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Case No. 37149-2-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

GILBERTO CANTU, a single person,
Appellant,

v.

ADAMS COUNTY, et al.,
Respondent.

Appeal From An Order Of The Adams County Superior Court
Case No. 17-2-00259-7

BRIEF OF APPELLANT

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I. INTRODUCTION

This is an appeal from an Order granting Defendant Adams County's Motion for Summary Judgment on all claims advanced by Gilberto Cantu. Mr. Gilberto Cantu maintained causes of action based on negligence, negligent training, agency theory and respondeat superior.

Mr. Gilberto Cantu was struck by an Adams County Patrol car driven by Deputy Darryl Barnes. Mr. Gilberto Cantu was riding a bicycle being pursued by Deputy Barnes.

Deputy Barnes vehicle struck Mr. Cantu and caused injury to Mr. Cantu's foot during the collision. A video made by a police video camera is included as part of the record and was considered by Judge Steven Dixon of Adams County Superior Court.

The trial court granted Adams County's Summary Judgment Motion on September 30, 2019. Mr. Gilberto Cantu maintains that there are genuine issues of material fact in dispute. Further, appellant maintains as a matter of law Adams County should not be entitled to summary judgment.

II. ASSIGNMENT OF ERRORS

- A. Whether the Superior Court Erred When It Granted Adams County Motion For Summary Judgment As There Were Factual Issues In Dispute.

B. The Superior Court applied the incorrect standard in granting the Adams County Motion for Summary Judgment.

III. STATEMENT OF THE CASE

On April 4, 2015, at 13:10, Deputy Darryl Barnes in a police car pursued Plaintiff GILBERTO CANTU who was riding on a bicycle in Othello, Washington. CP 73 and CP 69. After a period of time, Deputy Barnes' vehicle struck GILBERTO CANTU as he rode his bicycle through a parking lot. CP 69.

On a police video, Deputy Darryl Barnes, at 03:34, stated he accelerated. CP 69. At 03:39 to 03:41, Deputy Barnes stated that he tried stepping on the brake. CP 69. At 06:42 to 06:50, he said he tried braking "but Cantu got caught underneath". CP 69. On the video, at 11:06 to 11:10, Deputy Barnes stated that he tried braking. CP 69.

In his police report, Deputy Barnes states: "I accelerated to gain momentum which I planned to carry me over the berm. CP 73. I noticed Gilberto's bike was beginning to cross my track traveling north east. CP 73. I applied my brakes in an attempt to prevent a collision with the bike. CP 73. I observed the bike and Gilberto disappear out of view in front of my bumper. CP 73. I vehicle came to a stop at the berm and I backed up a few feet. Gilberto came into view resting on the north side

of the berm. The green bike was partially lodged under my patrol unit's front bumper" (IMG 1980). CP 73.

Deputy Barnes was aware of who Mr. Gilberto Cantu was and had prior contacts with him. CP 73, CP 140-142 and CP 69 (video record at 04:16 to 04:20). The Deputy states, in his deposition, he was not intending to strike Mr. Cantu on the bicycle that day. CP 145-146. Deputy Barnes, in his deposition, clearly acknowledges that he did not have control of the vehicle. CP 145-146. The bulk of the evidence demonstrates that Deputy Barnes failed to maintain control of his vehicle when he struck Mr. Gilberto Cantu. CP 145-146. Plaintiff's Complaint, paragraphs 3.1 to 3.7, alleges that Deputy Barnes failed to yield to bicyclist, drove off the roadway in striking the bicyclist, failed to reduce speed to avoid collision and failed to maintain control of his vehicle CP 1-5. All of these facts are demonstrated in the video of the collision CP 69.

The Defendants' Motion for Summary Judgment includes a policy on "vehicle pursuits". CP 87. Section 314.1.1 of the policy defines vehicle pursuit as an event involving a "suspect who is attempting to avoid apprehension while operating a motor vehicle by using high speed driving". CP 87. In RCW 46.04.320 a motor vehicle is defined as a vehicle that is self-propelled. CP 157. The bicycle pursuit

here never reached highspeed driving greater than driving greater than low speed travel. CP 69. The policy actually supports the defense position that a pursuit was improperly conducted and led to the injury of Gilberto Cantu.

The policy sets forth factors to be considered in deciding to initiate a pursuit. In consideration of those factors, the pursuit was not justified in this case and never involved a motor vehicle as a bicycle is not a motor vehicle under the Revised Code of Washington 46.04.320 CP 157. The Defendant has provided no policy regarding pursuit of bicyclist which suggests the pursuit of a bicyclist is consistent with department policy. CP 87-88.

The police report documents that Mr. Gilberto Cantu sustained injury to his foot as a result of the vehicle versus bicycle collision. CP 74. Deputy Barnes was traveling at speeds to fast for conditions at the time of the collision. CP 73 and CP 145. Darryl Barnes violated RCW 46.61.400 (1) when he failed to maintain control of his vehicle when he slid on the gravel unable to avoid collision with the bicycle Mr. Cantu was riding. CP 145-146.

Mr. Darryl Barnes makes conflicting statements about the bicyclist and police car collision. Immediately after the accident in the video he says the brakes failed. (Video 00:01 to 06:42). CP 69. In his deposition, he

denies any mechanical problems related to the car. CP 145-146. At the deposition he maintains the collision was the result of Mr. Gilberto Cantu crossing in front of him. CP 145-147.

Mr. Darryl Barnes says he was accelerating to cross the berm just before the collision. CP 73. Similarly, he states he was sliding after braking just prior to colliding with the bicyclist. CP 145. The Department policy regarding police pursuits discusses only pursuing a motor vehicle. The pursuit policy never contemplates a police vehicle being in pursuit of bicyclist or pedestrians. CP 87-96. There is no authority in the policy to chase bicyclist or to run over a bicyclist contrary to defense argument. CP 30-33.

IV. ARGUMENT

1. Standard of Review

a. Summary Judgment

This Court reviews orders granting summary judgement de novo, and performs the same inquiry as the trial court. Durland v. San Juan County, 182 Wn.2d 55, 69, 340 P.3d 191 (2014). Summary judgment is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and inferences are to be viewed in the light most favorable to the

nonmoving party. Kok v. Tacoma School District No. 10, 179 Wn. App. 10, 17, 317 P.3d 481 (2013).

b. Duty/Negligence

The existence of a duty is a question of law which this Court reviews de novo. N.K. v. Corp. of President Bishop, 175 Wn. App. 517, 525, 307 P.3d 370 (2013), review denied, 179 Wn. 2d 1005 (2013). Whether a defendant breached its duty is generally a question of fact. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). The elements of a negligence action are duty, breach, proximate cause and damage or injury. Berger v. Sonneland, 144 Wash 2d91,103 26P.3d 257 (2001).

Duty is the duty to exercise ordinary care or alternatively phrased the duty to exercise such care as a reasonable person would exercise under the same or similar circumstances. Breach is the failure to exercise ordinary care or alternatively phrased, the duty to exercise such care as a reasonable person would exercise under the same or similar circumstances. Breach is called negligence. Matthis v. Ammons, 84 Wash.App. 411, 416, 928 P.2d 431 (1996)(footnotes omitted), review denied, 132 Wash 2d1008, 940 P.2d 653 (1997).

2. Argument on Assignments of Error

A. Whether the Superior Court Erred When It Granted Adams County Motion For Summary Judgment As There Were Factual Issues In Dispute.

Summary judgment is only proper when the pleadings, affidavits, depositions and admissions on file demonstrate there is no genuine issue of material fact, and that the non-moving is entitled to summary judgment as a matter of law. CR 56(c). Where different inferences can be reasonable drawn from evidentiary facts, however, summary judgment must be denied if the record shows any reasonable hypotheses which entitles the non-moving party to relief. Mostrom v. Pettibon, 25 Wn.App 158, 162, 607 P.2d 864 (1980). The trial court is not permitted to weigh the evidence or resolve any material fact issues in ruling on a motion for summary judgment. Fleming v. Smith, 64 Wn.2d 181, 185, 390 P.2d 990 (1964). Deputy Darryl Barnes in a video recording can be seen driving through the parking lot in an erratic fashion. (video generally 00:01 to 06:42) CP69. The video clearly shows that Mr. Gilberto Cantu is riding the bicycle through the parking lot. (Video 00:01 to 06:42) CP 69. In the video the vehicle accelerates to jump over a berm. (Video 04:00 – 06:42) CP 69. After accelerating, the police vehicle strikes Mr. Cantu knocking him to the ground. (Video 00:001 – 06:42) CP 69. On the video Deputy Barnes states at 3:34 that he accelerated before the collision. CP 69, (video

at 3:30-3:35). At 3:39 to 3:41 on the video Deputy Barnes said he hit his brakes to avoid the collision. Then later in the video at 11:06 to 11:10 Deputy Barnes said he tried braking. CP 69.

In his police report Deputy Barnes states “I accelerated to gain momentum which I planned to carry me over the berm.” CP 73. “I noticed the bike cross my track of traveling north east. I applied my brakes in an attempt to avoid collision with the bike.” CP 73. “Gilberto and the bike disappeared out of view in front of my bumper.” CP 73. “My vehicle came to a stop at the berm and I backed up a few feet.” CP 73. “Gilberto came into view resting on the northside of the berm. The green bike was partially lodged under my patrol unit’s front bumper.” CP 73.

Deputy Barnes was aware of who Mr. Gilberto Cantu was and had prior contacts with him CP 73, CP 140-142 and CP 69 (video record at 04:16 to 04:20). The Deputy states, in his deposition, he was not intending to strike Mr. Cantu on the bicycle that day. CP 145-146. Deputy Barnes, in his deposition, clearly acknowledges that he did not have control of the vehicle. CP 145-146. The bulk of the evidence demonstrates that Deputy Barnes failed to maintain control of his vehicle when he struck Mr. Gilberto Cantu. CP 145-146. Plaintiff’s Complaint, paragraphs 3.1 to 3.7, alleges that Deputy Barnes failed to yield to bicyclist, drove off the roadway in striking the bicyclist, failed to reduce

speed to avoid collision and failed to maintain control of his vehicle. CP 1-5. All of these facts are demonstrated in the video of the collision. CP 69.

The Defendants' Motion for Summary Judgment includes a policy on "vehicle pursuits". CP 87-96. Section 314.1.1 of the policy defines vehicle pursuit as an event involving a "suspect who is attempting to avoid apprehension while operating a motor vehicle by using high speed driving". CP 87. In RCW 46.04.320 a motor vehicle is defined as a vehicle that is self-propelled. CP 157. The policy actually supports the defense position that a pursuit was improperly conducted and led to the injury of Gilberto Cantu. The bicycle pursuit here never reached highspeed. CP 69. (Video generally)

The policy sets forth factors to be considered in deciding to initiate a pursuit. In consideration of those factors, the pursuit was not justified in this case and never involved a motor vehicle as a bicycle is not a motor vehicle under the Revised Code of Washington 46.04.320. CP 157. The Defendant has provided no policy regarding pursuit of bicyclist which suggests the pursuit of a bicyclist is improper under department policy. CP 87-88.

B. The Superior Court applied the incorrect standard in granting the Adams County's Motion for Summary Judgment.

The Superior Court appears to have applied a standard other than negligence applying a reasonable force in making an arrest. Deputy Barnes maintains that he was not intentionally striking Mr. Gilberto Cantu when he struck the bicycle and Mr. Cantu. In his deposition, Deputy Barnes testified he did not intend to hit Mr. Gilberto Cantu. CP 145-146. The Deputy never maintains he was intending to his Mr. Gilberto Cantu.

The defense appears to be arguing that as Mr. Gilberto Cantu was a fleeing felon in a vehicle, therefore Deputy Barnes could have intentionally struck Mr. Cantu and his bicycle. It is clear that Mr. Gilberto Cantu was struck due to Deputy Barnes being unable to control his Crown Victoria. There are statements that the gravel surface and the speed of the vehicle would not allow him to stop. CP 73 and CP 145-146. When asked if he struck Mr. Gilberto Cantu intentionally, Deputy Barnes said "no". CP 145-146.

Here it appears that the Court applied a use of force standard for an arrest rather than the common law negligence as alleged in the Plaintiffs complaint. CP 1-5. The defense counsel urges the court to find that Deputy Barnes under the City of Othello Police Policy and procedures Section 314 could maintain a police pursuit of a bicyclist. The defense use of the

pursuit policy is misplaced and Superior Court incorrectly applied criminal law for negligence action.

The complaint does not allege, nor could the plaintiff demonstrate an intentional excessive force claim. Deputy Barnes maintains it was not an intentional act when his Crown Victoria police cruiser struck Mr. Cantu. CP 145-146.

The facts support the plaintiff's claim of negligence. Deputy Barnes traveling at speeds too fast for conditions RCW 46.61.400 (1) provides that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

The Superior Court failed to apply the appropriate standard because the court must apply the evidence viewed in the non-moving parties favor. When the defense argued Borromeo v. Shea, 138 Wn.App. 290, 156 P.3d 946 (2007) stands for a bicyclist is a motor vehicle even when on a sidewalk or crosswalk the trial court applied an incorrect standard. At summary judgment the court must find there is "no genuine

issues of material fact and the moving party is entitled to judgment as a matter of law.” CR 56(c). All facts and inferences are to be viewed in a light most favorable to the non-moving party. Kok v. Tacoma School District No. 10, 179 Wn. App. 10, 17, 317 P.3d 481 (2013). Borromeo v. Shea, 138 Wn.App. 290, 156 P.3d 946 (2007) dealt with the courts jury instructions during a civil trial under a different standard than applied on summary judgment.

Here the trial court applied the incorrect standard interpreting the facts including the definition of a motor vehicle in the light most favorable to the moving party, the defense. The Deputy cannot simply because he is law enforcement negligently run into a person fleeing on a bicycle. The police officer still had to use ordinary care in following the bicyclist. Whether he violated the duty of reasonable care is a question of fact for the jury.

V. CONCLUSION

Summary Judgment was improperly granted because the court failed to apply the correct standard. A law enforcement officer cannot run over a bicyclist on private property who he is pursuing. The officer must still comply with RCW 46.61.400 and use due care in following the bicyclist.

Additionally, where there are factual disputes “all facts are to be viewed in the light most favorable to the non-moving party. Kok v. Tacoma School District No. 10, 179 Wn. App. 10, 17, 317 P.3d 481 (2013). In looking at the record before the court, summary judgment was improperly granted by the Adams County Superior Court.

The Plaintiff respectfully ask that the Superior Court’s grant of summary Judgment be reversed, and the matter be remanded to Superior Court for trial on the merits.

Respectfully submitted this 13th day of April, 2020.



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PROOF OF SERVICE

I, Sarah Thomas, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action and make this declaration upon personal knowledge. I am employed as a Paralegal at Phelps & Associates, P.S., and in that role I caused to be served a true and correct copy of the Brief of Appellant to the following individuals in the manner indicated below, with costs prepaid:

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Respectfully submitted this 13th day of April, 2020.



Sarah Thomas, Paralegal

PHELPS & ASSOCIATES, P.S.

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