

74366-0

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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 OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Janet M. Helson

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This lawsuit arises out of a motor vehicle accident that occurred at a Seattle intersection when plaintiff/appellant Billy Colburn (“Colburn”) failed to yield the right of way on a left hand turn to defendant/respondent David Trees (“Trees”) in violation of RCW 46.61.185. Colburn crossed directly in front of Trees’ vehicle, causing Trees to collide with the passenger’s side of Colburn’s car. As the disfavored driver, Colburn had the primary duty to avoid this collision. Colburn has failed to establish that Trees - the favored driver- breached any duty owed to Colburn and/or that Trees’ conduct was a proximate cause of this collision.

Moreover, under Washington law, Trees cannot be liable for negligence under the deception doctrine. The deception doctrine is only available to *disfavored driver* as a *defense* to relieve him from liability from conduct that would otherwise be negligent per se – such as failing to yield on a green light. The doctrine, however, cannot be used *offensively* by a disfavored driver to impose liability against a favored driver. Simply, Washington law does not recognize a cause of action against a favored driver for “deception” in the motor vehicle context. Even assuming the doctrine could be used offensively, Colburn has failed to produce any evidence of deception by Trees that warrants submission of this issue to the jury.

The trial court properly dismissed Colburn's negligence claim against Trees as a matter of law.

II. STATEMENT OF THE ISSUES

1. Did the trial court properly dismiss Colburn's claim for negligence under CR 56:

- where Colburn, the disfavored driver, had the primary duty to avoid the collision and failed to yield the right of way in making his left turn; and
- where there is no evidence that Trees breached any duty owed to Colburn, and no evidence that Trees' conduct was a proximate cause of Colburn's injuries, particularly in light of Colburn's failure to establish the "point of notice" i.e., where a reasonable favored driver would realize that Colburn was not going to yield?

2. Did the trial court properly refuse to apply the deception defense in this matter because the defense cannot be used offensively to create liability against a favored driver and/or because there is no evidence of any deception by Trees the favored driver?

III. STATEMENT OF CASE

A. Substantive Facts.

The subject accident occurred on August 23, 2011 at approximately 9 a.m. at the intersection of 23rd Avenue E. and E. John Street. Twenty-third Avenue E. is a north-south arterial that crosses Capitol Hill with two lanes of traffic traveling in each direction. CP 34-35.

Colburn, the disfavored driver, was traveling *northbound* on 23rd Avenue E. in the left lane. He had stopped at the intersection of 23rd and E. John Street and was waiting for traffic to clear to make a left hand turn onto E. John Street (*i.e.* to the west). CP 26. This intersection does not have a designated left hand turn lane. CP 33-35.

Trees, the favored driver, was approaching the intersection from the opposite direction and was travelling *southbound* in the left lane on 23rd Avenue E. When he was about a block away from the intersection, Trees saw that a city bus had stopped ahead in the left lane and was waiting to make a left turn onto E. John Street (*i.e.* to the east). CP 34-35. Trees decided to move into the right lane and go around the bus. When he was about 30 feet from the bus and at least 70 feet from the intersection, he put on his right turn signal, checked for traffic, and moved into the right hand lane. The traffic light was green and Trees continued into the

intersection. CP 35; 91. As Trees entered the intersection, Colburn turned left and crossed directly in front of Trees. Trees did not see Colburn's vehicle until the moment he entered the intersection due to the height and position of the bus, and did not realize Colburn was not going to yield the right of way until the moment he entered the intersection. CP 35; 87. Trees assumed that cars turning left off of 23rd Avenue E. would yield the right of way to him. CP 35.

Once Trees saw Colburn, he slammed on his brakes and turned slightly to the left in an attempt to avoid hitting Colburn, but did not have enough time to stop. The right corner of Trees's vehicle hit the passenger side of Colburn's vehicle. CP 35.

While Trees did not see Colburn's vehicle until the moment he entered the intersection, Colburn admitted he saw Trees's vehicle much earlier and in fact never lost sight of Trees' vehicle. The following admissions are particularly important (see generally CP 28-30):

- Colburn admitted that he arrived at the intersection before the bus did. CP 27 (at 56:14-15).
- Colburn admitted that he saw Trees drive up in the left lane behind the bus. CP 27-28 (at 57:10-58:3).
- Colburn admitted that he had a full view of the intersection while he was waiting to make his left turn because he was at the bottom of a slight slope looking upward. Colburn admitted he could see all the traffic coming southbound; he could see what was behind

the bus by looking underneath it; and he could see what was to the left and right of the bus. CP 30.¹

- Colburn admitted that he never saw Trees' vehicle stop behind the bus and that Trees' vehicle was always moving. CP 28 (at 60:5-15).
- Colburn admitted that he saw three other vehicles in the right lane go through the intersection and after those vehicles went through, he began his left turn. CP 28 (at 58:12-60:1).
- Colburn admitted that he saw Trees' vehicle behind the bus when he initiated his left turn. CP 28 (at 60:2-4).²
- Most significantly, Colburn admitted that he saw Trees make his lane change from behind the bus and into the right lane. CP 29. Colburn does not dispute that Trees' lane change occurred at least 70 feet from the intersection. CP 50; 91; (See also, Appellant's brief pp. 8; 23; 25.).

Notwithstanding Colburn's clear observations of Trees vehicle at all relevant times, Colburn turned left in front of Trees as he was proceeding lawfully on a green light through the intersection, in clear violation of the right of way rules, which resulted in the subject collision.

B. Procedural Facts.

On August 13, 2015, Trees filed and served his Motion for Summary Judgment seeking dismissal of Colburn's negligence claim. The hearing was held on September 25, 2015. On November 6, 2015 the King

¹ Contrary to statements in Colburn's opening brief at page 6 and referencing CP 30, Colburn did not testify that once he reached the top of the slope at the intersection, he could no longer see under the bus.

² Contrary to statements in Colburn's opening brief and referencing CP 74, Colburn did not testify that once he entered the intersection, the bus obstructed his view of Trees.

County Superior Court granted Trees' Motion for Summary Judgment and dismissed Colburn's claims against Trees with prejudice. CP 150-151. The Court denied Trees' Motion to Strike Colburn's Response to Trees' Motion for Summary Judgment which was premised on Colburn's response being untimely. The Court, however, reserved her right to award sanctions in Trees' favor in the amount of \$500.00 based on the untimely filing. RP 4-6. Colburn now appeals the trial court's dismissal of his negligence claims.

IV. ARGUMENT

A. **Standard of Review.**

The appropriate standard of review for an order granting or denying summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. Ruvalcaba v. Kwang Ho Baek, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012), *citing* Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); International Broth. of Elec. Workers, Local Union No. 46 v. TRIG Elec. Constr. Co., 142 Wn.2d 431, 435, 13 P.3d 622 (2000). A material fact is one upon which the outcome of the litigation depends. Eubanks, et. al. v. North Cascades Broadcasting, et.

al., 115 Wn. App. 113, 61 P.3d 368 (2003). Such a motion will be granted, after considering the evidence in the light most favorable to the non-moving party, only if reasonable persons could reach but one conclusion. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998).

Once the moving party has met its initial burden of showing the absence of evidence to support the non-moving party's claim, the non-moving party must present specific, admissible facts showing that there is a genuine issue of material fact for trial. Dicomes v. State, 113 Wn.2d 612, 782 P.2d 1002 (1989); Adult Entertainment Center, Inc. v. Pierce County, 57 Wn. App. 435, 788 P.2d 1102 (1990). Unsupported assertions are insufficient to defeat a motion for summary judgment. Dombrosky v. Farmers Ins. Co., 84 Wn. App. 245, 253, 928 P.2d 1127 (1996). Further, the non-moving party may not rely on the bare allegations of the pleadings to defeat summary judgment, but must set forth specific facts showing that there is a genuine issue of material fact for trial. Baldwin v. Sisters of Providence in Washington, Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Similarly, a motion for summary judgment cannot be defeated on speculation, conjecture or mere possibility. Chamberlain v. Dept. of Transp., 79 Wn. App. 212, 215-216, 901 P.2d 344 (1995). If the claimant fails to show 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 moving party is entitled to judgment as a matter of law and the trial court should grant the motion. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

B. Colburn Failed to Produce any Evidence that Trees Breached any Duty or that Tree's Alleged Negligent Conduct was a Proximate Cause of the Collision.

1. Pursuant to RCW 46.61.185, Trees had the right of way as the oncoming driver. Colburn had the primary duty to avoid this collision.

In order to prove negligence, a plaintiff must show (1) existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The existence of a duty is a question of law, while breach and proximate cause are generally questions of fact for a jury; though, a court may determine breach and proximate cause as a matter of law where reasonable minds could not differ about them. Bowers v. Marzano, 170 Wn. App. 498, 505-06, 290 P.3d 134 (2012), *citing* Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

Under Washington law, all drivers have a duty to exercise reasonable care for their own safety. Whitchurch, v. McBride, 63 Wn. App. 271, 276-277, 818 P.2d 622 (1991), *rev. den.* 118 Wn.2d 1029 (1992). However, contrary to Colburn's argument, those duties are not

equal. The duties of all drivers are measured in light of all circumstances, including relative rights of way. *Id.*

Washington law is clear that a driver of a vehicle turning left must yield the right of way to an oncoming vehicle that is close enough to constitute an immediate hazard. Specifically, RCW 46.61.185 provides:

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

The oncoming driver with the right of way is deemed the favored driver and the driver turning left is deemed the disfavored driver. Under Washington law the primary duty to avoid a collision rests with the *disfavored driver*. Bowers, *supra*, 170 Wn. App. at 506; Watts v. Dietrich, 1 Wn. App. 141, 460 P.2d 298 (1969); Tobias v. Rainwater, 71 Wn.2d 845, 851, 431 P.2d 156 (1967). This duty must be exercised with a reasonable regard to the maintenance of a fair margin of safety at all times. *Id.* at 851; Kilde v. Sorwak, 1 Wn. App. 742, 747, 463 P.2d 265 *rev. den.* 77 Wn.2d 963 (1970).

Moreover, the duty imposed on the disfavored driver to yield the right of way under RCW 46.61.185 is mandatory and the right of way in

favor of the oncoming driver is an extremely strong one. Tobias, supra, 71 Wn.2d at 853. As stated in Watts, supra, at 146:

Construing the right of way statutes, this court has many times voiced the precept that the burden of avoiding a collision at a street intersection rests not only primarily, but also heavily, on the driver who occupies the disfavored position....”

This right of way does not hinge on whether the favored driver is proceeding lawfully. State v. Carty, 27 Wn. App. 715, 718, 620 P.2d 137 (1980). (Where the disfavored driver turned left into path of oncoming car, court held that the disfavored driver was guilty of failure to yield, even though oncoming car was speeding, stating that: “RCW 46.61.185 contains no requirement that the State prove an oncoming vehicle was proceeding lawfully.”); *See also*, Hammel v. Rife, 37 Wn. App. 577, 583, 682 P.2d 949 (1984) and Tobias, supra, 71 Wn.2d at 853-854 (excessive speed does not overcome ordinary duty to yield the right of way.).

The significance of this right of way and corresponding presumption in favor of the oncoming driver, is made particularly clear in Doherty v. Municipality of Metro. Seattle, 83 Wn. App. 464, 470, 921 P.2d 1098 (1996). In Doherty, the oncoming favored driver had lost control of her vehicle due to hypoglycemic shock due to her diabetes condition. While traveling northbound on Southcenter Parkway she

swerved back and forth over several lanes of traffic, struck two cars at a stoplight, careened onto the median, and ran through a red light. She veered back into the northbound lanes, swerved left, sideswiped a southbound car, swung back across both northbound lanes and ricocheted off the curb. She veered to the left again, and travelled diagonally across the northbound lanes, and crashed head on into an articulated Metro bus. Despite her erratic driving, the favored driver was in her rightful lane of travel at the time of the collision.

The disfavored driver of the bus was traveling southbound and making a left turn into the Southcenter parking lot. The bus driver had started his left turn and then paused, partially blocking the northbound lanes while waiting for traffic to clear. When the bus driver observed the favored driver's wild and erratic behavior and saw her heading straight for the bus, he set the parking brake and ran backward on the bus, warning his passengers to prepare for a collision. The favored driver's vehicle slid under the bus and she and her unborn child were killed.

The court held that notwithstanding the wild and erratic conduct of the favored driver, at the point of collision, the disfavored bus driver was violating the right of way set forth in RCW 46.61.185 by blocking a lane of oncoming traffic. The favored driver's car was within its rightful lane of travel and close enough to constitute a hazard. The favored driver's

conduct did not excuse the bus driver's duty to yield the right of way on a left turn. Doherty, *supra*, 83 Wn. App. at 470.

“The bus driver's duty to follow the rules of the road was not suspended simply because Mrs. Doherty had lost, to an unknown degree, the ability to control her vehicle.”

See also, Sulkosky v. Brisebois, 49 Wn. App. 273, 279, 742, P.2d. 193 (1987), (“yield the right of way” ordinances impose a requirement of continuous observation and avoidance of injury on the person who was required to yield the right of way).

2. Trees' duty to avoid this collision was not triggered in the absence of “point of notice” evidence.

A favored driver is entitled to assume that a disfavored driver will yield the right of way and is not required to anticipate the disfavored driver's negligent conduct. Kilde v. Sorwak, *supra*, 1 Wn. App. at 746. This assumption continues until the favored driver becomes aware, or should become aware in the exercise of reasonable care, that the disfavored driver is not going to yield. *Id.*; Bohnsack v. Kirkham, 72 Wn.2d 183, 192, 432 P.2d 554 (1967). The point where the favored driver realizes (or should realize) that the disfavored driver will not yield the right-of-way is the “point of notice”. The favored driver enjoys a reasonable reaction time from the “point of notice” to act to avoid the collision before he can be charged with negligence. Kilde v. Sorwak,

supra, 1 Wn. App. at 746; Grobe v. Valley Garbage Serv. Inc., 87 Wn.2d 217, 226-227, 551 P.2d 748 (1976). Split-second computations of time, alone, are insufficient to prove the favored driver's negligence. Theonnes v. Hazen, 37 Wn. App. 644, 646, 681 P.2d 1284 (1984).

Applying these basic rules to the instant matter, Trees was the favored driver and Colburn was the disfavored driver. Contrary to Colburn's argument that both drivers had equal duties to avoid this collision, the primary and heavy duty to avoid this collision rested upon Colburn. Colburn's admissions regarding his observations of Trees' vehicle, including that he never saw Trees stop behind the bus and that he saw Trees move into the right lane, underscore Colburn's duty to avoid this collision by yielding on his left turn. Colburn's primary duty to avoid the collision was not excused by any allegedly wrongful conduct by Trees.

Moreover, Trees, as the favored driver, was entitled to assume that Colburn would yield the right of way on his left turn. Trees was allowed to continue with this assumption until he knew or should have known that Colburn was not going to yield. Trees had no duty to take evasive action until he knew that Colburn was not going to yield. The only evidence before the Court regarding Colburn's "point of notice" is Trees' unrefuted testimony that he did not see Colburn and did not know he was not going to yield until the moment he entered the intersection and just before

impact. CP 34-35; 87-88. Colburn has produced no evidence whatsoever that Trees should have realized *sooner* that Colburn was not going to yield and thus there is no evidence that Trees' duty to take evasive action to avoid this collision was triggered. As explained in Bohnsack v. Kirkham, 72 Wn.2d 183, 192, 432 P.2d 55 (1967):

The failure of a favored driver to adequately observe an approaching vehicle prior to its suddenly crossing the center line of a highway from its own lane of travel into that of the favored driver, does not establish negligence on the part of the favored driver, since, until such time as the approaching vehicle crossed the center line into his lane there was no reason for the defendant to be concerned with its presence on the highway. This rule is entirely consistent with the general rule that a favored driver is entitled to rely on his right of way until he becomes aware, or in the exercise of reasonable care should have become aware, that the right of way will not be yielded. (*citing, Tobias v. Rainwater*, 71 Wn.2d 830, 431 P.2d 156 (1967).)

In sum, the primary duty to avoid this collision remained with Colburn and Colburn's breach of that duty was the sole proximate cause of this collision.

3. **Colburn has not produced any competent admissible evidence that Trees' alleged excessive speed or improper lane change proximately caused this collision.**

a. **Alleged excessive speed.**

Colburn argues that Trees' violated several statutes by driving over the posted speed limit, which Colburn claims was 20 miles per hour. Even assuming that Trees was travelling over the speed limit, there is no

evidence that Trees' excessive speed was a proximate cause of the collision.

At the outset, Colburn has failed to establish that Trees was actually speeding. Colburn has failed to produce any competent admissible evidence regarding the actual speed limit at this location. He has improperly relied on the Seattle Police Department Collision Report and an attachment, which consists of certain pages from the 2014 WSP Traffic Report Instruction Manual. CP 97 -102. The police report does not indicate the speed at which Trees was driving.

Moreover, both the report and the attachment are not competent admissible evidence for several other reasons. Both are inadmissible pursuant to RCW 46.52.080, which prohibits a police report from being used as evidence at trial. Neither were properly authenticated under ER 901 and Colburn's counsel cannot and has not properly authenticated these documents. CP 56-57. The attached instruction manual is unreliable because it is incomplete and is from 2014 – three years *after* the subject collision occurred. Furthermore, it appears to have been improperly attached to the police report by *Colburn's counsel*. It was not part of the police report as created by the investigating officer. CP 56-57; CP 97-102. And finally, both the police report and instruction manual are inadmissible hearsay based on ER 801 and 802. For these reasons, neither the police

report nor instruction manual are competent, admissible evidence sufficient to establish the speed limit or that Trees was speeding. Trees objected to the admissibility of this evidence in his reply memorandum on his motion for summary judgment. CP 117.

Second and even more problematic, Colburn's failure to establish Trees' "point of notice", as detailed above, prevents Colburn from establishing that Trees' excessive speed was a proximate cause of the collision. In a negligence case, plaintiff has the burden to establish proximate cause. Proximate cause consists of two elements, cause in fact and legal cause. Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). A cause in fact is one without which the accident would not have happened. *Id.* at 778. Plaintiff has the burden of producing evidence sufficient to support a finding that the accident would not have occurred but for the negligent conduct of the defendant. Whitchurch, *supra*, 63 Wn. App. at 275.

When a disfavored driver seeks to recover damages from a favored driver, the right of way rules require that the disfavored driver produce sufficient evidence to show where the favored driver, in exercise of reasonable care, should have realized that the disfavored driver was not going to yield. This evidence is critical in determining whether the excessive speed of the favored driver was a factor, i.e. a cause-in-fact of

the collision. *Id.* at 63 Wn. App. at 275-76. To show proximate cause, a plaintiff must produce evidence from which the trier of fact can infer the favored driver's approximate point of notice. Holmes v. Wallace, 84 Wn. App. 156, 161-62, 926 P.2d 339 (1996); Bowers v. Marzano, 170 Wn. App. 498, 506, 290 P.3d 134, 138 (2012). The jury must determine whether, from this point of notice, a reasonable favored driver would still have time to maneuver to avoid the accident. Grobe v. Valley Garbage Serv., Inc., 87 Wn.2d 217, 226-27, 551 P.2d 748 (1976).³ If the plaintiff cannot establish a “point of notice”, the plaintiff fails to bear its burden to show proximate cause. The jury has no way to determine what a reasonable person's actions would have been in the favored driver's situation. Whitchurch, *supra*, 63 Wn. App. at 276–77. Without evidence as to where a reasonable person would have started to react, there is no reason to set the distance at any particular point and summary judgment is appropriate. *Id.*, 63 Wn. App. at 277; Bowers v. Marzano, 170 Wn. App. 498, 505-507, 290 P.3d 134 (2012).

As detailed above, the only evidence before the Court regarding Trees’ “point of notice” is Trees’ testimony that he did not know Colburn

³ In other words, the jury must compare the favored driver's actual conduct to the hypothetical conduct of a reasonable person in the same situation to determine whether sufficient evidence demonstrates that the accident would not have happened but for the favored driver's negligence. Whitchurch v. McBride, 63 Wn. App. 272, 276, 818 P.2d 622 (1991), *review denied*, 118 Wn.2d 1029, 828 P.2d 564 (1992) Channel v. Mills, 77 Wn. App. 268, 279, 890 P.2d 535 (1995).

was not going to yield until the moment before impact. Colburn has produced no evidence that Trees' "point of notice" should have been sooner. Washington law permits Trees, the favored driver, a reasonable reaction time after he realizes the disfavored driver will not yield. A moment before impact is not a reasonable reaction time. Grobe, *supra*, 87 Wn.2d at 226-27; Theonnes, *supra*, 37 Wn. App. at 646. Consequently, in the absence of any evidence that Trees should have realized *sooner* that Colburn was not going to yield, Colburn cannot establish that Trees' excessive speed was a proximate cause of the collision.

b. Alleged failure to timely signal.

Colburn argues that Trees violated RCW 46.61.305 by failing to signal for 100 feet prior to changing lanes and that this constituted an unsafe lane change in violation of RCW 46.61.140(1). Similar to his excessive speed claim, even assuming that Trees failed to timely signal, Colburn has failed to produce any evidence that this conduct was a proximate cause of the collision.

The crux of Colburn's argument is that if Trees turned on his signal at least 100 feet prior to changing lanes, Colburn would have seen the signal, would have been on notice that Trees intended to change lanes, and would have yielded to Trees' vehicle. CP 48; 51; *See also*, Appellant's brief p. 24. This argument is based on pure speculation.

Colburn has produced no evidence, including his own deposition or declaration testimony, or any expert testimony to support this claim.

Moreover, this argument is belied by Colburn's other admissions. Colburn does not dispute that Trees did, in fact, engage his right turn signal when he was 30 feet from the back of the bus and 70 feet from the intersection. CP 48; 50; *See also*, Appellant's brief pp. 8; 23; 25. Colburn admits, however, that he did not see this signal. CP 74. There is no reasonable basis to conclude that Colburn would have seen the turn signal if Trees had engaged it earlier, when he was even further away from the intersection. In sum, Colburn has produced to no admissible evidence that the failure to engage the turn signal earlier was a proximate cause of this collision.

C. Under Washington Law, the Deception Doctrine is a Defense to Liability, Available to a Disfavored Driver in Very Limited Circumstances.

1. The deception doctrine cannot be used offensively by a disfavored driver to create liability on the part of a favored driver for deception.

Colburn's appeal – like his defense to Trees' motion for summary judgment - is premised on the applicability of deception doctrine. Colburn argues that Trees lost his favored driver status and the right of way because he deceived Colburn into believing he could safely turn left. Colburn argues that Trees is liable for negligence because he *deceived*

Colburn, the disfavored driver. Colburn attempts to use the deception doctrine offensively, to *create* liability by implicitly arguing that a favored driver has a duty *not to deceive* a disfavored driver and that if the favored driver acts deceptively, he can be liable for negligence. This is a fundamental misapplication of the deception doctrine. An understanding of the history of deception doctrine and the public policy interests behind the doctrine is paramount in determining whether the doctrine applies in this context.

The deception doctrine is a defense. It was developed in order to cushion the harsh effects of the negligence per se doctrine as applied to collisions resulting from left turns at or between intersections. Hammel v. Rife, 37 Wn. App. 577, 582, 682 P.2d 949 (1984). As such, its application is limited to situations where a favored driver has by some manner of wrongful driving deceived a reasonably prudent disfavored driver into believing that he or she can make a left turn with a fair margin of safety. Id. (citing, Chapman v. Claxton, 6 Wn. App. 852, 856, 497 P.2d 192 (1972)). The favored driver's conduct must be “tantamount to an entrapment, a deception of such marked character as to lure a reasonably prudent driver into the illusion that he has a fair margin of safety in proceeding....” Id., (quoting, Mondor v. Rhoades, 63 Wn.2d 159, 167, 385 P.2d 722 (1963)). The deception doctrine is a *defense* to liability,

available to a disfavored driver who fails to yield the right of way to a favored driver on a left turn. When it applies, it will relieve a *disfavored driver* from liability for failing to yield the right of way.⁴ Hammel v. Rife, 37 Wn. App. 577, 582, 682 P.2d 949 (198).

However, the deception doctrine does not *create* a duty on the favored driver to not deceive. Simply, it cannot be used as a means to *impose liability* on a favored driver. In Wood v. City of Bellingham, 62 Wn. App. 61, 66, 813 P.2d 142 (1991), a case ignored by Colburn, the court held that the deception doctrine is a defense, available only to a disfavored party. The doctrine was not available to a favored party trying to disprove contributory negligence. Similarly, it cannot be used to impose liability on a favored driver. Colburn has failed to cite any cases in which a court has held that the deception doctrine can be used to impose liability on a favored driver.⁵

⁴ In the usual context, the *favored* driver sues the disfavored driver for failing to yield. The disfavored driver raises the defense of deception on the part of the favored driver to rebut a finding of negligence per se against the disfavored driver.

⁵ In Watts v. Dietrich, 1 Wn. App. 141, 460 P.2d 298 (1969), a case whose facts are remarkably similar to the instant matter, the disfavored driver sued the favored driver for negligence based on a deception doctrine argument, claiming as Colburn does here, that the favored driver deceived the disfavored driver by speeding and by failing to make a proper lane change. The court did not specifically consider whether the deception doctrine could be applied offensively to impose liability on the favored driver and it does not appear that issue was raised. However, the court concluded that the trial court properly refused to submit the issue of deception to the jury because there was no evidence of deception by the favored driver.

Allowing the doctrine to be expanded to create liability on the part of a favored driver, does not support the public policy reasons behind the doctrine – which is to cushion the consequences of a finding of negligence *per se* on the part of a left turning disfavored driver. Expanding the doctrine *to create* a duty on the part of a favored driver to not deceive, would fundamentally change the rules of the road and would weaken the right of way rules. An oncoming favored driver’s right of way would be dependent on also establishing that his conduct was not deceptive. Such a rule would create considerable confusion as to the relative duties of drivers and would correspondingly result in more litigation and a greater number of accidents.

Moreover, Colburn’s stated concern that unless the deception doctrine applies, an oncoming favored driver will always be immune from liability with respect to a left turning driver, is nonsense. A favored driver’s potential liability is grounded upon the basic rules of negligence, comparative fault, and the relative right of way rules applicable to any particular situation. A favored driver most certainly can be liable for negligence in the appropriate circumstances. *See generally, Bohnsack v. Kirkham, 72 Wn.2d 183, 432 P.2d 554 (1967).*

2. **Even assuming the deception doctrine can be used offensively, it does not apply in the instant matter because Colburn has failed to satisfy either prong of the doctrine.**

The deception doctrine is applied in two situations: (1) where an obstruction *conceals* the favored driver from the prudent view of the disfavored driver (aka, the “clear stretch of road”/“obstruction” test), or (2) where the disfavored driver *sees* the favored vehicle and is deceived by the driver's actions. Hammel, *supra*, 37 Wn App at 582-583. The doctrine is limited to those situations where the favored driver’s deception is “tantamount to an entrapment, a deception of such marked character as lure a reasonably prudent driver into the illusion that he has a fair margin of safety in proceeding”. *Id.* at 582.

The distinction between these two tests pertains to whether the disfavored driver actually sees the favored driver. Under the “clear stretch of road/obstruction” test, the disfavored driver does not see the favored driver because the favored driver is obscured by another object. Under the “deception” test, the disfavored driver, actually sees the favored driver – but is deceived by the favored driver’s conduct. Colburn fails to recognize this important distinction and argues that he has satisfied the deception doctrine under both tests. He 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.

a. The “clear stretch of road/obstruction” rule does not apply.

To establish deception under the “clear stretch of road rule”, the disfavored driver must demonstrate: (1) that the favored driver was concealed by an obstruction in the roadway and (2) that the favored driver was negligent. Watts v. Dietrich, 1 Wn. App. 141, 144-145, 460 P.2d 298 (1969). Colburn cannot establish concealment. Contrary to Colburn's statement in his opening brief, that the bus obstructed his view of Trees' vehicle (pg.6), Colburn repeatedly admitted in his deposition that he had a full view of the intersection, that he could see all traffic coming southbound, and that he could see to the left, right, and behind the bus.⁶ Colburn further admitted that he saw Trees' vehicle as it approached the back of the bus, that he never saw Trees vehicle stop behind the bus, that Trees' vehicle was continually moving, and that he saw Trees change lanes 70 feet from the intersection. CP 27-30. A cumulative review of these admissions leads to the conclusion that Colburn, in fact, never lost

⁶ Colburn states “the bus partially obstructed the northbound traffic's view of the inside and curbside lanes of southbound Twenty-third Avenue East” and cites to Tricia Tuttle's declaration at CP 54-55. While this may have been Ms. Tuttle's perspective, who was driving behind Colburn, it is contrary to Colburn's, who repeatedly admitted the bus did not obstruct his view of the intersection or his view of Trees' vehicle.

sight of Trees. An admission by a disfavored driver that was much less comprehensive than Colburn's here, in Watts, *supra*, 1 Wn. App. at 145, was found to be determinative that the "clear stretch of road" rule did not apply because the disfavored driver admitted to seeing the favored driver prior to the collision.⁷

Moreover, other occupied vehicles on the roadway cannot be considered obstructions under the deception doctrine. A disfavored driver has duty to keep a proper lookout for other vehicles and, therefore, occupied vehicles and other traffic cannot be deemed obstructions sufficient to warrant application of the deception doctrine. Harris v. Burnett, 12 Wn. App. 833, 532 P.2d 1165 (1975). Thus, the bus waiting at the subject intersection does not constitute an obstruction of the type to warrant application of the deception doctrine.

Because Colburn cannot satisfy the first prong of the clear stretch of road/obstruction test, the second prong of the test need not be discussed.

b. Colburn was not deceived by Trees' conduct.

To establish deception under this test, the disfavored driver must have seen the favored driver and been deceived by his conduct. In

⁷ Specifically, in Watts v. Dietrich, Watts, the disfavored driver testified in his deposition:

Q.: And had or had you not seen the Dietrich car prior to when he hit you?
A.: Quite a ways up the street, I had seen him."

contrast to his prior argument that he did not see Trees, Colburn now asserts the reverse, namely that he saw Trees prior to the collision but was deceived by his excessive speed and failure to signal earlier. This argument is not compelling.

Alleged excessive speed: Even assuming that Trees was driving at an excessive speed, Washington law is clear that excessive speed alone on the part of a favored driver does not warrant submission of deception to the jury. Tobias, *supra*, at 853-54. In fact, where there is evidence that the disfavored driver saw the favored driver and was aware of the favored driver's excessive speed, the disfavored driver's duty to yield would be *intensified* -- rather than diminished -- by the known fact of excessive speed. *Id.*, citing Mercillott v. Hart, 173 Wash. 224, 22 P.2d 658 (1933). Here, Colburn acknowledged that he observed Trees' vehicle continuously for almost a block, that he never lost sight of Trees, and that he understood that Trees was travelling at 30 miles per hour. Colburn could not be deceived into believing he could safely turn left when he never lost sight of Trees' vehicle and perceived his speed.

Alleged failure to timely signal: Colburn argues that Trees' failure to engage his turn signal earlier *i.e.* 100 feet prior to changing lanes

deceived him into believing that he could safely turn left. CP 48; Appellant's brief pp. 28-29. This argument is based on pure speculation.

As stated previously, Colburn has failed to produce any competent evidence, including his own testimony, that had Trees engaged his turn signal earlier, Colburn would have seen it. Colburn admits he did not see Trees' turn signal that Trees engaged when he was 70 from the intersection. CP 74. It is pure speculation that Colburn would have seen the turn signal from *farther* away had Trees engaged the signal earlier. Moreover, Colburn's continuous observation of Trees' actual course of travel, well before Trees entered the intersection, means that the timing of the turn signal was immaterial and did not operate to deceive Colburn. Simply, Trees' lane change here is not "tantamount to an entrapment," particularly where Colburn admits he saw Trees drive up behind the bus, never saw Trees stop behind the bus, and saw Trees change lanes 70 feet from the intersection. *See, Watts, supra*, at 160.

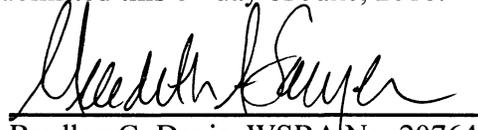
V. CONCLUSION

Colburn's failure to yield the right of way on his left turn, particularly in light of his numerous admissions that he saw Trees at all relevant times, was the sole cause of this collision. In the absence of any point of notice evidence, Trees had no duty to take evasive action and Colburn cannot establish that Trees' conduct was the proximate cause of

this collision. Moreover, the deception doctrine cannot be used offensively to impose liability on Trees – and even if it could, there is no evidence of deception. For these reasons, the trial court properly dismissed Colburn’s negligence claims as a matter of law.

Respectfully submitted this 8th day of June, 2016.

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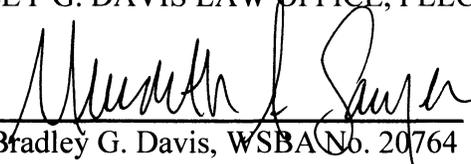
CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of Brief of Respondents to be served on the following attorney of record via E-mail and Legal Messenger on June 8, 2016:

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