

68426-4

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NO. 68426-4-I

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

HALEY MORGAN-JONES;

Plaintiff,

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.

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BRIEF OF RESPONDENTS HUARACHA

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Introduction

Defendants Huaracha were traveling southbound on I-5, behind plaintiff Morgan-Jones. A phantom vehicle cut in front of plaintiff Morgan-Jones. In response, Morgan-Jones' vehicle lost control, spun, and came to a sudden stop, across the Huaracha's lane of travel. They braked hard but still struck her. She sued them.

After discovery, defendants Huaracha filed a Motion for Summary Judgment. In response, plaintiff failed to produce any evidence of negligence by driver Pablo Huaracha. She relied, instead, on the fact of impact between their two vehicles. Skagit County Superior Court Judge, John M. Meyer, heard the Motion for Summary Judgment on February 6, 2012.

As this Court will see upon reviewing the summary judgment record, plaintiff made no effort to actually "prove up" that the Huarachas were at fault. She presented no evidence of their following distance (5-6 car lengths) being inadequate. She presented no evidence that they were distracted, speeding, or otherwise non-responsive to traffic conditions. And, she presented no evidence that they acted, or failed to act, in some way that caused this accident. In fact, she decided intentionally not to use an expert to analyze such issues. Instead, she relied on the fact of

impact--that they had struck her vehicle--and their testimony that they followed at 5-6 car lengths, and merely argued from it that the case should not be resolved on summary judgment.

The Huarachas' undisputed testimony was that they had been 5-6 car lengths back, going 58 mph, that they saw the events unfold and responded immediately, and that they had no opportunity to avoid the accident. The investigating officer's testimony, after investigating the scene, talking to the drivers, and analyzing skid marks and the vehicles' resting points, was that the Huarachas had acted reasonably and had no opportunity to avoid the accident. And, Morgan-Jones admits that she cannot identify *any* act or omission by defendants Huaracha that would have allowed them to avoid the accident.

The trial court, through Judge Meyer, found that, given the state of the summary judgment record, plaintiff had simply failed to produce evidence on an essential element of her claim. It therefore dismissed the case on summary judgment. This court should affirm.

Statement of the Case

Assignments of Error:

Plaintiff presents two assignments of error, both of which are answered below:

- A. Did the trial court err in dismissing the plaintiff's claim judgment, when the defendants' own evidence in support of their motion created issues of disputed material fact?

No. There is no evidence disputing the fact that the Huarachas had been traveling 5-6 car lengths back, that they were attentive and saw the events unfolding, and that they tried hard to brake before impact. The only "disputed" evidence in the record is: when Morgan-Jones lost control, did she (Morgan-Jones) "fishtail" rather than "swerve" before she spun sideways and came to rest directly across the Huarachas' lane of travel. That is neither a *material* fact, nor does it equate with the required showing that defendants were negligent.

- B. If dismissal of the plaintiff's claim constitutes reversible error, should the trial court vacate the defendant's award of prevailing party attorney fees?

No. There was no award of prevailing party attorney fees. Plaintiff has confused the *cost bill* with an award of attorney fees. Costs were warranted below based on RCW 4.84. The trial court did not err in awarding those costs. Costs should be awarded to defendants on appeal as well. RAP 14.1 *et seq.*

B. Standard of review

This court reviews the record *de novo*. *Gossett v. Farmers Inc. Co.*, 82 Wash App. 375, 381 917 P2d 1124 (1996).

C. Statement of Facts

Because this Court will review the entire summary judgment record *de novo*, the defense generally agrees with the plaintiff's basic Statement of Facts found at page 6 through 7 of Appellant's Brief. The defense has separately moved to strike portions of pages 7-8, as containing evidence from outside of the summary judgment record. The defense also generally agrees with the procedural history presented at pages 9-10, except for the argumentative characterization of Trooper Rudy's testimony.

Argument

1. The trial court did not “reverse the burden of proof.”

Plaintiff’s most understandable argument—found at pages 16-18 of Plaintiff’s Brief—is that Judge Meyer “reversed the burden of proof.” She argues that the court began by “inquiring what evidence Ms. Jones could proffer.” She presents excerpted portions of Judge Meyer’s conversation with counsel at the February 6, 2012 hearing, to create the impression that Judge Meyer misunderstood or misapplied the burden on summary judgment. She contends that was error.

What plaintiff’s brief does *not* explain is that plaintiff had *failed to file a timely Response* on Summary Judgment. Plaintiff filed her Response just three working days before the summary judgment hearing (instead of the required 11 days). And, plaintiff had also failed to provide the trial court with a judge’s copy of its filing. The defense had moved to strike plaintiff’s Response pleading as untimely. Therefore, the first matter that Judge Meyer heard was a Motion to Strike plaintiff’s untimely brief, and to disallow oral argument by plaintiff’s counsel. CP 170-171; RP at 2 (“It makes sense, I think, to hear the motion to strike first.”)

Therefore, when this Court reads the short, 21-page Report of Proceedings from the February 6 hearing, it will see that, for the first 9 pages, the court was inquiring of plaintiff's counsel about the defendant's Motion to Strike. The court was inquiring why the plaintiff had not been able to comply with the briefing schedule and rules. (RP at 3 ("my main concern is why you have trouble complying with local rules.") Plaintiff's response was to assert that she had been waiting for a variety of items of evidence that she *would have liked to produce*, in response to the Motion for Summary Judgment, *but had not actually obtained or produced*. So then, the court explored, at length, *why* the plaintiff did not yet have those items of evidence to present. (RP 2-10). Twice, the court offered plaintiff the opportunity for a continuance of the Summary Judgment hearing. Plaintiff declined, both times. Finally, on page 10, the court stated,

The defendant says that it was an unavoidable accident. * * * Then that would seem to me to put the burden on you to say that's not how it happened. *I'm going to hear it on the merits*. Let's hear your position. Tell me what you have provided that can lead me to conclude that there's a dispute as to how this accident occurred.

(RP at 10). In other words, Judge Meyer transitioned from inquiring about the reasons for plaintiff's untimely brief, to hearing

explanations about evidence that was not being offered, to asking plaintiff for her substantive response to the Motion for Summary Judgment. Plaintiff was then asked to *present first*, and was allowed to argue about the facts she *had* presented, which she believed created a genuine issue of material fact. (RP at 11-14).

There is nothing improper about the way that Judge Meyer handled the argument at the summary judgment hearing. This case was handled exactly the way that *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 770 P.2d 182 (1989) suggests that summary judgment should be handled. From *Young*,

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wash.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); see also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630–32 (9th Cir.1987).

FN1. The moving defendant may meet the initial burden by “ ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, “by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”

Young, 112 Wash. 2d at 225. Like the *Young* court discussed, in Footnote #1, the defendants here—the Huarachas—had used their Motion for Summary Judgment to point out plaintiff’s lack of evidence of negligence. The burden was properly on plaintiff to “make a showing sufficient to establish the existence of an element essential to that party’s case[.]” *Celotex*, *supra* at 322. There was no reversal of the burden of proof, except what is expressly allowed under *Celotex/Young*. The trial court did not err.

2. The trial court had no evidence before it of “following too close.”

Plaintiff’s next argument is that the Huaracha’s testimony--that they maintained 5-6 car lengths of following distance--in and of itself “raises a triable issue of material fact as to whether they were following too closely.” (Appellant’s Brief at 11). No expert has said so—nor did the investigating officer. Also, no expert has opined as to what a safe following distance would have been, given the roadway, traffic conditions, visibility, etc... Instead, plaintiff simply

asks this Court to contrast the established following distance (“5-6 car lengths”) with a suggested following distance from the Washington State Drivers’ Manual (which was *not* in the record), and to find that “reasonable minds could differ” about whether “such a modest” following distance complies with the requirements of RCW 46.61.145.

The problem is that plaintiff *did not give the trial court any evidence even suggesting* that 5-6 car lengths was inadequate. In such a vacuum, mere testimony that the Huarachas followed at “5-6 car lengths” is not evidence of negligence.

a. Motion to Strike

The Huarachas have filed a Motion to Strike several “facts” from the plaintiff’s opening brief. Plaintiff has, belatedly, offered facts from the Washington State Drivers’ Manual and from the Chevrolet company’s website, and then asks this Court to use new, unsupported mathematical calculations based upon those facts, to come up with the conclusion that “the Huarachas would be required to keep a following distance of 352 feet.”

This is exactly the kind of factual analysis that an accident reconstruction expert should have done. In fact, under *Ashley v.*

Hall, 138 Wash.2d 151, 158, 978 P.2d 1055 (1999), it is the kind of analysis that *must* be done by an expert, and cannot come in through lay testimony. (“An opinion of this nature requires either actual knowledge of certain relevant factors, such as speed and distance, or expertise in accident reconstruction; [therefore] the trial court's admission of Henry's testimony was an abuse of discretion under ER 701.”). *Id.* at 158. But here, plaintiff intentionally chose to proceed to summary judgment without obtaining any such analysis.

Plaintiff retained Amrit Toor, Ph.D, who is an expert in accident investigation. (CP at 1). But despite retaining such an expert, plaintiff intentionally chose *not* to use the expert for summary judgment purposes. (See Motion to Strike, p. 4, CP 1, 102-103, and RP at 17). Plaintiff also was not able to testify about such facts—she claims “post-accident amnesia.” Therefore, *there were no facts* or opinions in the summary judgment record about what would have been a safe following distance.

Plaintiff now attempts to have this Court supplement the record, formally or informally, to “take judicial notice” of a safe following distance, based on evidence not in the record, and new mathematical analysis. For the reasons stated in the Motion to Strike, the court should not take judicial notice of these facts (ER

201), nor should it supplement the record with these facts (RAP 9.11). Instead, using RAP 9.12, it should limit its review to those facts that plaintiff chose to present to the trial court at the summary judgment proceeding.

Further, plaintiff made it abundantly clear that she did not want to pursue a CR 56(f) motion—i.e., to postpone the summary judgment hearing. Instead, she twice told Judge Meyer:

If my friend wants more time to respond. . . **I'm not seeking a continuation.** There's significant conflicts even as between the defendants and the police officer. I don't believe I have to go farther than that. I think I can demonstrate to you. * * * * * **I would suggest we can proceed with the application on its merits. I have not asked for a continuation[.]**

RP at 5, 9. This court should not second-guess plaintiff's strategic decision to proceed on the record she had made. It should limit its review to the facts in the record, and conclude they are insufficient to show negligence.

b. The fact of impact is not evidence of following too closely

Plaintiff's second argument for "following too closely" comes from the fact that the Huarachas struck plaintiff's vehicle. To the trial court, she argued, "we know that [Jones'] car had time to come to a full stop. That's a significant period of time[.]" (RP 13). In other words, plaintiff relies on this analytical construct:

- a. Jones and Huaracha had both been going around 60 mph. (Fact – established by Huaracha testimony).
- b. By the time Jones was hit, she had come to a stop and was stationary in the roadway. (Fact – established by Huaracha testimony).
- c. It must have taken Jones "a significant period of time" to brake her vehicle from 60 mph to a stop in the roadway. (Speculation – based on plaintiff's speculation about the speed at which Jones could have used controlled braking to bring the car to a stop.)
- d. Therefore, if Huaracha had been at a safe distance, he should have had just as much time as Jones did, to use controlled braking and bring his vehicle safely

to a stop. (Speculation—based on Opinion #C,
above.)

From that construct, plaintiff has concluded (and argued) that because Morgan-Jones could stop but Huaracha could not, Huaracha must not have been at a safe following distance.

The problem, again, is the fact that the only *evidence* says that plaintiff *did not use controlled braking* to bring her vehicle to a stop. Instead, she was clipped, lost control, and spun out very, very quickly, leaving her vehicle perpendicular across the roadway. CP 109, 190 (“it all happened very fast”), 209 (“What I did was to brake the maximum I could, squeal my tires, did everything I could to avoid hitting her”); 226 (“nothing different that Mr. Huaracha could have or should have done that would have avoided striking the Jones vehicle”); 228 (“He can’t stop on a dime, I mean, you know, controlled. I think he is doing the best he can.”); 229-230 (even if Huaracha had gone straight through traffic in the left-hand lane, “I think he would have still hit her * * * because she is partially in the lane.”). There is *no evidence* that plaintiff intentionally slowed her vehicle using her brakes in a controlled way, and stayed in her lane, such that a court could infer that Huaracha should have been able to “match” her braking speed and stop behind her.

Plaintiff's logical construct is not based on the evidence in the record—it is based on a false premise (that Morgan-Jones executed a controlled stop). That logical construct—a fallacy—does not constitute a *reasonable* inference from *admissible* evidence that the Huarachas were following too closely.

Compounding the problem, there was also no evidence about *how much time elapsed after the spin-out* before the Huarachas struck plaintiff. As Judge Meyer asked plaintiff's counsel, "We don't know whether it happened instantaneously or five seconds later?" (RP at 13). Plaintiff cannot or will not say. (CP 190-95). The plaintiff's passengers have not testified. Without some evidence that plaintiff stopped and that Huaracha nonetheless struck her vehicle *much later*, the argument that "impact equals following too close" is nothing more than speculation.

A following driver is not guilty of negligence as a matter of law simply because he collides with a vehicle in front of him. *Vanderhoff v. Fitzgerald*, 72 Wash.2d 103, 431 P.2d 969 (1967); *James v. Niebuhr*, 63 Wash.2d 800, 389 P.2d 287 (1964); *Felder v. Tacoma*, 68 Wash.2d 726, 415 P.2d 496 (1966). Here, *on this record*, that is the position that plaintiff urged the trial court to

adopt. The trial court properly declined. The fact of an impact is not proof of negligence. The fact of impact is insufficient to survive summary judgment. Because *there was no other evidence*, summary judgment was appropriate.

c. The “differences” in testimony between Mr. and Mrs. Huaracha do not create a disputed issue of material fact

Plaintiff also argues on appeal that the stories of Mr. Pablo Huaracha and Mrs. Cynthia Huaracha are, “in many aspect, inconsistent.” She contends that “they cannot even agree whether Ms. Jones was stopped still, or spinning in a circle * * * when they hit her.” (Brief, at 19). (At the summary judgment hearing, plaintiff also argued that the husband-and-wife witnesses were inconsistent because one witness described Morgan-Jones’ vehicle’s motion in the roadway as “swerving,” while the other described it as “fishtailing.” (RP at 11-12). (It appears that she is also arguing that there is an “inconsistency” because Mr. Huaracha testified that he “slowed down,” while Mrs. Huaracha testified that she “yelled at him and he hit the brakes.” (RP at 13). She contends on appeal that these “inconsistencies” should have been enough to survive

summary judgment.

A 'material fact' is a fact upon which the outcome of the litigation depends, in whole or in part. CR 56; *Zedrick v. Kosenski*, 62 Wash.2d 50, 380 P.2d 870 (1963). This case is similar to the discussion in *Amend v. Bell*, 89 Wash.2d 124, 570 P.2d 138 (1977):

Defendants concede that credibility issues may preclude a summary judgment in appropriate circumstances but argue, correctly, that such issues must be based on more than argument and inference on collateral matters. To hold that disputed facts about other issues preclude a summary judgment without facts related to the issue in point would abrogate the summary judgment procedure. We agree with the court in *Rinieri v. Scanlon*, 254 F.Supp. 469, 474 (D.C.S.D.N.Y.1966):

(T)he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and that the opposing party may not merely recite the incantation, "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.

Here, the fact that Mr. Huaracha said "swerved" while Mrs. Huaracha said "fishtailed," or that he said "slowed down" while she said "hit the brakes," are not *material* variations in testimony. All of the evidence shows that Morgan-Jones very suddenly lost control of her vehicle, while going around 60 mph, and that within

seconds, her car was suddenly perpendicular across the Huarachas' lane of travel, where they hit it. As was pointed out to the trial court,

you're required to find a genuine issue of *material* fact. And the idea that the car fishtailed instead of swerved, swerved instead of spun...[it is] undisputed that, within a matter of seconds, this car ended up perpendicular in the slow lane. *
* * **Whatever credibility issues counsel is finding in the record simply do not create an issue of material fact.**

RP at 19. The trial court correctly rejected the idea of a Huaracha "credibility" problem as a basis for denying summary judgment.

5. The trial court gave proper consideration to plaintiff's lack of ability to testify, and her decision not to produce the other two eyewitnesses' testimony.

Finally, plaintiff appears to argue that the trial court gave too much weight to the defendants' testimony, in light of the fact that plaintiff was unable to testify about her own recollections. She argues that the fact of plaintiff's "post-accident amnesia * * * alone mandates meticulous evaluation of the Huarachas' evidence," because, she argues, the "material facts are particularly within the knowledge of the moving party." (Appellant's Brief at 15, 19).

Plaintiff's claimed inability to testify about the facts is, in itself, in question. Mr. Huaracha testified that plaintiff was out of

her car, interactive and inquiring about the causes of the accident, within minutes after impact. (CP 204-206). The investigating officer also testified that he talked with Jones and she was able to converse with him and answer questions. (CP 223-224).

Regardless, even if plaintiff is now asserting “post-accident amnesia,” there were five potential eye-witnesses who could have given testimony about this accident, and one potential investigative witness. The eyewitnesses were: Pablo Huaracha, Cynthia Huaracha, Haley Morgan-Jones, Kayla Hochstetter, and Tamra Mulvihill. The investigative witness was State Trooper Rudy, who had expertise and factual knowledge, based on his investigation. The Huarachas’ Motion had pointed out that there was no evidence that they were negligent. Therefore, to avoid summary judgment under *Young, supra*, it was incumbent upon *plaintiff* to investigate those other sources of testimony and evidence.

In that regard, eyewitnesses Hochstetter and Mulvihill were plaintiff’s friends and co-workers, and live in the area of Surrey, British Columbia, near the plaintiff. (CP at 37, 108, RP at 9). In fact, they were former clients of plaintiff’s attorney, up until just a few months before the summary judgment hearing. (RP at 9). Despite that fact, plaintiff did nothing to procure their version of the

accident. (CP at 193 (“haven’t talked to either of [the] passengers”); RP at 9 (“I’m having to think through how to compel their attendance in BC for depositions.”). Indeed, as the trial court noted, “Why don’t we have affidavits from them?” (RP at 9).

Further, there is no authority for the proposition that summary judgment cannot issue when the plaintiff cannot or will not testify. That would be an unworkable rule—especially in wrongful death-type actions, where the plaintiff is unavailable. If plaintiff herself could not identify a breach of a driver’s duties allegedly committed by Mr. Huaracha, then it was incumbent on her to find witnesses who could. But she did not do so. The trial court did not err in giving due weight to the testimony of Pablo Huaracha, Cynthia Huaracha and State Trooper Rudy. There *was no other* evidence.

3. The trial court properly awarded costs (not attorney fees).

After the Order Granting Summary Judgment was entered, the defendants sent plaintiff a Cost Bill. It included:

1.	Statutory Attorney fee (RCW 4.84.080)	\$200
2.	Deposition transcript of Trooper Mike Rudy (submitted at MSJ)	\$405

3.	Deposition transcript of Haley-Morgan Jones (submitted at MSJ)	\$411.95
4.	Deposition transcript of Cynthia Huaracha (submitted at MSJ)	\$133.00
5.	Deposition transcript of Pablo Huaracha (submitted at MSJ)	\$129.00

Total: \$1,278.95

It appears that plaintiff has not included the Cost Bill in the appellate record. If this Court is still inclined to review it, this Cost Bill was proper under RCW 4.84.080 through .090. It did not contain an award of *reasonable* attorney fees—only the statutory attorney fee. The other costs fall within permissible categories of RCW 4.84. Of course, if this court does reverse the trial court on the merits, it would also have authority to reverse the Order Granting Costs, (RAP 7.2(i)), but not on the basis that entering a cost bill was error. Granting costs to the Huarachas was appropriate.

6. This court should award costs to defendant for prevailing on appeal.

Defendants Huaracha are seeking costs on appeal, pursuant to RAP 14.1 through 14.4.

Conclusion

This court should affirm Judge John Meyer's Order Granting Summary Judgment, affirm the Order Awarding Costs to Defendants, and award costs of the appeal to defendants.

DATED this 30th day of August, 2012.

Respectfully submitted,



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