

68426-4

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Case No. 68426-4

**COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON**

HALEY-MORGAN JONES,

Plaintiff (Appellant),

v.

**PABLO E. HUARACHA-ANGEL and CYNTHIA HUARACHA, husband and wife,
and the marital community composed thereof; and JOHN DOE and JANE DOE,
husband and wife , and the marital community composed thereof; and RICHARD
ROE; and ABC CORPORATION; and XYZ CORPORATION,**

Defendants (Respondents).

REPLY OF APPELLANT HALEY-MORGAN JONES

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Summary Judgment Proceedings – Liability “as a matter of law”

Summary Judgment requires that the moving party prove there is no genuine issue as to any material fact, and, that they are entitled to judgment “as a matter of law”.

The summary judgment rule is ideally suited to areas of law where there can be only one legal outcome presuming the facts of record are true. For example, the formal creation of contract, valid constitution of negotiable instruments, failure to comply with a court order by a specified date, and so forth. The Plaintiff says this is the natural reading of the second branch of the test, “as a matter of law”.

The Plaintiff says there are numerous issues of material fact and evidence on which the Defendants’ motion must fail on the first branch of test. However, even if all facts are uncontroverted, something more must happen. Because the law of negligence contemplates application of a standard of care, liability does not flow immediately from the facts. The court must weigh evidence, make inferences from the facts and apply a standard of care before liability is found.

The Supreme Court of Washington in *locus classicus* Preston v. Duncan et al., 55Wn.2d 678; 349 P.2d 605, made precisely this caution. They adopted with approval the following guidance from Moore’s Federal Practice (2nd ed.):

A brief statement of certain general principles relative to summary judgments, with which we are here concerned, may not be amiss. (The statements [***8] which are capitalized herein will be found to be supported by abundant authority, under a discussion of Federal Rule No. 56, in 6 Moore’s Federal Practice (2nd ed.) § 56.15 p. 2101 *et seq.*)

[1] [**607] The Function of the Summary Judgment is to Avoid a Useless Trial.

A Trial is Not Useless But Absolutely Necessary Where There is a Genuine Issue as to Any Material Fact.

[2] [HN1] It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, [*682] knowledge, good faith, negligence, et cetera, a summary judgment would not be warranted. [Emphasis added.]

Presumptively, any plaintiff has the right to a trial where she may avail herself of the tools of civil justice to prove her case. The object of the summary judgment rule is not to abrogate that right, rather to weed out vexatious or “formal” pleadings where there are not genuine issues to be tried. In Preston, the Supreme Court of Washington further adopted with approval Moore’s Federal Practice (2nd ed.), quoting Judge (later Justice) Cardozo where he said:

“... The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial. ...” [Internal citation omitted.]

The Proceedings and Record from the February 6, 2012, Summary Judgment

The Defendants question the Record of Proceedings from the Superior Court. Prior to the hearing, Plaintiff’s counsel attended in person at both the registry and the court administrator to ensure the record was complete. For certainty, at the hearing Plaintiff’s counsel provided the court with a complete, bound, two-volume motion record. The first volume contained all filed evidence, pleadings and arguments of all parties. The second volume contained authorities. This court may note that the file before the trial judge as provided to him by the court administration may not have been complete¹. If so, it was through no error of counsel.

¹ RP 11

Though the clerk's minutes indicate the parties would receive a ruling by letter to counsel, on February 7, 2012, the judge endorsed an order in the form provided by defence counsel, with further annotations finding the Plaintiff's non-culpability. The order expressly noted consideration of the whole record.

The Defendants' Motion to Strike

The Defendants filed a Motion to strike portions of the Plaintiff's appeal brief. The Plaintiff timely replied. That motion has not been decided. Accordingly the Plaintiff at this moment does not know if she must, or need not, reply further to that portion of the Brief of Respondents. For certainty of the record, the Plaintiff refers to and incorporates by reference the arguments made in her Answer to Motion to Strike.

The Defendants' Time-and-Motion Evidence

In Hash v. Children's Orthopedic Hospital, 49 Wn. App. 130; 741 P.2d 584, this Division of the Court of Appeal said:

[HN8] If the adverse party must [***8] set forth "specific facts" in order to defeat a motion for summary judgment, elemental [*135] fairness compels an interpretation of the rule which places the same burden on the moving party if it is to succeed in making the initial showing that there is no material factual issue for trial. One cannot show there is no genuine factual issue without presenting the court with the facts surrounding the critical issue. ...

The Defendants insist that simple arithmetic is outside the purview of a court. They gave sufficient evidence of their own speed, following distance and following time that reasonable persons, applying arithmetic, could disagree there was no genuine issue for trial.

Trooper Rudy's Participation

Trooper Rudy was not an eyewitness to the collision. He interviewed people at the scene. He did not measure skid marks, the vehicles' dimensions and positions, or anything else. He had the opportunity to preserve this key evidence and did not. Yet the Defendants tender his evidence (called analysis, but lacking any empirical data) as a purported admissible expert opinion that the Defendants were not negligent. The significant challenges to the evidentiary utility of Trooper Rudy were put before the judge in detail² and revisited in the Brief of Appellant. Without any physical evidence or measurements, even a qualified engineer could not offer such an opinion on the ultimate issue before the trier of fact. There are no written reasons given by the trial judge to indicate how this evidence was treated.

Evidence Respecting the Dynamics of Collision

The Plaintiff cannot answer the Defendants' argument at pages 16 through 18, because it is a theory *sui generis* unconnected to her pleadings, and ascribes to her evidence she never gave. They say she claims to have made a controlled stop. That is not plead, is not asserted, and was not her evidence.

The Defendants were following behind her. If they saw her make a controlled stop and still hit her, it suggests their negligence even more so.

The Defendants incorrectly assert at page 18 that there is no evidence about how much time elapsed after the spin out before they hit her. They ignore their own inculpatory evidence. It was "a second".³

² CP 100-102

³ CP151

Theory of Negligence

The Defendants, again, ascribe to the Plaintiff arguments she did not make. The Defendants say that the Plaintiff alleges that the mere fact of a collision is negligence. It is trite to say that is not a proposition of tort law. It is also not her pleading or her argument, in this court or below. It does not assist this court that the Defendants purport to disprove a theory of the case she did not advance.

What she says is that reasonable persons, viewing the evidence in a light most favorable to her as the non-moving party, reasonably could disagree that the defendants' evidence (5 to 6 car lengths, about 60 m.p.h., a second to impact) raises a genuine issue for trial, or, that they met the standard of care required of Washington drivers.

Material fact and Credibility

The Defendants misstate the probative value of how Ms. Jones' car moved. Nothing, indeed, turns on a semantic distinction between the words "swerved" or "fishtailed". That is not the Plaintiff's argument. Rather, the Defendants rely heavily on the evidence of Trooper Rudy, who was not eyewitness. The Defendants filed and rely on his drawings, which show the Plaintiff's car spinning through a 360 degree circle across both lanes of the highway before being hit by the Defendants.

That is a significantly different accident. It is material because the Defendants make it part of their case. What the Plaintiff says is that a trial is necessary to test the evidence and determine why their witness's evidence departs so significantly from their own. Either the Trooper completely misunderstood them or he formed an opinion different from theirs, neither of which can be overlooked when the initial evidentiary burden is theirs to meet.

Amnesia and Inability to Testify Later as to Events.

The Plaintiff asks this Court note with disapproval the Defendants repeated *ad hominem* suggestion that the Plaintiff is fabricating evidence. The Defendants appear not to understand, or disregard for argumentative advantage, the difference between loss of consciousness (or lack of it) at the time of a head injury, and antegrade or retrograde amnesia at a later time.

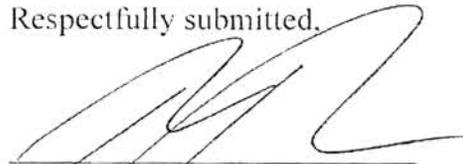
The Plaintiff placed before the trial judge authorities and her argument governing the challenging situation where a party must defend a summary judgment motion with no memory of the events, resulting from an act or omission of the Defendants themselves⁴.

Evidence of Inattention by the Defendants

The Defendants say there is no evidence disputing the fact that they were attentive. On the record that is not true or correct. Mrs. Huaracha had to yell at her husband before he hit the brakes⁵. The court may also note that in their entire submission the Defendants do not account for the fact they were following by one second. That is their own evidence. For the trial judge to have dismissed the claim he must have decided that no reasonable person would disagree that that was an adequate following separation.

DATED this 1st day of October 2012.

Respectfully submitted,



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Haley-Morgan Jones

⁴ CP 96-98

⁵ CP 151, 153