data and to convert the time stamp data into seconds and hundredths
21 of seconds, from which I understand the time elapsed on the video for the Subaru to
22 travel between its location in Exhibit B and Exhibit C was 3.4 seconds.
- 23

- 1 15. I did not rely on Mr. Luhrs or any other witness to determine the accuracy of my
2 statement in para 12, which is based entirely on my observation and recollection.
- 3 16. There are two reasons why my estimate in paragraph 10 is slightly more than the time
4 data from video 3. First, when I last saw the Subaru it appeared to be going slower
5 than the Subaru in video 3 at the point ~ 10' in front of the stop. Second, my
6 recollection of the time from when the Subaru was ~ 10' in front of the stop to the
7 crash was slightly more than time it took for the Subaru to travel between those points
8 in the video.
- 9 17. I am relying entirely on my observation and recollection to state the speed of the
10 Subaru ~10' in front of the stop sign.
- 11 18. I am also relying entirely on my observation and recollection to state that the time
12 elapsed between the point when the Subaru was ~10' in front of the stop sign and the
13 crash was more than the time it took for the Subaru to travel that distance in video 3
- 14 19. To make the estimate that 3.5 to 4 seconds elapsed from the last time I saw the
15 Subaru to the crash I am relying in part on other witnesses because I am using both
16 my observation summarized in para 18 and the calculation of the elapsed time on
17 video 3 as determined by others (see para 14).
- 18 20. I have been asked to recount some details about what I observed after the crash.
19 Immediately after the crash our whole group ran to the accident scene to try to help
20 the victims. Others had gone to the Subaru, and I went to the silver/white truck to
21 help the driver, whom I now understand was Ms. Marzano. From where I was
22 standing to the truck was less than 100 yards away, and after stopping at my vehicle
23 to get my cell phone I would estimate I got there 30 to 45 seconds after the crash.

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- 21. At no time did I observe Ms. Marzano unconscious. She was out of the truck walking around when I got there.
- 22. I did observe Ms. Marzano complaining that the Subaru hit her, but my observation was that she hit the Subaru.
- 23. Ms. Marzano also asked me to help her find her cell phone and I called it so she could retrieve it from under the seat to make a call.

DATED April 16, 2010



 NICCOLE JOHNSON

N. Johnson Decl
No. 09-2-09689-4

LAW OFFICE OF GEORGE H. LUHRS
701 Fifth Avenue, Suite 4600
Seattle, WA 98104
(206) 632-1100

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HONORABLE THOMAS FELNAGLE
NOTED 4/30/10, 9:00 a.m.

IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

Colin Bowers

Plaintiff,

v.

Pamela M. and Jerry Marzano; and Walter S.
Bowers,

Defendants

No. 09-2-09689-4

DECLARATION OF WALTER BECINSKI

WALTER BECINSKI states the under penalty of perjury of the laws of WA.

1. I am of sound mind and competent to testify to the facts and opinions herein, and make this declaration on personal knowledge except where stated to the contrary. All opinions and conclusions stated herein are my opinions based on my experience and expertise and are expressed on the basis of a reasonable probability.
2. I am an expert in vehicle accident reconstruction as well as driver safety and safe vehicle operation. Exhibit D is a true and correct copy of my Curriculum Vita which sets forth my education, training and experience in the areas of accident reconstruction and driver safety and safe vehicle operation. I have qualified as an

- 1 expert in the area of accident construction and safe driving practices in previous
2 Washington superior court trials.
- 3 3. I was retained to investigate the 8/31/08 accident in which a 1997 Subaru wagon
4 driven by Walter S. Bowers and a 2004 Chevrolet Silverado driven by Pamela
5 Marzano collided at the intersection of 152nd Street E. and 66th Ave. E., Puyallup,
6 WA at about 6:00 pm.
- 7 4. For purposes of preparing this declaration I have visited the scene of the accident,
8 reviewed the investigative report prepared by the Pierce County Sheriff's Office
9 investigators, a scene diagram prepared by the Pierce County Sheriff's Office
10 investigators, photographs of the scene and roadways, electronic data (crash data
11 retrieval) information from the 2004 Chevrolet Silverado, the deposition of Jennifer
12 Anderson, the deposition of Pamela Marzano, and the Declaration of Niccole
13 Johnson, and other data that will be discussed infra. I have also examined both
14 vehicles post-collision.
- 15 5. In addition I have run an accident simulation using the SLAM program, utilizing the
16 scene measurements taken by the Pierce County Sherriff's department. This uses
17 vehicle weights, angles approaching the crash, tire marks, place where vehicles came
18 to rest, etc. to calculate the force and momentum necessary for the vehicles move in
19 the way they did post-crash, and the amount of energy this would require in order to
20 estimate the speeds of the two vehicles just before the crash. This has been accepted
21 by the courts as providing a reasonable approximation of vehicle speeds which is
22 generally allowed in evidence.
23

- 1 6. Based on the Pierce County data and my own measurements and expert opinion
2 regarding issues such as the angle at which the vehicles first met, the SLAM program
3 predicts that just before impact the Silverado was traveling at least 41.0 mph and I
4 agree with this conclusion.
- 5 7. I have also considered that after the accident the Subaru appeared to be in first gear
6 from the photo provided by the Sheriff's department (Exhibit E), and the Declaration
7 of Dawn Edwards and Exhibit F supporting this.
- 8 8. I have also considered that the Subaru would be unlikely to get beyond 22 mph in 1st
9 gear based on Dawn Edwards' Declaration.
- 10 9. Although I would have liked to have the testimony of Walter S. Bowers, this has
11 apparently not been available due to the limitations on his activities imposed by his
12 work release sentence. See Luhrs Decl.
- 13 10. Based on my review of the data I have reached the following conclusions.
- 14 a. At the time of the accident the approach to the intersection taken by Ms. Marzano
15 was subject to a traffic control device in the form of a yellow warning sign
16 warning of an upcoming intersection which was in place at the time of the
17 accident ~ 200' or more from the start of the intersection.
- 18 b. Exhibit G is a photo of the warning sign I took on or about 9/9/08. Exhibit H is a
19 copy of the statute defining warning signs as traffic control devices. Exhibit I is a
20 copy of the Washington Drivers' Guide for new drivers showing the warning sign
21 and what is supposed to signal to the driver.
- 22 c. Exhibit J is a copy of the Pierce County Police scene diagram (Defendants' Ex 2)
23 with the approximate position of the warning sign marked thereon.

- 1 d. Ms. Marzano did not notice the warning sign as she passed by it driving West on
2 152nd Street E just before the accident. See Marzano testimony Exhibit K.
- 3 e. It is my opinion based both on her testimony that she didn't see the warning sign
4 and the data showing she didn't react before the crash that Ms. Marzano was not
5 driving attentively when she approached the intersection just before the accident.
- 6 f. That Ms. Marzano was not driving attentively is supported by the physical
7 evidence. There was a tire mark beginning ~ 5' feet in front of the point of
8 impact. See Exhibit L, with the part of the mark that was before the crash circled.
9 Assuming she was going at least 41 mph this meant her 1st physical reaction took
10 place .086 seconds or less before impact.
- 11 g. Ms. Marzano's CDR data is consistent with her lack of attentiveness. See
12 redacted excerpt, Exhibit M¹. The constant 1280 rpm shown on the CDR makes it
13 more likely than not that she had the vehicle on cruise control.
- 14 h. It is my opinion that had Ms. Marzano been exercising reasonable caution she
15 would have slowed to no more than 30 mph when she saw the warning sign.
- 16 i. It is my opinion that had Ms. Marzano observed and heeded the warning sign and
17 had she been driving attentively and with reasonable vigilance as she approached
18 the intersection she would have been prepared to react to someone running the
19 stop sign and her perception/reaction time would have been reduced. In my
20 opinion if she had been driving with appropriate attentiveness Ms. Marzano
21 would have seen the Subaru going through the stop sign and would have begun to
22 brake within .67 seconds.

23

¹ The miles per hour reading is redacted because I can't endorse it without additional evidence.

- 1 j. In my opinion based on the SLAM program analysis, the evidence that the car
2 was in 1st gear, and the testimony of Nicole Johnson Mr. Hunter's estimate that
3 the Subaru was traveling 36 mph at impact is wrong. Based in part on the
4 testimony of Nicole Johnson² and also on my expert analysis I believe it
5 reasonable to assume the Subaru was moving at ~ 15 mph between the stop sign
6 and the collision as shown in video 3 (Exhibit N), and that Ms. Marzano had 2.53
7 seconds to react to the Subaru going through the stop sign. The time is derived by
8 comparing the time stamps on stills from video 3 at relevant points. See Exhibit
9 O, and Exhibit C, and Breit Declaration explaining how to interpret the time
10 stamps to calculate time.
- 11 k. In my opinion had Ms. Marzano observed and heeded the warning sign, dropped
12 her speed to 30 mph, and proceeded attentively and with reasonable vigilance as
13 she approached the intersection she would have noticed the Subaru running the
14 stop sign and would have reacted within .67 seconds and if she had reacted by
15 hitting her brakes she would have stopped prior to the point of impact and would
16 have averted the collision. It is my further opinion that with all assumptions
17 other than speed the same she also could have stopped before impact at 41 mph.
- 18 l. In my opinion Ms. Marzano was negligent in exceeding the posted limit (35
19 mph), in exceeding the reasonable speed for the circumstances of the warning
20 sign (no more than 30 mph), in failing to heed the warning sign, in failing to keep
21 a proper lookout, and in failing to proceed with reasonable vigilance under the
22 circumstances (warning sign, upcoming intersection).
- 23

² This is conservative because Ms. Johnson testified that the Subaru was going slower than this.

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m. In my opinion the negligence of Ms. Marzano was a significant cause of the collision with the Subaru and to the severity of the damage from the collision with the Subaru.

DATED April 17, 2010



WALTER BECINSKI

Legacy station wagon, Washington license 039-TEU was in the field to the northwest corner, approximately 80+ feet from the intersection.

I went to the Subaru first as everyone was pointing and saying that is where the person who was seriously injured was. The Subaru was extensively damaged. The rear window was gone, the passenger side was badly damaged and it appeared the impact was at the passenger door. The male in the passenger seat was covered in blood and two men were helping him. One man was holding his head still and the other was holding another part of him. I asked the men to continue holding the passenger-Colin BOWERS. Medical Aid was arriving at that time. Colin was conscious and was thrashing his head back and forth.

Walter 'Steve' BOWERS said he was driving. He was walking around the field and was very upset. He said the passenger still in the car was his brother. I asked him to sit on the rear bumper of his car. He did not want to and was quite upset. I asked him to sit down and try and relax so I could see if he was hurt. He said he was not hurt but he said his brother was and he was adamant that the aid crew help Colin. In an effort to calm him down I asked him his name and address and his brother's information too. Steve emitted an odor of intoxicants from his mouth. He was quite upset and agitated. He would be fine one minute and then was screaming about Colin. Steve told me his left knee did hurt. I told him the aid crew would check him as soon as they were done with Colin.

I asked Steve which way he was going and what happened. He said he was northbound on 66 Ave E approaching 152 St E. He said he did a 'California stop' at the stop sign and then the crash happened.

Someone said there was a dog in the car. Steve became very upset and started to scream that he killed his dog. I saw the Dachshund 'Willie' was bleeding on its face. I told Steve I would make sure the dog was taken care of. I requested dispatch ask the sergeant for approval to call animal control out. Animal control was dispatched. While waiting for them to arrive a firefighter, Jason SIMMONS, took 'Willie' to the Animal Emergency clinic. Another Dachshund was found hiding under the car. She did not appear to be as hurt and was left under the Subaru until animal control arrived. Officer Davidson took that dog to the emergency clinic as well.

Next, I spoke to Jennifer ANDERSON. She was the left rear seat passenger. She was also quite agitated and was demanding someone help her boyfriend, Colin. I asked her to sit down and try to calm down. I asked her for her information and asked her to tell me what happened. She said she did not know. I asked if she was hurt. There was some blood on her right hand and a droplet on her forehead. She said her stomach hurt and she was clutching her right side. The aid crew tended to her injuries. She was transported to a local hospital.

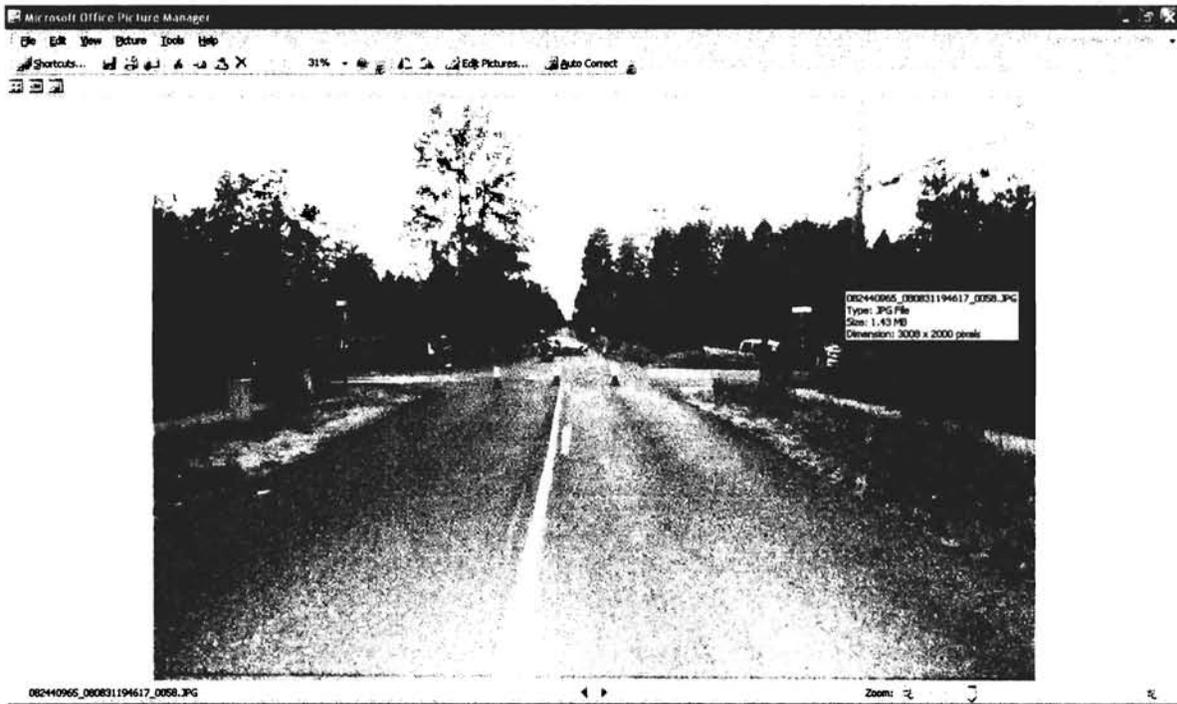
I spoke to Deputy Allen and told him Steve emitted an odor of intoxicants from his mouth. Deputy Allen said he would speak to Steve further. See his report for further information.

Next, I spoke to the truck's driver, Pamela MARZANO. She was being tended to by a medic while I spoke to her. I was not aware of her injuries but they did not seem life threatening. Pamela was westbound on 152 St E. She said the green car did not even stop. She said "...he blew through the stopsign."

Next, I spoke to Vickey JUDD. She and several other people were outside on the property located at the southwest corner of the intersection on 66 Ave E. Vickey said she heard tire noise and said a vehicle was travelling fast. She said it was the truck but when I asked her if she saw the truck driving fast, she said she did not. So, she agreed that she heard a vehicle travelling fast but did not know which vehicle she heard. Vickey said she looked towards the intersection and saw the Subaru was airborne. She said she ran to the area and saw the driver getting out of the car. I asked her if the driver was still in the car or was getting out. She said he had already gotten out and was walking around the car. She said he seemed confused. She said he was wearing a red shirt. I asked her where he was while I was speaking to her; she pointed at Steve, who wore a red t-shirt.

Ryan MERCIER was also outside with Vickey. He said he heard the crash and ran to the area too. He stopped at the truck and helped the driver, Pamela, out of her truck. Then he went to the Subaru. He said Steve and Jennifer were both outside the car and were checking on Colin. Ryan said he was the one who was holding Colin's head still.

I also spoke to Niccole JOHNSON. She was also outside with Vickey and Ryan. She said she saw the green



1 **TIME OF NOTICE TO MARZANO OF HAZARD**

2 e. **Subarau took 2.53 seconds from point where its nose was through the stop sign**
3 **to point of collision.** This is derived from Becinski's estimate of Subaru speed at 15
4 between running the stop and impact, Becinki Decl para 10 j; 2nd Becinski Decl para
5 5 [SLAM program shows 15 mph at impact]. It is also supported by evidence that the
6 Subaru was in 1st gear immediate after the accident [Plf Ex E and F, Edwards Decl
7 para 4-5, Becinski Decl para 7, 2nd Becinski Decl para 5]; that the Subaru couldn't go
8 more than 22 mph in 1st gear [Edwards Decl para 3] and the eyewitness Johnson
9 estimate that the Subaru was going \leq 10 mph and slowing as it reached the point ~
10 10' south of the stop sign. Thus this time is conservative as it could have taken
11 significantly longer if the car slowed below 10 mph as it ran the stop sign and
12 proceeded toward the 152nd, and if it then accelerated to 15 mph as it got to the
13 intersection.

14 f. **In state of vigilance warranted by the yellow warning sign Marzano should have**
15 **noticed the Subaru running the stop sign and failing to yield.** Becinki Decl para
16 10 i.

17 g. **Therefore Marzano's time of notice of hazard was 2.53 seconds before collision**

18 **Position of Marzano at Time of Notice**

19 h. **Relevant mph conversions to feet per second (fps) are as follows:**

20 **41 mph = 60.1333 fps; ph = 44 fps.** Request judicial notice:

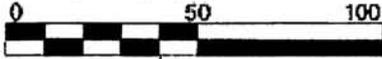
21 1 mph = 5280 feet/60*60 sec = 1.46666 feet/sec.

22 Thus 30 mph (30 * 1.46666) fps = 44 fps; 41 mph = (41 * 1.46666) fps = 60.1333 fps.

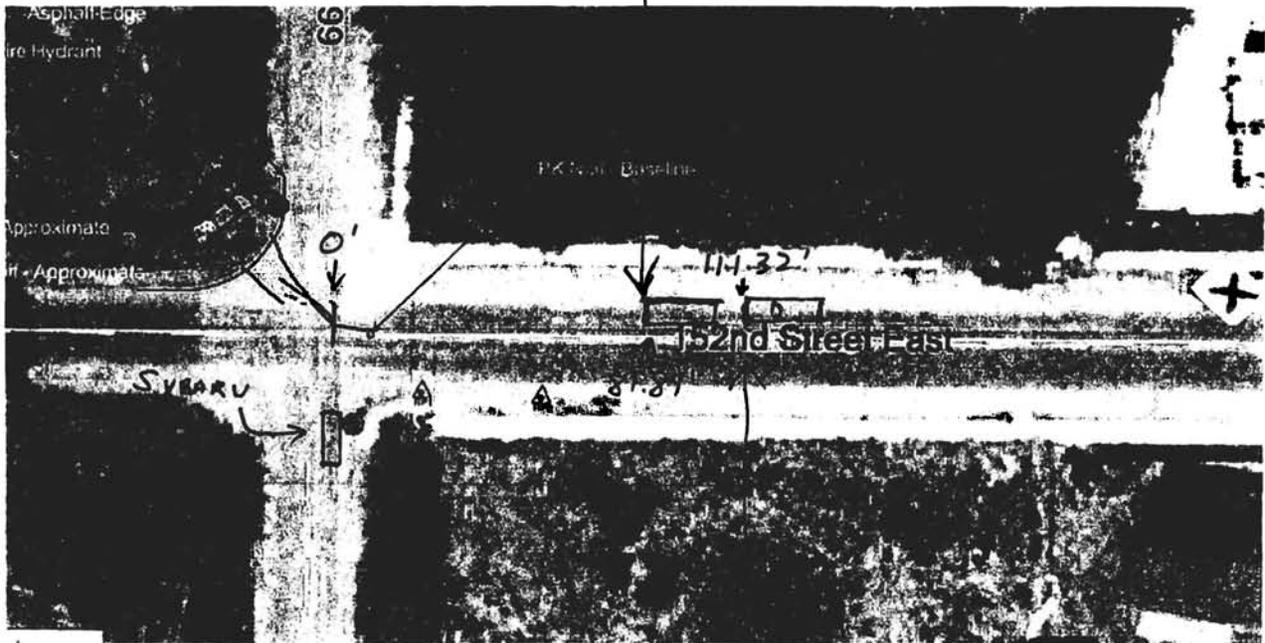
EXHIBIT AA

NOTICE AT 30 mph

Case Number 08-244-0965
Vehicle Collision - Serious Injury
152nd Street East & 66th Ave East
Date: 08/31/2008 Time: 1802
Drawn By: Deputy S. Powers #264/90-014



BEGIN
BRAKING

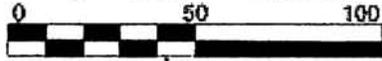


NOTICE

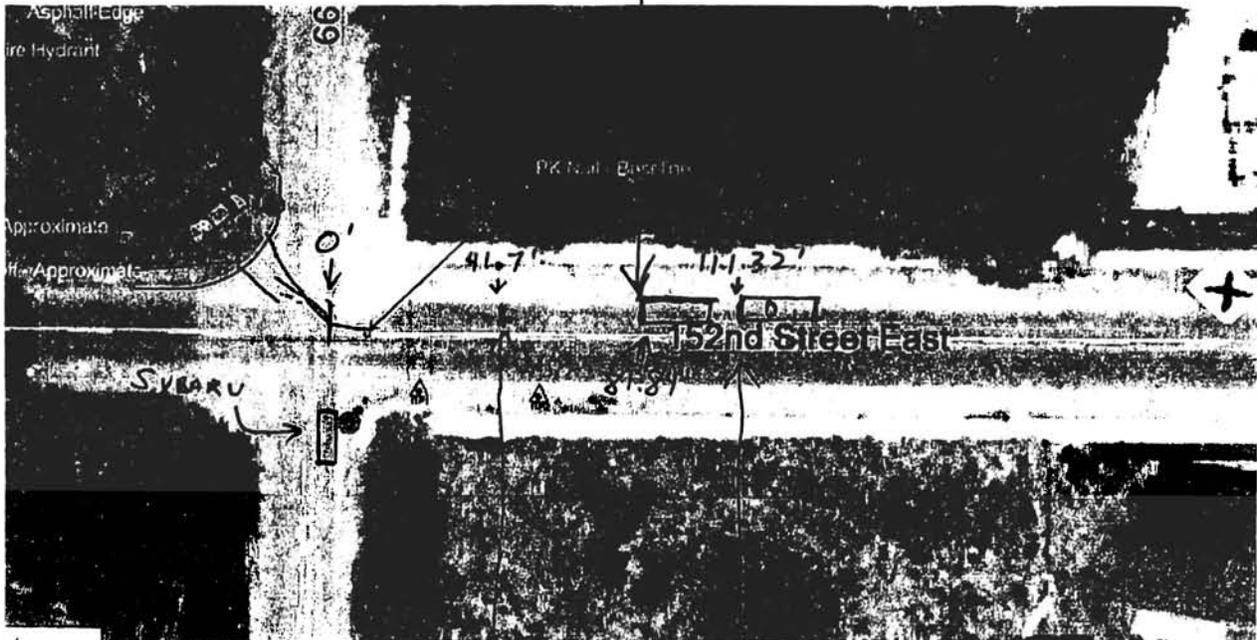
EXHIBIT BB

NOTICE AT 30 mph

Case Number 08-244-0965
Vehicle Collision - Serious Injury
152nd Street East & 66th Ave East
Date: 08/31/2008 Time: 1802
Drawn By: Deputy S. Powers #264/90-014



BEGIN
BRAKING



NOTICE

MARZANO
STOP

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

May 10 2010 4:30 PM

KEVIN STOCK
COUNTY CLERK
HONORABLE THOMAS FELNER
PLF M FOR RECONSID NOTED 6/4/10
~~NO. 09-2-09689-4~~

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IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

Colin Bowers

Plaintiff,

v.

Pamela M. and Jerry Marzano; and Walter S. Bowers,

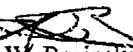
Defendants

No. 09-2-09689-4

3rd DECLARATION OF WALTER BECINSKI

WALTER BECINSKI states the under penalty of perjury of the laws of WA.

1. I am of sound mind and competent to testify to the facts and opinions herein, and make this declaration on personal knowledge except where stated to the contrary. All opinions and conclusions stated herein are my opinions based on my experience and expertise and are expressed on the basis of a reasonable probability.
2. I have been asked to elaborate on my previously stated opinions. These are not new opinions, but are an elaboration of opinions I already hold in this matter.
3. I have been asked to elaborate on my previous testimony that defendant Marzano could have stopped before the collision if she had been otherwise operating in a manner which in my opinion would have been reasonable under the circumstances


W. Becinski 3rd Decl
No. 09-2-09689-4

- 1 (4/18/10 Decl¹ p. 5 para 10 k) by specifying the stopping distance of the Marzano
2 Silverado at the time of accident at different speeds.
- 3 4. To calculate stopping distance² for a vehicle like the Marzano pickup I and other
4 experts in my field use an equation which is dependent on starting speed and a factor
5 for how much the vehicle is being slowed. The equation is set forth in Exhibit Z, and
6 is basic physics and universally used and accepted by collision reconstructionists.
7 The factor for how much the vehicle is being slowed is a number based on the amount
8 of friction between the vehicle in question and the particular pavement. In the
9 equation in Exhibit Z this is called "Accel factor", but I generally call this factor
10 "coefficient of friction", and it can also be called "drag factor".
- 11 5. Pierce County noted the "drag factor" for this road at the accident site as .75 in its
12 investigative report. See Exhibit Y, copy of page of Pierce County investigative
13 report circled portion³. I used a .75 coefficient of friction for my stopping distance
14 calculations.
- 15 6. Based on the .75 coefficient of friction stopping distance for the Silverado on hard
16 braking would be 40.1 feet using 30 mph speed before braking, and 74.9 feet using 41
17 mph speed before braking. Exhibit Z shows both the equation and calculations of
18 stopping distance for these speeds and was produced using a software program I use
19
20

21 ¹ As stated in my 4/29/10 Declaration, although my first Declaration in this matter bears the date
22 4/17/10, it was actually signed on 4/18/10.

23 ² I am referring here to the distance it takes to stop after brakes are applied. The distance traveled
during reaction time before brakes are applied is a separate issue which has been separately discussed.

³ Pierce County calculations which are not relevant to this discussion have been redacted.


W. Becinski 3rd Decl
No. 09-2-09689-4

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LAW OFFICE OF GEORGE H. LUHRS
701 Fifth Avenue, Suite 4600
Seattle, WA 98104
(206) 632-1100

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as part of my collision reconstruction analysis called AITools Equations-Advanced Module Derivations.

7. Although I use AITools to "crunch the numbers" any mathematician or collision reconstructionist would derive the same figures using this equation and using the same figures for speed before braking and coefficient of friction.

8. To further elaborate my opinions regarding defendant Marzano's ability to avoid this collision had she been using due care under the circumstances, using speeds in feet per sec (fps)⁴, and using 1.86 sec as the time to stop before collision⁵

a. Marzano should have been going no more than 30 mph, or 44 fps, should have begun braking 81.8 feet before collision (1.86 sec * 44 feet/sec) and would have stopped in 40.1 feet had she done so, leaving 41.7 feet to spare.

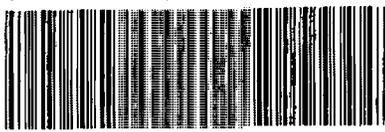
b. Even if Marzano had been going 41 mph, or 60.133 fps she should have begun braking 111.8 feet before collision (1.86 sec * 60.133 feet/sec) and would have stopped in 74.9 feet had she done so, leaving 36.9 feet to spare.

DATED May 8, 2010


WALTER BECINSKI

⁴ That conversion is 1 mph= (5280 feet/60*60 sec) = 1.46666 feet/sec. Thus 30 mph = 44 fps; and 41 mph = 60.1333 fps.

⁵ This is based on my previously stated opinion that under the circumstances Marzano should have reacted to the hazard and begun braking 0.67 seconds later. Thus 1.86 seconds is derived by taking the time at notice of hazard minus the time to react and start braking. 2.53 sec - 0.67 sec = 1.86 sec.



09-2-09689-4 34295554 ORGSJ 05-13-10



The Honorable Thomas J. Felnagle

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

<p>COLIN BOWERS,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>PAMELA M. And JERRY MARZANO, and WALTER S. BOWERS,</p> <p style="text-align: right;">Defendants.</p>	<p>NO. 09-2-09689-4</p> <p>(proposed) AMENDED ORDER GRANTING DEFENDANTS PAMELA and JERRY MARZANO'S SUMMARY JUDGMENT</p>
--	---

This matter came before the Court on April 30, 2010 on defendant Pamela and Jerry Marzano's motion for summary judgment. Defendants Marzano appeared through their attorney Don G. Daniel, Defendant Walter Bowers appeared through his attorney Kevin Carey and plaintiff appeared through his attorney George Luhrs.

The Court having heard argument and considered the records and files herein including:

AMENDED ORDER GRANTING DEFENDANT
MARZANO'S MOTION FOR SUMMARY
JUDGMENT

1. The following pleadings submitted by defendants PAMELA M. and JERRY MARZANO:
 - a. Defendants' Motion and Memorandum in Support of Defendants' Motion for Summary Judgment;
 - b. Declaration of Pamela Marzano with attachments;
 - c. Declaration of John Hunter with attachments; and
 - d. Declaration of Don G. Daniel in Support Motion for Summary Judgment with attachments.
 - e. Reply Memorandum in Support of Defendants' Motion for Summary Judgment and in Response to Plaintiff's Motion for Continuance and attachment thereto.
 - f. Supplemental Declaration of John E. Hunter in Support of Defendants Marzanos' Motion for Summary Judgment and attachment thereto;
 - g. Supplemental Declaration of Don G. Daniel in Support of Defendants' Motion to Strike, in Response to Plaintiff's Motion for Continuance and Reply in Support of Defendants' Motion for Summary Judgment and attachments thereto.
2. The following pleadings submitted by plaintiff:
 - a. Opposition to Motion for Summary Judgment, including CR 56(f) Request for Continuance and attachments thereto (Exhibits A-S);
 - b. Declaration of Niccole Johnson;

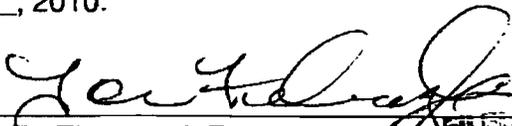
- c. Declaration of Kenneth Breit;
- d. Declaration of Colin Daly;
- e. Declaration of Dawn Edwards;
- f. Two Declarations of Walter Becinski;
- g. Surreply Declaration of George H. Luhrs with attachments
(Exhibits T-X); and
- h. Second Declaration of Kenneth Breit.
- i. Declaration of George H. Luhrs

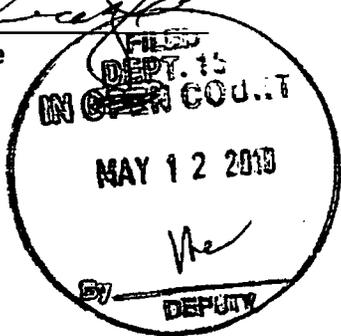
Based on the foregoing, the Court denies CR 56 f) motion and finds that there is no genuine issue as to any material fact and defendants Pamela and Jerry Marzano are entitled to summary judgment as a matter of law. Now, therefore, it is hereby

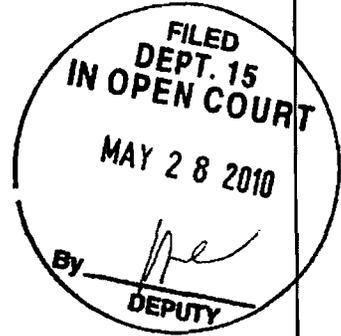
ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment shall be and hereby is granted, and .

SAID ORDER shall be effective NUNC PRO TUNC as of 4/30/10.

DATED this 12th day of may, 2010.


 Judge Thomas J. Felnagle





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The Honorable Thomas J. Felnagle

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

COLIN BOWERS,

Plaintiff,

vs.

PAMELA M. And JERRY MARZANO, and
WALTER S. BOWERS,

Defendants.

NO. 09-2-09689-4

ORDER DENYING PLAINTIFF COLIN
BOWER'S MOTION FOR
RECONSIDERATION

This matter came before the Court on May 28, 2010 on plaintiff's Motion for Reconsideration of the Court's order granting summary judgment to Pamela and Jerry Marzano and dismissing plaintiff's claims against them. Defendants Marzano appeared through their attorney Don G. Daniel, Defendant ~~Walter Bowers~~ appeared through his attorney Kevin Carey and plaintiff appeared through his attorney George Luhrs, and the Court having heard argument and considered the records and files herein including the submissions by each party with respect to this motion. Now, therefore, it is hereby *Court rejects plaintiff's proffer of excerpt of 5/27/10 deposition of Walter Bowers.*
ORDERED, ADJUDGED AND DECREED as follows: *Plaintiff's request for continuance sufficient to consider the 5/27/10 deposition of Walter Bowers is denied.*
That plaintiff Colin Bower's Motion for Reconsideration is hereby DENIED.

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DGD 5/14

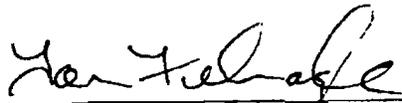
GHJ
DGD

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ORDER DENYING PLAINTIFF
COLIN BOWER'S MOTION
FOR RECONSIDERATION

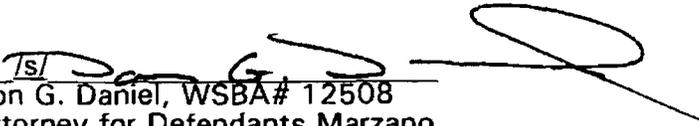
LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2674 RW JOHNSON RD., TUMWATER, WA 98512
PO BOX 11880, OLYMPIA, WA 98508-1880
(360) 754-3480 FAX: (360) 357-3511

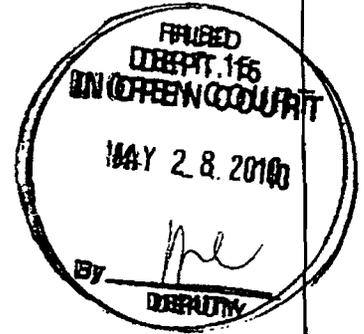
DONE IN OPEN COURT this th 28 day of may, 2010.


Judge Thomas J. Felagle

Presented by:

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.


Don G. Daniel, WSBA# 12508
Attorney for Defendants Marzano
LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.
P.O. Box 11880
Olympia, WA 98508-1880
(360) 754-3480
Fax: (360) 754-3511
E-Mail: ddaniel@lldkb.com



Approved for entry:


George H. Luhrs, WSBA# 7036
Attorney for Plaintiff
Law Office of George H. Luhrs
702 - 5TH Avenue, Ste 4600
Seattle, WA 98104-7068
(206) 632-1100
Luhrs@ncfweb.net

Approved for entry:

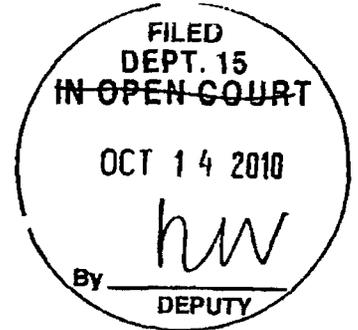
Did not appear.
Kevin Carey WSBA#17102
Attorney for Defendant Bowers
Bolton & Carey
7016 - 35th Avenue N.E.
Seattle, WA 98115-5917
(206) 522-7633
Kevin@boltoncarey.com

ORDER DENYING PLAINTIFF
COLIN BOWER'S MOTION
FOR RECONSIDERATION

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.
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(360) 754-3480 FAX: (360) 357-3511



HONORABLE THOMAS FELNAGLE



IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

Colin Bowers

Plaintiff,

v.

Pamela M. and Jerry Marzano and Walter S. Bowers

Defendants

No. 09-2-09689-4

(PROPOSED) *[initials]*

JUDGMENT OF DISMISSAL WITH FINDINGS SUPPORTING NO JUST REASON FOR DELAY

NOTED 10/1/2010

This Matter came before the Court on plaintiff's motion pursuant to Cr. 54(b) for an order directing that there is no just reason for delay in entering a partial final judgment in favor of defendants Marzano. The Court heard oral argument of counsel for plaintiff, counsel for defendants Marzano, and counsel for defendant Bowers did not appear. The Court reviewed and considered the briefs and all the evidence submitted by the parties

Based on the argument of counsel, the pleadings and evidence presented, the Court finds:

- 1. Plaintiff's claims alleges negligence against all defendants as a result of an intersection collision and therefore there is a relation between the claims which plaintiff seeks to appeal regarding the summary judgment granted in

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favor of the Marzanos and those claims which would remain against defendant Bowers .

2. Plaintiff avers that he has been offered the \$100,000 insurance limits on behalf of defendant Bowers in return for full settlement of all claims against him, but plaintiff declined to accept because he believed doing so would destroy the potential for joint and several liability against both defendants against whom judgment was entered (i.e. defendant Bowers and defendants Marzano if appeal is successful). Defendant Bowers swears under oath that he has no current assets other than insurance policy limits of \$100,000

3. Plaintiff's claims against defendant Bowers will be suspended one way or another because plaintiff has averred he will voluntarily dismiss defendant Bowers if the requested relief is not granted due both to the extra expense of going to trial against defendant Bowers (which plaintiff claims would be \$15,000-\$20,000) and because of the risks this would pose to his goal of holding defendant Marzano jointly and severally liable with defendant Bowers. Plaintiff has further averred that if he voluntarily dismissed the Bowers action he ~~will~~ would then appeal the summary judgment granted in favor of the Marzanos and re-file the action against defendant Bowers before the 8/31/11 statute of limitation deadline and join that action with the remanded Marzano action in a single trial if his appeal was successful. The Court believes plaintiff will do this and therefore it is unlikely any appellate issues will be mooted by refusing to grant an immediate appeal.

- 1 4. In balancing the advantages from an immediate appeal versus the negatives
2 the Court finds the most significant factor for CR 54(b) certification is what
3 will promote the most efficient use of court resources
- 4 5. It is unclear how extensive the proceedings will be if the motion is not
5 granted. The Court finds that if this motion is not granted there is a risk that
6 two trials might occur. Those being a trial against defendant Bowers followed
7 by a second trial if plaintiff is successful in overturning the summary
8 judgment in favor of Marzano on appeal.
- 9 6. However, it is clear based on the afore noted findings that if the motion is
10 granted further proceedings between these parties will likely be limited to an
11 appeal, and one trial only if an appeal is successful against the Marzanos
- 12 7. Furthermore the Court finds the requested procedure would avoid raising an
13 issue of first impression over the operation of RCW 4.22.070 (1) (b). That
14 being whether a judgment entered against Bowers in a separate proceeding
15 and a later separate judgment entered against Marzano would satisfy RCW
16 4.22.070 (1) (b) holding Marzano jointly and severally liable with defendant
17 Bowers.
- 18 8. The Court finds that the avoidance of an additional trial and the mootng of
19 the potential RCW 4.22.070 (1) (b) issue constitute efficient use and savings
20 of court resources and strongly favor granting the requested relief.
- 21 9. Based on the afore noted the Court finds there is no just reason for delay in
22 entering a partial final judgment on the summary judgment order in favor of
23 defendants Marzano.

1 Based on the above findings, It is Ordered as follows:

- 2 1. That there is no just reason for delay of immediate entry of an appealable
- 3 Judgment of dismissal on behalf of defendants Marzano.
- 4 2. That the Marzanos are awarded statutory attorney fees in the amount of
- 5 \$200.00 against plaintiff.
- 6 3. JUDGMENT OF DISMISSAL is hereby entered on behalf of defendants
- 7 Marzano.

8
9 DATED 10-14-10

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11 
12 HONORABLE THOMAS FELNAGLE

