

CO. APPEALS
DIVISION II
2014 JUL 24 AM 10:22
STATE OF WASHINGTON
BY *DM*

NO. 46099-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROCHELLE TRAN,

Appellant,

vs.

VICTORIA GALLARDO and "JOHN DOE" GALLARDO,

Respondents.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
HONORABLE JERRY COSTELLO

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred in entering the February 10, 2014, order granting the defendant's Victoria Gallardo's Motion for Dismissal and dismissing Appellant's claims against Victoria Gallardo.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err in dismissing the Appellant's claims against Victoria Gallardo where: a) Victoria Gallardo failed to comply with information disclosure requirements following a motor vehicle collision under RCW 46.52.020; b) Victoria Gallardo failed to file a police report following a motor vehicle collision as required under RCW 46.52.020(7); c) Victoria Gallardo failed to file a police report following a motor vehicle collision as required under RCW 46.52.030; d) Appellant was unable to serve the Washington State Secretary of State under 46.64.040 because no last known address was provided by Victoria Gallardo; e) Victoria Gallardo's failure to provide her

current address, telephone number, vehicle license number, and driver's license information created an inability to prosecute this case; f) The process server H. Taylor filed a declaration of service on Victoria Gallardo and as such a genuine issue of material fact exists that prevents summary judgment?

III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

1. On or about August 26, 2010, Ms. Rochelle Tran was driving in Pierce County, Washington. CP 2. Ms. Tran was struck from behind by a vehicle driven by Ms. Victoria Gallardo. CP 2.
2. Following the collision Ms. Tran and Ms. Gallardo pulled over to the side of the road. CP 56.
3. Ms. Tran complained to Ms. Gallardo of substantial pain in her neck and back. CP 56. Ms. Tran also was in a state of shock and unable to comprehend what had happened. CP 56.
4. Ms. Gallardo and Ms. Tran then exchanged names and motor vehicle insurance information. CP 56.

5. Ms. Gallardo failed to provide her address, telephone number, vehicle license number, and driver's license information to Ms. Tran. CP 56.
6. Ms. Gallardo never filed a police report in accordance with RCW 46.52.030. CP 56, 72-74.
7. The Washington State Patrol has no record of any police report filed by Victoria Gallardo, Victoria Dunbar or Victoria Gallardo Dunbar. CP 56, 72-74.
8. On July 9, 2013, Ms. Rochelle Tran filed a complaint for personal injuries as a result of the motor vehicle collision. CP 1-5.
9. Ms. Tran searched the Washington State Patrol's database for accident reports concerning this collision both before and after the case was filed. CR 56, 72-74. No accident reports were found. CP 56, 72-74.
10. An extensive search was performed from both online and print databases both locally and nationally. CP 57, 84-95.
11. Address searches were done for several months before a viable address was believed to have been found. CP 57, 84-95.
12. On July 9, 2013, a Summons and Complaint was filed in Pierce County Superior Court. CP 1-5.

13. On July 22, 2013, a Ms. Victoria Gallardo was served with a Summons and Complaint in Lacey, Washington, by a registered process served H. Taylor. CP 6; 57.

14. On November 12, 2013, the defendant, Jason Dunbar, was served at 7742 Tirrell Hill Circle, Liverpool, Onondaga County, New York. CP 122-123, 159.

15. Since the date of injury the defendants have lived at five different residences and three different states. CP 159.

16. The defendant Victoria Gallardo also changed her name to Victoria Gallardo-Dunbar. CP 159.

17. On August 19, 2011, Gallardo filed her Answer and Affirmative Defenses. CP 8-11.

18. On October 16, 2013, Gallardo filed a motion to dismiss. CP 12-54.

19. On November 1, 2011, Tran filed her response to defendant's motion to dismiss. CP 55-95.

20. On November 8, 2013, Tran filed her reply to Plaintiff's Response to Motion to Dismiss. CP 96-120.

21. On January 14, 2014, Plaintiff filed a Response to Defendant's Motion for Dismissal. CP 157-204.

22. On January 17, 2014, the Motion to Dismiss was argued before the Honorable Jerry Costello. See Verbatim Report of Proceedings.

23. Judge Costello orally ruled “So I have to conclude that there is a material question of fact on whether or not the Plaintiff really could effectively prosecute the case. I don’t think I can decide that as a question of law based on the record in front of me. So I am going to - - I am denying the motion.” See Verbatim Report of Proceedings: Page 16, Lines 12-17.

24. On February 10, 2014, Judge Costello issued an Order Granting the Motion to Dismiss in contravention of his oral ruling. CP 205-206.

25. Judge Costello found that Defendant Gallardo stopped and provided insurance information to Plaintiff Tran. CP 205. There were no obvious injuries were apparent necessitating emergency medical aid. CP 205. That the defendant’s answer asserted lack of jurisdiction over the defendant. CP 205. Plaintiff served someone other than Defendant Gallardo before October 3, 2013. CP 206. The Court found that “[d]espite the court’s preliminary comments on the record, the court finds as a matter of law that Plaintiff had an obvious and reasonable ability to prosecute the claim against

Defendant within three years of the motor vehicle accident. The court finds as a matter of law that the statute of limitations was not and cannot be tolled in the present case.” CP 206.

26. On February 19, 2014, Plaintiff filed a motion for reconsideration. CP 207-253.

27. On March 3, 2014, Judge Costello denied Plaintiff’s motion for reconsideration without oral argument. CP 255.

28. On April 1, 2014, Plaintiff filed a Notice of Appeal. CP 256-260.

IV. SUMMARY OF ARGUMENT

A. The Standard on Review

An appellate court reviews an order of summary judgment de novo and performs the same inquiry as the trial court. *Boss Logger Inc., v. Aetna Cas. & Surety Co.*, 93 Wn. App. 682, 685, 970 P.2d 755, 756 (1998).

All facts and reasonable inferences must be construed in favor of the non-moving party in summary judgment. *Turngren v. King County*, 104 Wn.2d 293, 705 P.2d 258 (1985). A court should only grant summary judgment if the evidence viewed in a light most favorable to the non-moving party shows the absence of a genuine issue of material fact, and that the moving party deserves judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). On a motion for

summary judgment, the court does not try issues of fact; it only determines whether or not factual issues are present which should be tried. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980). A material fact is one upon which the outcome of the case depends. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998).

B. The trial court erred in dismissing the plaintiff's claim based upon the statute of limitations where defendant failed to comply with RCW 46.52.020.

There are genuine issues of material fact as to whether the statute of limitations was tolled when Ms. Gallardo failed to comply with RCW 46.52.020.

RCW 46.52.020 governs the duties owed to in a motor vehicle collision. It states:

RCW 46.52.020. Duty in case of personal injury or death or damage to attended vehicle or other property - - Penalties

- (1) A driver of any vehicle involved in an accident resulting in the injury to or a death of any person or involving striking the body of a deceased person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section; every such

stop shall be made without obstructing traffic more than is necessary.

- (3) Unless otherwise provided in subsection (7) of the section **the driver of any vehicle in an accident** resulting in injury to or death of any person, or involving striking the body of a deceased person, or resulting in damage to any vehicle which is driven or attended by any person or damage to other property **shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her driver's license** to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with . . . (emphasis added)

- (7) If none of the persons specified are in condition to receive information** to which they otherwise would be entitled under subsection (3) of this section, **and no police officer is present, the driver** of any vehicle involved in such accident after fulfilling all other requirements of subsections (1) and (3) of this section insofar as possible on his or her part to be performed, **shall forthwith report such accident to the nearest office of the duly authorized police authority and submit thereto the information specified in subsection (3) of this section.** (emphasis added)

Pursuant to RCW 46.52.020(3) the parties were required to exchange names, addresses, insurance companies, insurance policy number, vehicle license number and shall show the other party their driver's license. In the present case, this extensive exchange of information did not occur. CP 56.

Following the collision Ms. Tran was in a state of shock and in substantial pain. CP 56. Ms. Tran and Ms. Gallardo pulled over to the

side of the road and Ms. Tran was provided Ms. Gallardo's name and her insurance carrier information but Ms. Gallardo failed to provide vital contact information to Ms. Tran. CP 56. Specifically, Ms. Gallardo failed to provide her addresses, vehicle license number, provide her telephone number and show Ms. Tran her driver's license. CP 56. Ms. Gallardo failed to comply with RCW 46.52.020 by failing to provide this statutorily required information to Ms. Tran.

The fact that Ms. Gallardo did not provide her address is vitally important. Ms. Tran could not properly serve the Washington State Secretary of State pursuant to RCW 46.64.040 because Plaintiff could not mail a copy of the Summons and Complaint to the Defendant's last known address.

In addition, because Ms. Tran was not in a condition to take this information then pursuant to RCW 46.52.020(7) Ms. Gallardo was required to immediately file a police report which contains the information as outlined in section (3). However, Ms. Gallardo did not file a police report. CP 56.

In *Brown v. ProWest*, 76 Wn.App. 412, 886 P.2d 223 (1995), the Court was to decide whether the statute of limitations was tolled where a negligent truck driver failed stop at the scene of the collision and provide the information required by statute pursuant to RCW 46.52.020.

In *Brown* the truck driver failed to stop at the collision scene. However, following an investigation by the Washington State Patrol the plaintiffs in *Brown* were able to obtain the (1) license number of the vehicle, (2) the registered owner's name and address of the vehicle, and (3) the name of the driver of the vehicle on the date of the collision. *Brown*, 76 Wn. App. at 415. *Brown*, 76 Wn. App. at 415. Despite having this information the Plaintiff in *Brown* failed to serve any of the Defendant's prior to the lapsing of the statute of limitations. *Brown*, 76 Wn. App. at 416. The case was ultimately dismissed on Summary Judgment. However, on appeal the Court was asked to determine "whether there exist genuine issues of material fact as to whether the statute of limitations was tolled when (Defendant) Clark failed to comply with RCW 46.52.020 and RCW 46.52.030." *Brown*, 76 Wn. App. at 417. The court noted that other courts are "unanimous in holding that the failure to comply with a statute requiring one involved in an automobile accident to stop or report will suspend the statute of limitations while, as a result of such action, there is an obvious inability to prosecute the cause of action." *Brown*, 76 Wn. App. at 418(citing C.S. Patrinelis, Annotation, *Failure to Comply With Statute Requiring One Involved in Automobile Accident To Stop or Report as Affecting Question as to Suspension or Tolling [of] Statute of Limitation*, 10 A.L.R.2d 564, 565 (1950)).

The Court also noted that other courts have found that “a defendant’s unlawful failure to report an automobile accident will suspend a statute of limitations while, as a result of such failure, there is inability to prosecute the cause of action.” *Brown*, 76 Wn. App. at 418(citing *St. Clair v. Bardstrom Transfer Line, Inc.*, 310 Ky. 776, 221 S.W.2d 679 (1949); Annot., 10 A.L.R.2d 564 (1950)). The Court in *Brown* ultimately adopted the rule that failure to stop and exchange information as required by statute will suspend the statute of limitations where there is an inability to prosecute the case. *Brown*, 76 Wn. App. at 418. Likewise the Court concluded that failure to report an automobile accident pursuant to statute will suspend that statute of limitations where such a failure creates an inability to prosecute the case. *Brown*, 76 Wn. App. at 418. The Court in *Brown* ultimately reversed the trial Court’s ruling and found that there were material issues of fact as to whether there was an inability of the Plaintiff to prosecute the case as a result of the Defendant’s action and reversed the Motion for Summary Judgment and remanded the case for further proceedings. *Brown*, 76 Wn. App. at 419, 425.

Even more compelling is the fact that the Plaintiff in *Brown* actually had the information required to serve the Secretary of State based upon the nonresident motorist statute. The Court in *Brown* found that

the plaintiff had the registered owner's name and address. *Brown*, 76 Wn. App. at 415. However, despite having this information the Court found that there remained an issue of fact as to whether the failure to comply with the requirements of RCW 46.52.020 and RCW 46.52.030 prevented the plaintiff from prosecuting its case. *Brown*, 76 Wn. App. at 418-419, 425.

There is no question that Ms. Gallardo failed to comply with the disclosure requirements under RCW 46.52.020. Had she provided the statutorily required information then Plaintiff would have served the defendant by serving the Secretary of State under RCW 46.64.040. However, the failure by the Defendant to provide the statutorily required information including her failure to provide her current address, telephone number, vehicle license number, and driver's license information and the fact that she lived in at least five different residences and lived in three different states and changed her name has led to an inability for the Plaintiff to adequately prosecute her case. CP 55, 159. As such, the Plaintiff was unable to serve the Secretary of State because she could not mail process to the defendant's last known address pursuant to RCW 46.64.040. As a result of this failure by the Defendant, the Plaintiff could not prosecute her case.

There is no question that had Ms. Gallardo filed a police report in accordance with RCW 46.52.020(7) her address and pertinent information would have been on file and submitted to the Washington State Patrol. CP 56, 72-74. Had Ms. Gallardo complied with RCW 46.52.020(7) then the Plaintiff could have served the defendant by serving the Secretary of State under RCW 46.64.040. However, the Defendant never filed a police report as is required. CP 56, 72-74.

This failure by the Defendant to provide the statutorily required information including her failure to provide her current address, telephone number, vehicle license number, and driver's license information and the fact that she lived in at least five different residences and lived in three different states and changed her name has led to an inability for the Plaintiff to adequately prosecute her case. CP 55, 159. Accordingly, the statute of limitations should be deemed to be tolled because the Plaintiff could not adequately prosecute her case as a result of the defendant's failures to comply with RCW 46.52.020. At a minimum there exists a genuine issue of fact remains that should be left to the trier of fact if there was an inability for the Plaintiff to prosecute her case as a result of the Defendant's failure to comply with RCW 46.52.020.

- C. **The trial court erred in dismissing the plaintiff's claim based upon the statute of limitations where defendant failed to comply with RCW 46.52.030.**

There are genuine issues of material fact as to whether the status of limitations was tolled when Ms. Gallardo failed to comply with RCW 46.52.030.

RCW 46.52.030 governs the mandatory duty to file an accident report. It states:

RCW 46.52.030. Accident reports

- (1) **Unless a report is to be made by a law enforcement officer under subsection (3) of this section, the driver of any vehicle involved in an accident** resulting in injury to or death of any person or damage to the property of any one person to an apparent extent equal to or greater than the minimum amount established by rule adopted by the chief of the Washington state patrol in accordance with subsection (5) of this section, **shall, within four days after such accident, make a written report of such accident to the chief of police of the city or town if such accident occurred** within an incorporated city or town or the county sheriff or state patrol if such accident occurred outside incorporated cities or towns. Nothing in this subsection prohibits accident reports from being filed by drivers where damage to property is less than the minimum amount or where a law enforcement officer has submitted a report. (emphasis added).
- (2) The original of the report shall be immediately forwarded by the authority receiving the report to the chief of the Washington state patrol at Olympia, Washington. The Washington state patrol shall give the department of licensing full access to the report.

Pursuant to RCW 46.52.030(1) Ms. Gallardo was required to file a written report of the collision with a police agency within four days of collision occurring. This report is then forwarded to the Washington State Patrol. See RCW 46.52.030(2). However, Ms. Gallardo never filed a police report in accordance with RCW 46.52.030. CP 56, 72-74.

In *Brown v. ProWest*, 76 Wn.App. 412, 886 P.2d 223 (1995), the Court was to decide whether the statute of limitations was tolled where a driver failed to file an accident report pursuant to RCW 46.52.030. However, following an investigation by the Washington State Patrol the plaintiffs in *Brown* were able to obtain the (1) license number of the vehicle, (2) the registered owner's name and address of the vehicle, and (3) the name of the driver of the vehicle on the date of the collision. *Brown*, 76 Wn. App. at 415. Despite having this information the Plaintiff in *Brown* was unable to serve any of the Defendant's prior to the lapsing of the statute of limitations. *Brown*, 76 Wn. App. at 416. The case was ultimately dismissed on Summary Judgment. However, on appeal the Court was asked to determine "whether there exist genuine issues of material fact as to whether the statute of limitations was tolled when (Defendant) Clark failed to comply with RCW 46.52.020 and RCW 46.52.030." *Brown*, 76 Wn. App. at 417. The court noted that other courts are "unanimous in holding that the failure to comply with a statute

requiring one involved in an automobile accident to stop or report will suspend the statute of limitations while, as a result of such action, there is an obvious inability to prosecute the cause of action.” *Brown*, 76 Wn. App. at 418(citing C.S. Patrinelis, Annotation, *Failure to Comply With Statute Requiring One Involved in Automobile Accident To Stop or Report as Affecting Question as to Suspension or Tolling [of] Statute of Limitation*, 10 A.L.R.2d 564, 565 (1950)).

Similarly, the Court noted that other courts have found that “a defendant’s unlawful failure to report an automobile accident will suspend a statute of limitations while, as a result of such failure, there is inability to prosecute the cause of action.” *Brown*, 76 Wn. App. at 418(citing *St. Clair v. Bardstrom Transfer Line, Inc.*, 310 Ky. 776, 221 S.W.2d 679 (1949); Annot., 10 A.L.R.2d 564 (1950)). The Court in *Brown* concluded that failure to file a police report for an automobile accident pursuant to statute will suspend that statute of limitations where such a failure creates an inability to prosecute the case. *Brown*, 76 Wn. App. at 418. The Court ultimately ruled that there was a material issue of fact as to whether there was an inability to prosecute the case and reversed the order granting summary. *Brown*, 76 Wn. App. at 419, 425.

In the present case, there is no question that Ms. Gallardo failed to file a police report in accordance with RCW 46.52.030. CP 56, 72-74.

Had Ms. Gallardo complied with the statute then the Plaintiff could have prosecuted the case by serving the Secretary of State under RCW 46.64.040 and mailing copies of the proceedings to the Defendant's last known address. However, the Defendant never filed a police report. CP 56, 72-74. As such, the Plaintiff was forced to rely on print and electronic databases to attempt to obtain the defendant's pertinent information. CP 56-57. This failure by the Defendant to file an accident report has completely hindered the plaintiff's case.

Had the Defendant complied with the statute the police report would have contained the defendant's current address, vehicle license number, and driver's license information. See RCW 46.52.030. However, she failed to file a report in violation of RCW 46.52.030. The fact that the defendant failed to comply with the mandatory report requirement and the fact that she lived in at least five different residences, lived in three different states and changed her name has led to an inability for the Plaintiff to adequately prosecute her case. CP 56, 72-74, 159. Accordingly, this Court should find that the statute of limitations was tolled pending the Defendants failure to comply with RCW 46.52.030 or at a minimum that there exists a genuine issue of fact for the trier of fact to determine if there was an inability for the Plaintiff to prosecute her

cause of action as a result of the Defendant's failure to comply with RCW 46.52.030.

D. Defendant Gallardo was properly served with the Summons and Complaint or issues of material fact exist as to whether she was properly served.

H. Taylor personally served the defendant Victoria Gallardo with a summons, complaint, and order setting case schedule in this matter on July 22, 2013. CP 6. The declaration of Victoria Gallardo, in support of her motion for summary judgment, only raises an issue of disputed fact regarding service. When there are two declarations that are in opposition to one another a material issue of fact should be deemed to be created. Pursuant to the Summary Judgment standard this issue of fact must be viewed in the light most favorable to the plaintiff. Because a genuine issue of material fact remains in dispute with regard to the sufficiency of service, summary judgment dismissal is improper at this time.

E. Attorney Fees.

Ms. Rochelle Tran is seeking attorney fees for having to bring this motion pursuant to RAP 14 and RAP 18.

Ms. Tran moves this court for an award of fees and costs pursuant to RAP 14 and RAP 18 for having to bring this appeal.

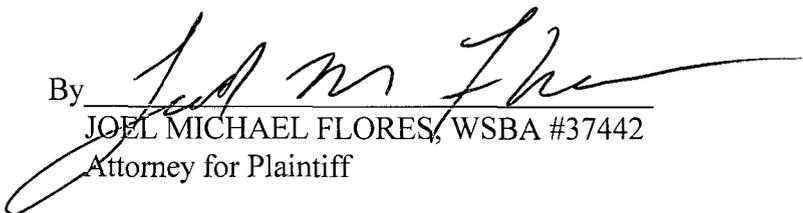
IV. CONCLUSION

The trial court erred in dismissing the case. This Court should reverse and remand for all issues.

Respectfully submitted this the 24th day of July, 2014.

ANDERSON HOSTNIK PLLC

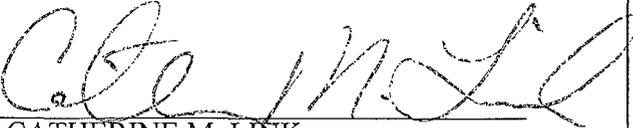
By


JOEL MICHAEL FLORES, WSBA #37442

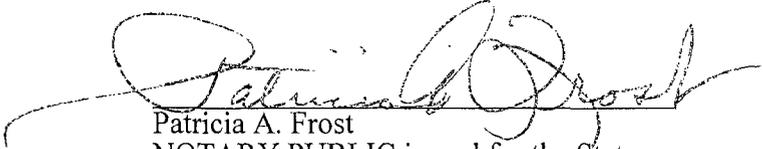
Attorney for Plaintiff

1 I served the above-listed documents to the address of: Betts Patterson & Mines PS
2 701 Pike St Ste 1400, Seattle, WA 98101-3927.

3 DATED this 24th day of July, 2014.

4
5 
6 CATHERINE M. LINK

7
8 SUBSCRIBED AND SWORN to before me this 24th day of July, 2014.

9
10 
11 Patricia A. Frost
12 NOTARY PUBLIC in and for the State
13 of Washington
14 My Commission Expires: 9-05-2014

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7 COURT OF APPEALS, DIVISION II
8 OF THE STATE OF WASHINGTON

9 ROCHELLE TRAN, a married woman,
10 Plaintiff,

)
) Case No. 13-2-10839-4
) 46099-8-II

11 vs.

)
) **AFFIDAVIT OF SERVICE**

12 VICTORIA GALLARDO and "JOHN
13 GALLARDO, a marital community,

14 Defendants.)

15 STATE OF WASHINGTON)

16 COUNTY OF PIERCE)

) ss.

17 The undersigned declares: I am now and at all times herein mentioned was a citizen of
18 the United States and a resident of the State of Washington, over the age of 18 years, and
19 competent to be a witness in the above-entitled matter.

20 On the 23rd July, 2014, I delivered to Shawna Lydon via ABC Legal Messenger a true
21 and complete copy of the following document:
22

23 Brief of Appellant (Corrected)

24 //

25 /

26 AFFIDAVIT OF SERVICE

Page 1

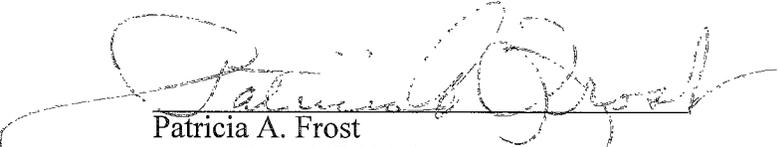
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9

10 
11 Patricia A. Frost
12 NOTARY PUBLIC in and for the State
13 of Washington
14 My Commission Expires: 9-05-2014
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