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FILED
July 18, 2016
Court of Appeals
Division I
State of Washington

NO. 74366-0

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

BILLY COLBURN,

Appellant,

v.

DAVID J. TREES and JANE DOE TREES husband and wife, and the
marital community composed thereof,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OR OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Janet M. Helson

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

A. TREES GREATLY EXCEEDED THE 20 MILE PER HOUR SPEED LIMIT AS HE APPROACHED AND ENTERED THE BLIND INTERSECTION.

It is uncontested that Trees maintained a speed of 35 to 40 mph while traveling southbound on Twenty Third Avenue East and that he never reduced his speed before entering the blind intersection at East John Street. CP 80, 86, CP 91- 92. It is also uncontested that Colburn was just a “few feet” from clearing the intersection at the time of the collision. CP 88. Contrary to Trees’ assertion in the Brief of Respondents (Resp. Brief) at page 15, the police collision report produced by Colburn is competent and admissible evidence establishing the posted speed limit was 20 miles per hour and Trees therefore entered the intersection at a speed twice the posted limit. CP 97; CP 101-102.¹

Trees' reliance on RCW 46.52.080 to exclude the police collision report is misplaced. RCW 46.52.080 states that “[n]o such accident report or copy thereof shall be used as evidence in any trial,” however it is only applicable to the mandatory “accident reports,” prepared by motorists involved in accidents pursuant to RCW 46.52.030(1) or RCW 46.52.040 and does not apply to “police officer reports.” RCW 46.52.070 governs

¹ Box 11 and 12, located on the left side of Officer Pellich’s collision report indicate the posted speed limit. CP 97.

“police officer reports” and has no similar provision requiring reports generated by law enforcement remain confidential. *See Guillen v. Pierce County*, 144 Wn.2d 696, 714, 31 P.3d 628 (2001), *rev'd in part on other grounds*, 537 U.S. 129 (2003).

Officer Pellich’s collision report is a public record that she was required to create under RCW 46.52.070, and which she signed under penalty of perjury in compliance with RCW 9A.72.085. As the investigating officer, Officer Pellich had first knowledge of details such as the location of the collision, the posted speed limit at that location, where the parties’ vehicles came to rest after the collision, and the location of collision related debris. Accordingly, Trees’ ER 801 and 802 hearsay and other evidentiary arguments are meritless.

Colburn’s summary judgment pleadings included excerpts from the Washington State Police Traffic Collision Report Instruction Manual (“Manual”) to assist the trial court in locating the posted speed limits noted in Officer Pellich’s collision report. CP 100-102. ER 201 allows this Court to take judicial notice of facts that are "not subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned" when "requested by a party and supplied with the necessary information." *State v. Royal*, 122 Wn.2d 413, 418, 858 P.2d 259 (1993). Under ER 201(d),

Appellant requests this Court take judicial notice that Box 11 and 12 of the Washington State Police Traffic Collision Report indicate the posted speed limit, as proven by the Manual² and the March 2011 State of Washington Police Traffic Report Overlay³ (“Overlay”). The Manual and Overlay are Washington State publications generated to be used in conjunction with the Washington State Police Traffic Collision Report form, they are not subject to reasonable dispute, and they are easily verified by the WSP, a source whose accuracy cannot reasonably be questioned.

The record contains abundant evidence establishing Trees greatly exceeded the posted speed limit prior to the collision. Officer Pellich’s sworn statement establishes the posted speed limit was 20 miles per hour. Trees admission establish he maintained a speed of 35 to 40 miles per hour, twice the posted limit, and failed to reduce his speed prior to entering the blind intersection. Moreover, Colburn’s testimony establishes Trees actually accelerated into the blind intersection. CP 70.

B. TREES’ NEGLIGENT CONDUCT VIOLATED MULTIPLE TRAFFIC STATUTES AND PROXIMATELY CAUSED THE COLLISION.

² The Washington State Police Traffic Collision Report Instruction Manual can be found at <http://www.wsp.wa.gov/publications/publications.htm>

³ The Police Traffic Report Overlay can be found at http://www.wsp.wa.gov/publications/forms/ptcr_overlay.pdf

In Respondents Brief⁴, Trees concedes that “under the appropriate circumstances” RCW 46.61.185 allows a left turning driver to hold a favored driver liable for negligence. However, Trees seems to argue the only circumstance in which such recovery is “appropriate” is where speed is the sole issue and a disfavored driver produces “point of notice” evidence that the favored driver had reasonable time to avoid a collision.

As addressed in the Appellant’s Opening Brief (App. Brief) at 19-27, Trees admitted to violating no less than seven (7) traffic statutes in the moments prior to the collision and there is substantial evidence that each violation proximately caused the collision. It should be left to the jury to determine whether Trees’ excessive speed, unlawful lane change, and inattentive driving proximately caused the collision.⁵

1. Trees Driving At Twice The Posted Speed Limit When Entering The Intersection Proximately Caused The Accident.

Even absent evidence Trees’ driving deceived Colburn into believing he could safely execute a left turn, Trees’ “point of notice” argument is meritless. Trees simply ignores the evidence establishing he was on reasonable notice of Colburn’s presence in the intersection at the moment Trees entered the curbside lane. Trees also ignores substantial

⁴ Resp. Brief at page 22.

⁵ Trees’ unlawful lane change was discussed at length in Respondent’s Opening Brief and need not be readdressed.

evidence that Trees was driving inattentively, and was oblivious to the speed limit and other conditions making the intersection especially hazardous.

“Under Washington law, speed is not a proximate cause of an accident if it does no more than bring the favored and the disfavored parties to the same location at the same time. *Channel v. Mills*, 77 Wn. App. 268, 277, 890 P.2d 535 (1995). But, a plaintiff can prove proximate cause by demonstrating that, but for excessive speed, the favored driver, between the point of notice and the point of impact, would have been able to brake, swerve or otherwise avoid the impact. *Id.* at 278-79. To make this showing, a plaintiff must produce evidence from which the trier of fact can infer the approximate point of notice, i.e., the point at which the favored driver should have seen the disfavored driver or pedestrian and realized that he or she was not going to yield the right of way. *Holmes v. Wallace*, 84 Wn. App. 156, 161-62, 926 P.2d 339 (1996);(citing *Channel*, 77 Wn. App. at 279 n. 13, 890 P.2d 535; *Whitchurch v. McBride*, 63 Wn. App. 271, 276, 818 P.2d 622 (1992). Thus such “point of notice” evidence may be required where the disfavored driver argues speed alone caused a collision.

Colburn alleges Trees’ excessive speed was just one of his multiple traffic violations that proximately caused the collision. However, the

record contains sufficient “point of notice” evidence that Trees’ had ample time to reduce his speed and avoid the collision to make summary judgment dismissal inappropriate.

a. Trees’ Should Have Realized No Less Than 70 Feet Before The Intersection Colburn Had Commenced His Left Turn.

Trees’ reasonable “point of notice” that Colburn had committed to his left turn occurred the moment Trees moved into the curbside lane, no less than 70 feet before entering the intersection. Colburn had already committed to his left turn when Trees “darted out” from behind the bus and abruptly moved into the curbside lane. CP 73; CP29. Trees stated his lane change occurred at least 70 feet before he entered the intersection. CP 91. Logic dictates that Colburn and Trees came into each others line of sight at approximately the same time. Therefore Trees’ reasonable point of notice occurred at the moment Colburn witnessed him change lanes, which was no less than 70 feet before Trees reached the intersection.

However, due to his inattentive driving, Trees failed to notice Colburn until the moment before the collision when Colburn was just a “few feet” from the crosswalk and had almost cleared the intersection. CP 88.

b. Trees’ Had Ample Time After Changing Lanes To Decelerate And Avoid The Collision.

Trees admitted to maintaining a speed of 40 mph, or 58.66 feet per second. Assuming Trees' lane change occurred 70 feet from the intersection, at 40 mph Trees had 1.2 seconds after his unlawful lane change to reduce his speed and avoid the collision. If Tree's had immediately decelerated to the lawful speed limit after changing lanes, he would have been traveling 20 mph or 29.33 feet per second and had approximately 2.4 seconds after his unlawful lane change to reduce his speed and avoid the collision.

Given Colburn was just a "few feet" from clearing the intersection when he finally noticed Colburn, a jury could easily conclude Trees had more than ample time from the reasonable point of notice, 70 feet before the intersection, to avoid the collision by reducing his speed to allow Colburn time to drive the remaining "few feet" necessary to clear the intersection. Similarly, a jury could infer Trees caused the collision by failing to appropriately reduce his speed to below the posted limit prior to entering the blind intersection in violation RCW 46.61.400(3) and SMC 11.52.020b.

2. Trees Inattentive Driving Proximately Caused The Accident.

As addressed at length in Respondent's Opening Brief, RCW 46.20.010 and SMC 11.58.008 prohibit operating a motor vehicle in an inattentive manner. There is an abundance of evidence that Trees'

violations of those statutes were a cause of the collision. The most obvious example of Trees' inattentiveness was his failure to notice Colburn during the 70 feet he was visible to Trees prior to entering the intersection and his complete failure to brake before the collision. CP 70, 55. Had Trees been driving attentively, he could have easily reduced his excessive speed and avoided the accident.

The record contains additional evidence establishing Trees' inattentive driving was a cause of the collision, including Trees': 1) failure to notice the 20 mph posted limit, believe the speed limit was 35 mph and resulting excessive speed while entering the intersection; 2) accelerating into the intersection despite Colburn being visible directly in front of him; 3) panicked turning to the right, directly into Colburn, rather than steering to the left, around Colburn to avoid the collision. Indeed, Colburn testified he was surprised Trees didn't attempt to avoid the collision, stating: "he could have turned a little bit and gone around me and would have missed or he could have stopped and he would have missed me. But he just -- given his no gesture, no brake on his speed..." CP 29.

C. APPLICATION OF THE DECEPTION DOCTRINE IS APPROPRIATE IN THIS CASE.

This Court should reject Trees' argument the Deception Doctrine cannot be used offensively by a disfavored driver to impose liability on a

avored driver for deception, as he entirely fails to cite any authority rejecting such an “offensive” tactic. Trees also asserts the Deception Doctrine cannot create a duty on the driver not to deceive or be used to impose liability on a favored driver, and for support cites to *Wood v. City of Bellingham*, 62 Wn.App. 61, 813 P.2d 142 (1991). However, Trees’ reliance on *Wood* is misplaced as the case does not support either of his assertions and Colburn never made those arguments.

In *Wood*, the court stated 'the doctrine is only available as a defense for a disfavored party, not a favored party.' *Id.* at 66. However, *Wood* refers to a pedestrian's position as a favored party attempting to use the deception doctrine to disprove her own contributory negligence as a matter of law. Accordingly, *Wood* is easily distinguished from this case. Here, Colburn is the disfavored driver and is properly asserting that under the deception doctrine, he is relieved of the additional duty placed on him by RCW 46.61.185 and the statute’s negligence *per se*. It follows that Trees was also relieved of his favored driver status due to his deceptive and negligent conduct, leaving Colburn free to seek recovery from Trees for his breach of duty to exercise ordinary while driving.

In arguing against application of the deception doctrine, Trees repeatedly misrepresents Colburn’s arguments and the facts in the records. For example, Trees stated “[Colburn] claims that he both saw and did not

see Trees' vehicle prior to the collision. The error of this argument is apparent, because on this planet, both cannot be true." Resp. Brief at 23-24. This is a mischaracterization of Colburn's testimony that he could see Trees before beginning his left turn, but the Bus obscured his view of Trees after he started to execute his turn.

More puzzling are Trees' statements that a "cumulative review of these admissions leads to the conclusion that Colburn, in fact, never lost sight of Trees" and Colburn had "continuous observation of Trees' actual course of travel, well before Trees entered the intersection." *Id.* at 24-25; 27. The error of Trees' assertions are apparent, because on this planet, humans do not have the capacity to see through solid objects such as large Metro buses. These assertions are also contradicted by the testimony of Colburn, Tricia Tuttle, and Trees. Colburn clearly stated "I lost view of [Trees] behind the bus." CP73. Tricia Tuttle also indicated the Bus obstructed the view of the intersection. CP 54-55.

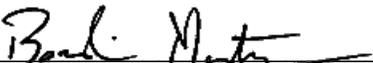
Trees similarly stated he couldn't see Colburn's vehicle "due to the height and position of the bus, which blocked my view." CP 35. Further stating "I believe I could not actually see across the intersection because of the bus" and "[t]he bus was there and so ... the lanes across the intersection headed north would not have been visible." CP 89; 85-86.

The record simply does not support the facts Trees asserted to argue against application of the deception doctrine.

II. CONCLUSION

For the above reasons, as well as those addressed in the Opening Brief, Mr. Colburn respectfully requests this Court reverse the trial court's ruling granting summary judgment, and remand for trial.

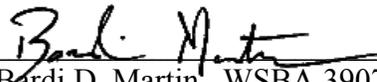
Respectfully submitted this 16th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2016, I served true and correct copies of Appellant's Reply Brief via Email and US Mail on the following parties:

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