

FILED

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No. 295516

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

TOBY TODD,

Appellant,

vs.

RIVER RIDGE HARDWARE, INC, and BRIAN POIRIER and JANE DOE POIRER,

Appellants.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Granting Defendants' Motion for Summary Judgment Where Defendants Failed to Meet its Initial Burden of Establishing the Absence of a Material Question of Fact.

ISSUE: Where the plaintiff in an action for damages alleges that an automobile accident in which he sustained injuries was caused by defendants' negligent creation of a large pile of snow obstructing his view at an intersection, is the defendant entitled to summary judgment where the defendant fails to come forward with any evidence showing that defendant was not responsible for creating the obstruction and fails to demonstrate, the absence of any evidence to support plaintiff's claim?

II. STATEMENT OF THE CASE

On January 13, 2009, Appellant, Toby Todd, was driving northbound on Milton Street. CP 15. When Mr. Todd came to a stop at the intersection with Driscoll Boulevard, his view to the left was blocked by a large pile of snow at the southwest corner of the intersection. CP 15. The pile of snow at that corner was higher than the snow that was piled up along the street and was pushed out into the roadway. CP 76, 79. It

appeared to Mr. Todd that the large pile of snow was the result of plowing that had been done on the parking lot of River Ridge Hardware located at the southwest corner of the intersection. The parking lot was cleared of snow and there were no other large piles of snow in the vicinity. CP 76.

The intersection is controlled by stop signs on Milton Street.

There are no stop signs or traffic control lights on Driscoll Boulevard at that intersection. CP 15. According to Mr. Todd, he came to a complete stop at the intersection and looked both ways more than once. Because of the large pile of snow, Mr. Todd could not see traffic traveling eastbound on Driscoll Boulevard coming from his left. Therefore, he slowly “inched” his way into the intersection while continuing to look both left and right to try to obtain a clear view of any oncoming traffic. CP 67, 75. At a point when he felt the front of his vehicle was already at least half way across the intersection and he felt that it was safe to proceed, Mr. Todd decided to proceed forward across the intersection. CP 68, 75. Almost immediately, his truck was struck on the left side by a vehicle traveling eastbound on Driscoll Boulevard. Mr. Todd did not see the vehicle prior to impact. CP 69- 70.

Todd brought the present action against River Ridge Hardware, Inc., and Brian and Jane Doe Poirer (“River Ridge”) for damages to his vehicle and injuries he sustained as a result of the accident. CP 1-5. In his

Complaint, Todd alleged causes of action for negligence and maintenance of an unreasonably dangerous condition. River Ridge moved for summary judgment claiming that Todd's own negligence was sole cause of the accident. River Ridge also claimed that it did not owe any duty of care to Todd, and that, if any such duty was owed, it did not breach that duty. CP 18-25.

The trial court granted the motion. CP 107-09. The trial court declined to rule as a matter of law that Todd was the sole proximate cause of the accident, but concluded that there was no genuine issue of fact and that River Ridge was entitled to judgment as a matter of law. CP 108. Todd now appeals.

III. STANDARD OF REVIEW

This court reviews an order granting summary judgment *de novo* and engages in the same inquiry as the trial court. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63-64, 1 P.2d 1167 (2000). The party moving for summary judgment bears the initial burden of showing the absence of a material question of fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The moving party's initial burden can be met by *showing* that there is an absence of evidence supporting an element of the nonmoving party's

case. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 810 P.2d 4 (1991). An unsupported claim by the defendant that there is a lack of evidence as to a material fact is not enough. At a minimum, a defendant must set forth its version of the facts and allege that those facts are not disputed. *Hash by Hash v. Children's Orthopedic Hospital & Medical Ctr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988).

Summary judgment is appropriate only when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). In determining whether genuine issues of material fact exist, all facts and reasonable inferences from those facts are construed in the light most favorable to the non-moving party. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 963, 948 P.2d 1264 (1997). In tort actions, issues of negligence and causation are generally issues of fact not susceptible to summary judgment. *Miller v. Likins*, 109 Wn.App. 140, 144, 34 P.3d 835 (2001). A question of fact can be determined as a matter of law only when reasonable minds could reach only one conclusion. *Id.*

IV. ARGUMENT

1. River Ridge is not Entitled to Summary Judgment because It Failed to Present Any Evidence Showing that It Was Not Responsible for Creating the Visual Obstruction.

At summary judgment, River Ridge argued that it was entitled to judgment as a matter of law because Todd had not produced any evidence to show that River Ridge had created the pile of snow that blocked his view. However, River Ridge did not provided any factual basis for that claim. The only evidence presented by River Ridge on that issue was Todd's deposition testimony. Todd testified that it appeared that the pile of snow had come from the River Ridge parking lot because the lot had been cleared of snow and there were no other large piles of snow near the parking lot. River Ridge did not file any affidavit from any other witnesses. Nor did River Ridge point to any part of the record showing that the pile of snow did not come from its parking lot or that it was not otherwise responsible for creating the pile of snow that obstructed Todd's view.

The burden on the moving party on summary judgment is to *demonstrate*, and not merely claim, a lack of evidence to support an essential element of the nonmoving party's case. River Ridge clearly

failed to meet that burden in this case. River Ridge could have presented affidavits from persons having knowledge of how, when and by whom the parking lot had been plowed. River Ridge could also have pointed out that discovery had been completed and that no evidence linking River Ridge to the pile of snow had been produced.¹ However, River Ridge did none of those things. Instead River Ridge relied solely on its bare, unsupported assertion that there was no evidence showing that it was responsible for creating the obstruction.

River Ridge is the party most likely to be in possession of facts and information regarding when, how and by whom, the pile of snow was created. Thus, River Ridge was obligated, at a minimum, to put its version of the facts before the court when seeking summary judgment. River Ridge cannot simply claim that there is no evidence to support Todd's claim, when River Ridge itself is most likely in possession of such evidence.

It is often the case in negligence actions that the defendant will be the best or only source of facts establishing the breach of a duty. If defendants are allowed to obtain summary judgment prior to responding to discovery requests or submitting to deposition as River Ridge did here,

¹ In fact, discovery was ongoing at the time River Ridge filed its motion and Todd had yet to conduct any depositions or obtain discovery by means of written interrogatories and requests for production.

many meritorious claims will be lost solely because the plaintiff does not possess direct knowledge of facts needed to support his or her claim. The whole purpose of the discovery process would be circumvented, and defendants would be able to escape liability for their tortious conduct simply by moving for summary judgment prior to the completion of discovery and withholding from the court material evidence in their possession. Here, River Ridge did not come forward with any evidence that it was not responsible for creating the obstruction of Todd's view at the intersection. Thus, River Ridge failed to meet its initial burden of demonstrating the absence of a material question of fact on that issue. The trial court erred by granting summary judgment.

2. River Ridge Clearly Owed a Duty to Todd and Other Motorists not to Create an Unreasonable Obstruction of the View of the Intersection.

River Ridge also argued that it did not owe any duty to Todd not to create an obstruction of the view of the intersection. River Ridge relied on cases holding that a landowner has no duty to protect the public from naturally occurring conditions on land near a public way. See, e.g., *Coulson v. Huntsman Packaging Prod. Inc.*, 121 Wn.App. 941, 92 P.3d 278 (2004).

The cases cited by River Ridge deal only with a landowner's duty with respect to naturally occurring conditions and are not on point. Numerous courts have held that there is a general common law duty not to unreasonably obstruct the view of drivers on a public roadway in a manner that renders use of the public roadway dangerous. See, *Atlantic Ins. Co. v. Kenney*, 323 Ms. 116, 591 A.2d 507 (1991); *Taylor v. State*, 431 So.2d 876 (1983); *Quiquin v. Fitzgerald*, 146A.D. 894, 536 N.Y.S.2d 874 (1989); *Vought v. Jones*, 205 Va. 719, 139 S.E.2d 810 (1965).

Here, the pile of snow that blocked Todd's view of the intersection was not a naturally occurring condition. The pile of snow that was significantly higher than the accumulated snowfall and was higher even than the snow piled on the roadside as the result of the streets having been plowed. It appeared from the surrounding conditions that the pile of snow resulted from plowing that had been done on the parking lot belonging to River Ridge. Thus, the obstruction was clearly man-made, not naturally occurring. River Ridge owed a duty to Todd and all other motorists not to create any obstruction that would render use of the adjacent intersection unreasonably dangerous.

3. Whether Todd was Contributorily Negligent is a Question of Fact to be Decided by a Jury.

River Ridge argued that Todd is precluded from maintaining an action for negligence because he breached his statutory duty under RCW 46.61.190(2) not to proceed into the intersection until it was safe to do so. Under Washington law, however, the breach of a statutory duty does not, by itself, establish negligence. See, RCW 5.40.050. Thus, the trial cannot find negligence as matter of law based upon the violation of a statutory duty, even the violation is clear and without excuse or justification. *Mathis v. Ammons*, 84 Wn.App. 411, 435-36, 928 P.2d 431 (1997). Instead, the trial court can find negligence as a matter of law only when reasonable minds would be compelled by the undisputed facts to conclude that the actor failed to exercise reasonable care. *Id.*

Todd testified in his deposition that he came to a full stop at Driscoll Boulevard. He was unable to see traffic coming from his left because of the pile of snow at the southwest corner of the intersection. Therefore, he “inched” his vehicle forward slowly as he continued to look to both his right and left for oncoming traffic. He did not accelerate through intersection until the front of his truck was already halfway across the intersection. Although he continued to look both right and left up until he decided to proceed through the intersection, he did not see the other vehicle prior to the collision.

Under these facts, a reasonable jury could conclude that Todd exercised reasonable care and complied with his statutory duty to the fullest extent possible under the circumstances. Todd did not simply drive into the intersection without looking for oncoming traffic. Instead, he slowly moved his vehicle forward in an attempt to obtain a better view of the traffic coming from his left, which was obstructed by the pile of snow. He proceeded only when his vehicle was already halfway across the intersection. A reasonable jury could conclude that once Todd had been forced to drive his truck that far into the intersection to try to get a clear view of traffic at the intersection, failing to proceed through the intersection would have created an even greater risk of an accident. Thus, whether Todd acted negligently is a question that must be decided by the jury.

Even if a jury were to find that Todd was negligent, it does not automatically follow that such negligence was the sole proximate cause of the accident. Todd's testimony establishes that the large pile of snow at the southwest corner of the intersection obstructed his view of oncoming traffic. He looked both to his left and right numerous times and decided to proceed into the intersection only when the front of his vehicle had reached the halfway point. Under these facts, reasonable minds could

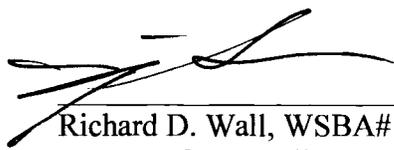
differ on the question whether Todd's conduct was a proximate cause of the accident or was the sole proximate cause of the accident.

Under Washington law, a plaintiff's own negligence does not preclude recovery against other potentially responsible parties. Rather, it is a question for the jury to determine the comparative negligence of the plaintiff and other responsible parties and to apportion any award based upon the percentage of fault. See, *Gregoire v. City of Oak Harbor*, ___ Wn.2d ___, 244 P.3d 924, 927 (2010). Thus, even if a jury determines that Todd was at fault and that his fault contributed to the accident, it may also determine that River Ridge was at fault and apportion damages between Todd and River Ridge accordingly.

V. CONCLUSION

For the foregoing reasons, this court should reverse the order granting summary judgment in favor of the defendants and remand this case for further proceedings in the trial court.

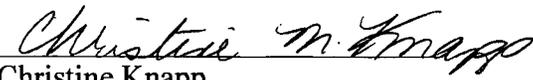
Dated this 22 day of February, 2011.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of February, 2011, a true and correct copy of the foregoing BRIEF OF APPELLANT was sent via legal messenger to the following:

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