

67201-1

67201-1

No. 67201-1-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

TABITHA M. TUBBS, a single woman,

Appellant,

v.

THE ESTATE OF STEVEN L. VAIL, a single man, individually and
dba NORTHWEST VEE DUB, a business entity believed to be a
Washington sole Proprietorship

and

LARRY E. VAIL and DARLENE E. VAIL, as Co-Administrators of
the Estate of Steven Lyle Vail, and not individually,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case arises out of a motorcycle accident which caused the death of Steven Vail and caused serious injuries to his long-time girlfriend, Appellant Tabitha Tubbs (“Tubbs” or “Appellant”). Ms. Tubbs filed suit against Larry and Darlene Vail (Steven’s parents) as Co-Administrators of the Estate of Seven Vail (“Respondents”), claiming Steven Vail’s negligent acts or omissions caused the motorcycle crash.

II. ISSUES

- A. Did the trial court err by refusing to speculate as to Steven Vail’s alleged negligence and subsequently granting summary judgment?
- B. Did the trial court err by failing to apply the doctrine of *res ipsa loquitur*?

III. STATEMENT OF THE CASE

A. FACTS

This lawsuit arises from a single vehicle accident that occurred on September 28, 2008 in Whatcom County. On that day, Steven Vail was driving a 1993 Harley Davidson model XL883H

motorcycle owned by Mr. Brad Ableman. Appellant Tabitha Tubbs was his passenger. They had borrowed the motorcycle for a trip to the Oyster Run, a motorcycle event held in Anacortes.

On the trip home, at approximately 5 pm, Mr. Vail and Ms. Tubbs were heading northbound on Interstate-5 in the right hand lane. The day was clear, dry, and warm. All accounts say they were going the speed limit, when the motorcycle drifted to the right, drove onto the shoulder and struck the guardrail. Both Mr. Vail and Ms. Tubbs were ejected from the motorcycle. Mr. Vail died on scene from his injuries. Ms. Tubbs survived, but was seriously injured.

Ms. Tubbs recalls detailed facts of the moments leading up to the accident.¹ Once they reached I-5 from Anacortes, they headed north, and did not stop until the rest stop just south of the Whatcom County line.² Once back on the freeway northbound, they proceeded uneventfully, going under 60 miles per hour.³

When nearing mile marker 244, close to where the accident occurred, Ms. Tubbs noticed that something was “wrong with the

¹ CP 178-188; CP 265-291.

² CP 285.

³ CP 178-179.

bike.”⁴ She said it “just wasn’t riding right. It wasn’t as smooth as it was.”⁵ Ms. Tubbs could tell the difference in how the motorcycle was riding, because she had been riding on it all day and had experienced it riding smoothly before that point in time. She describes the period of time between when she noticed this problem to when the accident occurred as “half a second—not literally, but it was really quick. I had no time to figure nothing [sic].”⁶ She said she felt the motorcycle shaking “microseconds” before the accident occurred.⁷

B. PROCEDURAL HISTORY

Appellant filed suit against Larry and Darlene Vail as co-administrators of Steven Vail’s Estate, alleging that Steven Vail’s negligence caused the accident and her injuries. Suit was also filed against Mr. Ableman, who owned the motorcycle involved in the crash. Respondents and Mr. Ableman filed separate motions for summary judgment, each of which were each granted by the trial court. Appellant is now appealing only the summary judgment

⁴ CP 179.

⁵ CP 179.

⁶ CP 181.

⁷ CP 188.

dismissal of the suit against Larry and Darlene Vail as co-administrators of the Estate of Steven Vail.

IV. STANDARD OF REVIEW

In reviewing a case that has been decided on a motion for summary judgment, the appellate court engages in the same analysis as the trial court or *de novo*.⁸ During this inquiry, any findings of fact made by the trial court may be disregarded on appeal because summary judgment determines issues of law, not issues of fact.⁹ The record on review of a summary judgment is limited to the documents reviewed by the trial court, as specifically stated in the trial court's order on summary judgment. RAP 9.12.¹⁰

V. ARGUMENT

In order to prevail in this appeal, Appellant must demonstrate the trial court erred in finding that the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as

⁸ *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996).

⁹ *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 878 P.2d 483 (1994).

¹⁰ The trial court's order on summary judgment is found at CP 35-37.

a matter of law.”¹¹ Below, Respondents had the initial burden of showing there was no genuine issue of material fact, and that they were entitled to judgment as a matter of law.¹² Respondents did just that. The burden then shifted to the Appellant to demonstrate that there was a genuine issue of material fact, and that Respondents were not entitled to judgment as a matter of law.¹³ Appellant failed to meet that burden below, and fails to do so again here.

A. PLAINTIFF IMPROPERLY RELIES ON SPECULATION AND CONJECTURE

“The mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence.”¹⁴ To survive summary judgment and justify a trial, Appellant must at least make a prima facie case of the three basic elements of negligence: (1) that Steven Vail owed a duty of care to Appellant; (2) that Steven

¹¹ CR 56(c).

¹² *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008).

¹³ *Id.*

¹⁴ *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475(1999).

Vail breached that duty of care; and, (3) that Steven Vail's breach of the duty was the proximate cause of Appellant's injuries.¹⁵

In determining whether there is an issue of material fact as to any of these elements, Appellant may not rely on "guess, speculation, or conjecture."¹⁶ The court "must view the evidence presented through the prism of the substantive evidentiary burden."¹⁷

Respondents agree that under the facts of this case, Steven Vail owed Ms. Tubbs a duty of reasonable care. However, Ms. Tubbs relies on speculation and conjecture in attempting to prove the second and third elements of negligence: breach and proximate cause.

Appellant points to several speculative factual theories in support of her claim, asserting that material issues of fact exist as to both breach and proximate cause. In taking this shotgun approach, Appellant tacitly admits she has no evidence that any of these facts constitute an actual breach of either the duty owed or the proximate cause of the accident. This lack of a valid nexus

¹⁵ See Generally, *Hansen v. Washington Natural Gas Co.*, 27 Wn. App. 127, 129, 615 P.2d 1351 (1980); *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953).

¹⁶ *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947).

¹⁷ *Sedwick v. Gwinn*, 73 Wn. App. 879, 873 P.2d 528 (1994).

between the known facts and inferences and the actual cause of the accident requires a reasonable person to speculate on that cause.¹⁸

Our courts have consistently recognized that speculation and conjecture is not a basis upon which negligence may lie. In the 1947 case of *Gardner v. Seymour*, a widow sued her deceased husband's employer for the wrongful death of her husband. Her husband had fallen down an elevator shaft. The evidence showed that the elevator doors were often left open by other employees to manipulate the elevator to different floors. The Plaintiff was able to show that it was *possible* that the decedent died as a result of his employer's negligence. However, the evidence also demonstrated that it was also possible he died as a result of his own negligence.

The Court held:

The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture.

... In applying the circumstantial evidence submitted to prove a fact, the trier of fact must recognize the

¹⁸ If in fact Appellant's theory was factually plausible, surely she could have provided expert testimony reconstructing and analyzing the cause (or potential causes) of the accident. This expert could have opined that on a more likely than not basis, the motorcycle accident was caused by one of Mr. Vail's acts/omissions (or a combination of them) rather than some other possibility. If that circumstance existed here, a jury would most likely have an issue of fact to determine.

distinction between that which is mere conjecture and what is a reasonable inference.¹⁹

The Court went on further to state:

“no legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, and without further showing that it could not reasonably have happened in any other way.”²⁰

(1) Breach of Duty – Not Established

On the record before this Court, without speculating, a reasonable person could not find that Mr. Vail breached any duty of care owed to Ms. Tubbs. The police reports indicate that witnesses did not report any erratic driving prior to the collision.²¹ A further review of the record, in a light most favorable to the Appellant, reveals that at best, the following can be established:

- The motorcycle was driving normally and at a safe speed.²²
- One witness says the motorcycle drifted towards the shoulder, and then back into the lane of traffic.²³

¹⁹ *Gardner*, 27 Wn.2d at 808-09.

²⁰ *Id.* at 810.

²¹ CP 231-239.

²² CP 233.

²³ CP 231.

- Five witnesses said the motorcycle went into the guardrail, but do not say that it first went onto shoulder and back into the lane.²⁴
- The motorcycle began to wobble.²⁵
- One witness “did not notice” seeing brake lights come on but does not definitively state the brake lights did not come on or that the motorcycle did not slow down.²⁶
- Seconds later, the motorcycle then drifted to the right, hitting the guardrail at freeway speed into the shoulder, ejecting both Mr. Vail and Ms. Tubbs.²⁷

At best, this Court can infer from these facts that for some reason, Steven Vail lost control of the motorcycle and went into the guardrail. That inference—that Mr. Vail “lost control”—does not lead to some inexorable conclusion that he breached the duty of care he owed to Ms. Tubbs. He very well could have done everything humanly possible to stop the crash or to regain control, but he ultimately failed. For a reasonable person to find under

²⁴ CP 233-237.

²⁵ CP 231-239.

²⁶ CP 235.

²⁷ CP 231, 233, 234, 235, 236.

these facts that Steven Vail acted or failed to act in a manner consistent with the duty he owed, a reasonable person would have to speculate as to what happened.

(2) Proximate Cause – Not Established

Proximate cause has two elements: cause in fact and legal cause.²⁸ Cause in fact refers to the “but-for” consequences of an act. “[L]egal causation rests on policy considerations as to how far the consequences of a defendant's acts should extend [and] involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact.”²⁹

Cause in fact is typically a question for a jury, but a court may decide cause in fact as a matter of law “if the causal connection is so speculative and indirect that reasonable minds could not differ.”³⁰ Our courts have held that the cause of an accident is considered speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as it is

²⁸ *Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010), *review denied*, 171 Wn.2d 1004 (2011).

²⁹ *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 683, 183 P.3d 1118 (2008) (emphasis in original) (citation omitted).

³⁰ *Moore*, 158 Wn. App. at 148 (citation omitted).

another.³¹

[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.³²

Appellant has provided nothing more than conjectural theories, none of which stand out as an inherent cause of the accident. Appellant has not shown that this accident could not have reasonably occurred due to something outside of Steven Vail's acts or omissions. Instead, Appellant spends a majority of her brief arguing theories which *could possibly* make Steven Vail liable, without showing they actually did. Just as in *Gardner v. Seymour* the only way a case such as this can survive summary judgment is if the Appellant also has proven that the accident "could not reasonably happen in any other way."³³ Appellant has failed to do this.

(i) The Wobble

Appellant argues that Steven Vail was negligent because he did not "slow down" when the motorcycle began to wobble. She

³¹ *Moore*, 158 Wn. App. at 148 (citation omitted).

³² *Id.*, citing *Gardner*, 27 Wn.2d at 809.

³³ *Gardner*, 27 Wn.2d at 808-09.

argues that the wobble was induced by operator error.³⁴ However, this argument is purely speculative. There is no evidence in the record on appeal as to what caused or could have caused the wobble. The only way to conclude that Mr. Vail caused the wobble or failed to properly respond to it would be to speculate.

(ii) The Hand on the Thigh

Appellant argues a trial is required because Steven Vail was negligent when he placed his hand on Appellant's thigh, thereby having only one hand on the handlebars. Ms. Tubbs indicated that she did not see him place his hand on her thigh but that she "felt it."³⁵

The sequence of events related to the "hand on the thigh" are as follows: Ms. Tubbs did not feel that the motorcycle was "riding right,"³⁶ She looked at Mr. Vail and he stated "I will always love you"³⁷; the motorcycle "shook and handle bar seemed not to be working right,"³⁸ then they hit the guardrail and were ejected.

³⁴ Brief of Appellant at 16-17.

³⁵ CP 184.

³⁶ CP 181.

³⁷ CP 241.

³⁸ CP 241.

Ms. Tubbs says she is not sure if she felt Vail's hand on her leg before the bike hit the guardrail or after.³⁹

Importantly, Ms. Tubbs specifically testifies that Mr. Vail placed his hand on her thigh only *after* she noticed that the motorcycle was not functioning properly and wobbling.⁴⁰ This is important because Appellant impliedly argues that the wobble was caused by Mr. Vail removing his hands.

Whether Mr. Vail put his hand on Ms. Tubbs' leg is questionable. However, even assuming Mr. Vail did put his hand on her leg, by Ms. Tubbs' own statement, that event occurred after the accident was already in motion and the wobbling had begun. Given the undisputed fact that all of these events took place within at most a few seconds, without a nexus between the known facts and the accident, a reasonable juror would have to speculate to conclude that Mr. Vail's actions contributed to or caused the wobble, or the accident.

(ii) Not Slowing Down

Appellant claims Steven Vail had a duty to slow down to correct the wobble. First, this claim is unsupported by admissible

³⁹ CP 241.

⁴⁰ CP 184.

evidence,⁴¹ and a conclusion of negligence based on this is improper. Second, even if true, speculation is required to conclude that Vail did not slow the motorcycle down. Tabitha Tubbs testified that the accident happened very quickly.⁴² She testified that the motorcycle had been riding fine until just moments before the accident, when she leaned forward to look at Steven Vail.⁴³ There is no evidence that Steven Vail could have even applied the brakes during the second or two of time during which this whole event transpired.

Further Tubbs has no idea if Vail did or did not slow the motorcycle down.⁴⁴ Only one witness testified they did not “believe” they saw brake lights on the motorcycle. However, that witness did not state conclusively that the motorcycle did not “slow down.” Common sense dictates that a motorcycle could slow down without applying the brakes—by simply letting off the throttle. Both theories are plausible. Appellant has not been able to present any facts or expert opinion supporting that their theory of the accident is how it actually happened. Without any evidence that Appellant’s theory is

⁴¹ Brad Abelman, who was not qualified as an expert witness, testified at deposition that an appropriate response to a wobble was to “slow down, put the brakes on.” CP 87.

⁴² CP 181.

⁴³ CP 180.

⁴⁴ CP 188.

stronger than some other, speculation would be required to find Steven Vail negligent.

(iv) Best Evidence—The Passenger

Perhaps more persuasive than any circumstantial evidence or reasonable re-creation of the accident is the testimony of the Appellant, Ms. Tubbs. Ms. Tubbs stated in her deposition that she knows of nothing that Steven Vail did to contribute to the accident.⁴⁵ She says that “something was wrong with the bike” because it was not riding as smooth as it had been for the whole day.⁴⁶ From the time she figured out the motorcycle wasn’t riding right until the accident was “half a second—not literally, but it was really quick. I had no time to figure nothing [sic].”⁴⁷

During the summary judgment proceedings below, Ms. Tubbs filed a declaration, but did not alter or retract this testimony. Ms. Tubbs was the best witness to what happened. Her statements must be considered when viewing the record with an eye towards what a reasonable juror could conclude about the accident, without speculating or conjecture.

⁴⁵ CP 291.

⁴⁶ CP 179.

⁴⁷ CP 181.

B. RES IPSA LOQUITUR DOES NOT APPLY TO THIS CASE

Res ipsa loquitur permits a plaintiff from avoiding the burden of proving all elements of negligence; thus, it should rarely be used.⁴⁸ To benefit from the doctrine of *res ipsa loquitur*, Appellant must show: 1) the occurrence producing the injury was of a kind that ordinarily does not occur in the absence of negligence; 2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant; and 3) the injury-causing occurrence was not due to any contribution by the injured party.

In determining when this doctrine can be used, courts have determined that it is not a substitute for proximate cause. "It is only where the circumstances leave no room for a different presumption that the maxim applies."⁴⁹ "[W]hen it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails, and it cannot be invoked."⁵⁰

Although Appellant does not expressly ask this Court to invoke the doctrine of *res ipsa loquitur*, in actuality, Appellant's arguments rely on the doctrine. The main premise of Appellant's

⁴⁸ *A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wn. App. 511, 105 P.3d 400 (2004).

⁴⁹ *Gardner*, 27 Wn.2d at 812.

⁵⁰ *Id.*

appeal is that “vehicles do not just go off the road by themselves.”⁵¹ Respondents agree that something caused the motorcycle to go off the roadway and into the guardrail, but at the same time assert that Appellant has some burden to show the accident was the fault of Mr. Vail by more than just the mere fact the accident occurred.

Any reliance on this doctrine by Ms. Tubbs as a substitute for her burden to prove proximate cause is misplaced. Ms. Tubbs cannot demonstrate how the accident originated from Mr. Vail’s acts or omissions. When her arguments are boiled down, she relies entirely on an assumption, rather than evidence.

The accident which greatly injured Ms. Tubbs could have been caused by Mr. Vail’s breach of his duty. However, it also could have been caused by something other than a breach of his duty. In such a case—where the tendency of a fact finder will be to speculate and suppose—summary judgment is appropriate for the Defendant. Plaintiff cannot demonstrate on the record before us that the accident could not have happened in “any other reasonable way.”

Requiring Respondents Larry and Darlene Vail, the decedent’s parents, to go through a trial when Appellant can only

⁵¹ Brief of Appellant at 19.

show it is possible the accident was caused by Steven Vail, would be improper. Appellant has not proffered sufficient evidence to show anything other than that for one of many possible reasons, a motorcycle accident occurred, killing Steven Vail and injuring Ms. Tubbs. Why that accident occurred—the factor that is most important in assigning liability—has not been established and cannot be established without speculation and conjecture. There is no issue of material fact for a jury to determine in this case; rather, there is only guesswork. Respondent was entitled to judgment as a matter of law.

VI. CONCLUSION

The trial court's grant of Summary Judgment to Respondent should be affirmed.

Respectfully Submitted this 8th day of February 2012.

BELCHER SWANSON LAW FIRM,
PLLC



Peter R. Dworkin
WSBA No. 30394

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LARRY E. VAIL and DARLENE E.
VAIL, as Co-Administrators of the
Estate of Steven Lyle Vail, and
not individually,

and

BRAD ABELMAN and JANE DOE
ABELMAN, husband and wife and
the marital community composed
thereof,

Defendants.

No. 67201-1-1

DECLARATION OF SERVICE

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I, Mylissa Bode, hereby certify as follows:

I am employed in the County of Whatcom, State of
Washington. I am over the age of 18 and not a party to the within
action. My business and place of employment is Belcher Swanson
Law Firm, PLLC, 900 Dupont Street, Bellingham, Washington
98225.

On the date set forth below, I served the following documents on the interested parties in this action in the manner described below and addressed as follows:

**PARTY/COUNSEL
INSTRUCTIONS**

DELIVERY

Michael J. Andrews Cogdill Nichols Rein Wartelle Andrews 3232 Rockefeller Avenue Everett, WA 98201 Email: Michaela@cnrlaw.com	<input type="checkbox"/> By Certified Mail <input type="checkbox"/> By Legal Messenger <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input checked="" type="checkbox"/> By Email
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- 1. *Brief of Respondents;***
- 2. *Declaration of Service.***

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of February 2012 at Bellingham, Washington.



Mylissa Bode