

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JAMES WALKER and BARBARA WALKER, husband and wife
and the marital community composed thereof, Appellants/Plaintiffs,

v.

THE WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS, a State agency,
STEVENS COUNTY, DEPARTMENT OF PUBLIC WORKS,
Defendants/Respondents

Appellants' Reply Brief

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REPLY STATEMENT OF THE CASE:

No photos from the approach were taken the day of the accident, [CP133] even though Mr. Schildt told the officers at the time that the stop sign was obscured. [CP 32] Mr. Walker provided a recorded statement which he adopted as a sworn statement. [CP 140]

A. And I couldn't see any stop sign and so I believe the stop sign was way over to one side and you had to get right up really close to it and then you had to look over to one side in order to see it so it was very, very blocked.

Q. Ok.

A. Ah, by it and I think there was shrubbery and things like that. [CP 148]

Mr. Schildt said there was "pretty high vegetation" around the stop sign that hid it. [CP 33, 36] He concluded the stop sign was not visible even as close as 100 feet. [CP 34] He did not see the stop sign until after the collision. [CP 45]. He stated,

And if I recall, there's a tree -- a fairly large tree on the right side. And the highway -- the main highway, 231, is in a bit of a curve. So when I go up the incline entering towards the intersection, you really can't see any left and right. Or even if you're like 100 feet back from the intersection, you can't really see anything. [CP 425]

Mr. Schildt also testified a rider could not see approaching traffic on the State Highway due to its curve. [CP 425] His testimony is consistent with the findings of Dr. Skelton, based on the scene as it existed a year after the accident: there was then only 125 feet visibility. [CP 71]

Mr. Flott testified that when he inspected the scene the vegetation would likely not have been materially different than at the time of the accident. [CP 237] He did not say it would for sure have grown 20 inches in the intervening year in every location, but in general could have grown 20 inches. [CP 113]

Road design expert Edward Stevens opined that the intersection did not comply with the MUTCD and, thus, was inherently dangerous. [CP 802-03]

Accident reconstruction expert Steve Harbinson opined Walker needed between 214 feet to 154 feet to stop, depending on his speed. [CP 135]

Human factors expert Joellen Gill opined that even more distance would be required given the need to perceive and react to the stop sign. [CP 224] Walker's failure to stop was foreseeable. [CP 223]

ARGUMENT

I. PROXIMATE CAUSE

Both defendants wrongly argue that Mr. Walker's lack of recall prevents him from proving proximate cause. They are wrong.

A. Visual Fiction

The defendants argue that the photos taken a year after the accident in 2014 establish definitively that sight distance was sufficient to stop, what they refer to as "visual fiction." This a new argument raised for the first time on appeal that does not apply. Note that the only reason there are no photos is that the State Patrolman did not bother to take pictures of the approach to the intersection; so, the State relies on the negligence of their own agent to form the basis for their argument.

Scott v. Harris, 550 U.S. 372, 127 S. Ct. 1769, 167 L.Ed. 2d 686 (2007), was a police excessive force case. There was a video of the actual event, which irrefutably contradicted the testimony of some witnesses. Thus, the Court properly excluded the witnesses' testimonies.

Here Respondents want to "stitch together" photos taken a year after the accident with Mr. Walker's supposed admission that those photos were "generally accurate." Then they add in testimony from Flott

that the vegetation ‘would have been 20 inches shorter’ in 2013 and conclude this proves definitively that Mr. Schildt’s eyewitness testimony is wrong and unreliable.

The 2014 photos do not establish sight distance.

1. Walker was asked if the photos in question were a fair and accurate depiction of the conspicuousness of the stop sign on July 26, 2013, [CP 439] Walker did not admit they were: he objected and stated the photos speak for themselves and are subject to different interpretations. [CP 439.]

2. Flott’s testimony does not address specifically what was visible in 2013. He said “on average” this type of tree could grow up to 20” in a year and that its growth “can vary quite a bit.” He opined it could have been between 12 and 30 inches. [CP 110]

3. Dr. Skelton opined the stop sign was not visible more than 125 feet away, based upon his own observation after taking measurements which informed his opinion. . [CP 71] Eyewitnesses Walker [CP 148] and Schildt [CP 425] testified the stop sign was not in fact visible.

4. Defense expert John Hunter admits that a photographic image cannot always represent what the eye actually detects. [CP 595] This is

a pretty significant hole in the Respondents' overall argument, because their own witness says a photo can't be relied upon for an accurate recreation of the site – and then immediately rely upon their expert's interpretation of the photos, really for their entire argument.

The trial court erred because Mr. Walker's expert opinions create questions of fact that preclude summary judgment. *Leahy v. State Farm Mut. Auto. Ins. Co.*, 3 Wn.App. App. 2d 613, 633, 418 P.3d 175 (2019).

B. Behla decision

This Court recently held that that causation becomes a question of law for the court only when the causal connection is so speculative and indirect that reasonable minds could not differ. *Behla v. R.J. Jung, LLC*, ___ Wn. App ___, ___ P.3d ___ (Slip. Op. No. 36276-1-III, 12/3/2019).

Indeed, there are often more than one proximate cause. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 676, 709 P.2d 774 (1985). Evidence simply must allow a jury to find that the harm more probably than not happened in such a way that negligence played a role. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). That evidence may be circumstantial and inferential. *Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978).

[I]f there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Prentice Packing & Storage Co. v. United Pac. Ins. Co., 5 Wn.2d 144, 106

P.2d 314 (1940). A plaintiff need only show "a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable.

Conrad v. Alderwood Manor, 119 Wn. App. 275, 78 P.3d 177 (2003).

Two eyewitnesses (Walker and Schildt) testified they were unable to see the stop sign. [CP 142-48; 33] Schildt testified the vegetation hid the stop sign until about 100 feet away. Experts Gill and Harbinson opined Walker could not have stopped when the stop sign was visible only 100 feet away.

C. Exceptions to ‘speculation rule’

The rule does not apply, as in this case:

1. Where the Plaintiff has provided evidence of what happened. We supplied testimony from Mr. Walker [CP 148] and from Mr. Schildt. [CP 425] Walker’s prior recorded statement adopted in his interrogatory answers is admissible. ER 801(d)(1); ER 803(a)(5).

Respondents say this is only applicable if the witness previously did

remember: but the statement he made proves that Mr. Walker did, at the time of the statement, remember. [CP 142, 148]

2. Where the Plaintiff has provided expert testimony of a hazard that, in their opinion, caused the accident. *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn.App.2d 115, 404 P.3d 97 (2017). Dr. Skelton, Mr. Harbinson, Ms. Gill and Mr. Flott all fill in the pieces of a compelling, not just possible explanation.

There is more at issue than just the placement of the stop sign: the curved approach of SR 231, Walker's lack of familiarity with the road, the absence of cues that a stop was approaching, all support causation. Walker's supposed failed memory is really largely irrelevant because there was nothing there for him to remember, there was no visible stop sign. The State and County attempt to argue these are speculative opinions but they are based upon the same information that the State uses for its witnesses' opinions.

3. Where the Plaintiff was following the rules of the road. *Rashoff v. State*, No. 45919-1-II (unpublished 10/20/2015) from Division II holds that a party who is following the rules of the road, provides circumstantial evidence he did not thereafter ignore the rules. This is very similar to the holding in this Court's opinions in *Tapken v. Spokane*

No. 329097-III (1/12/16) (unpublished) and in *Tapken v. Spokane County*, (6/13/19 no. 35473-3, Division III) (unpublished) (Tapken II): "drivers routinely slow to safely navigate a sharp curve when the sharpness of the curve is apparent. ... we must presume that [the Plaintiff driver] would have done what almost every other driver does when perceiving a sharp curve: slow down sufficiently rather than wreck." In our case we must presume that Walker, who was following the rules of the road and not speeding, would have slowed or stopped like every other driver if he perceived an upcoming stop sign.

4. Where the Defendants are unable to offer an alternate hypothesis that is just as likely as a failure to perceive a warning sign. Speculation is present when alternate causation theories are just as likely as Plaintiff's theory. *Rasmussen v. Bendotti*, 107 Wn.App. 947, 959, 29 P.3d 56 (2001). *Behla* says the plaintiff needs to rule out other possible causes combined with proof the alleged condition could have caused the injury. We have done this with testimony from Mr. Schildt and Mr. Walker that Walker was a careful, experienced rider, who did slow down approaching the intersection, just not in time due to reduced visibility of the stop sign. We also have the opinion of Ms. Gill that "Mr. Walker's

behavior at the time of this incident was consistent with foreseeable human behavior.” [CP 223]

Tubbs v. Estate of Vail, No. 67201-1-I, (Court of Appeals Division 1, February 19, 2013) (unpublished) suggests the burden shifts to the defense once such a showing is made, and the defense must put forth an ‘equally plausible explanation.’ In this case there is no equally plausible explanation why an experienced caution rider would simply blow through a stop sign. CP In short there was no reason for him to blow through the stop sign; ordinary drivers do not do that if they are aware of the stop sign.

II. DUTY OF STEVENS COUNTY

Wuthrich v. King County, 185 Wn.2d 19, 366 P.3d 926 (2016) is dispositive of Stevens County’s duty and mandates this Court reverse the trial court’s erroneous ruling.

A municipality has the duty "to maintain its roadways in a condition safe for ordinary travel." *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002) There is no exemption for roadside vegetation. *Wuthrich*, at 25.

Stevens County’s duty includes looking for inherently dangerous or misleading conditions.

[T]o the extent that *Ruff v. County of King*, 125 Wn.2d 697, 887 P.2d 886 (1995), has been misread as holding that a municipality's duty is limited to complying with applicable law and eliminating inherently dangerous conditions, we clarify that it is not. Municipalities are generally held to a reasonableness standard consistent with that applied to private parties.

Id. at 26.

Such a hazard may be presented by "the situation along the highway." *Id.* at 26.

An even more recent case, *Ogier v. City of Bellevue*, 12 Wn.App. 2d 550, 555 __ P.3d__ (2020) found the failure to regularly inspect manholes when the city knew third parties and vandals could remove covers at any time, could create liability when someone stepped into an uncovered manhole. "A municipality has the duty 'to maintain its roadways in a condition safe for ordinary travel."

Stevens County was or should have been aware of an inherently dangerous vegetation along its highway that obscured the stop sign. Stevens County neglected to take any steps to correct the problem. Stevens County could have discharged its duty by removing or trimming the vegetation, installing a sign, or notifying the State that Stevens County believed the State needed to remedy the problem.

CONCLUSION

The Superior Court decision should be reversed and remanded for trial.
29,
June ~~XX~~ 2020

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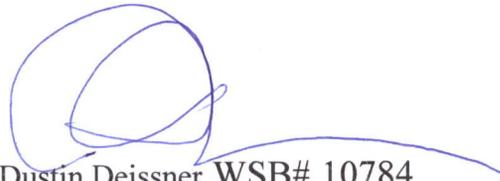
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