NO. 45934-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

DEANN I. TINNON,

Appellant,

vs.

WHITE RIVER SCHOOL DISTRICT,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case arises out of a motor vehicle collision. The appellant, Deann Tinnon, was driving to work in the early hours of the morning when a school bus driven by Mr. David Vawter from the White River School District, Respondent, pulled out in to an intersection and the two vehicles collided. There is dispute between the parties on the issues of fault, speed, and negligence. Both parties agree that Ms. Tinnon was the favored driver and that Mr. Vawter was the disfavored driver. Issues of negligence and contributory negligence were put to the jury and the jury returned a verdict in favor of White River School District.

The heart of the question in this case is: how did the issue of contributory negligence affect the outcome? First, Ms. Tinnon argues that the issue of contributory negligence should never have been put before the jury in the first place because it was not supported, in whole or in part, by substantial evidence. In order to receive the instruction on contributory negligence, the party seeking it has the burden of proof to show that the standard negligence elements—duty, breach, proximate cause, and damages—have been met. In this case, Ms. Tinnon contends that there is not substantial evidence of breach of duty via exceeding the speed limit, and even if the Court finds otherwise, there is no substantial evidence that Ms. Tinnon's speed was a proximate cause of the collision.

Additionally, Ms. Tinnon argues that even if the trial court was correct to place the issue of contributory negligence before the jury, the court failed to instruct the jury properly on the law governing contributory negligence. Ms. Tinnon offered, and the trial court refused to give, an instruction stating that, as the favored driver, she was allowed a reasonable reaction time after she knew that Mr. Vawter was not going to yield.

Both errors would be devastatingly prejudicial to Ms. Tinnon's claims and theory of her case, and either error should be grounds for a new trial.

The Verbatim Transcript of Proceedings was not numbered. In an effort to create a consistent numbering set, the following volume numbers have been assigned to the transcripts:

RP I - January 21, 2014, pp. 1-33

RP II - January 22 and 23, 2014, pp. 1-125

RP III - January 21 and 28, 2014, pp. 1-79

RP IV - January 28, 2014, pp. 1-14

RP V - January 28, 2014, pp. 1-24

RP VI - January 28 and 29, 2014, pp. 1-14

RP VII - January 29, 2014, pp. 1-19

II. ASSIGNMENTS OF ERROR

a) Assignments of Error

ASSIGNMENT OF ERROR 1: The trial court erred in instructing the jury on contributory negligence because that instruction was not supported by substantial evidence.

ASSIGNMENT OF ERROR 2: The trial court erred when it denied the plaintiff's motion for directed verdict on the issue of contributory fault.

ASSIGNMENT OF ERROR 3: The trial court erred when it refused to submit Plaintiff's proposed instruction 15 which would have fully informed the jury of the duties of the favored driver.

b) Issues Pertaining to Assignments of Error

ISSUE 1: Whether the trial court erred when it denied the plaintiff's motion for directed verdict and instructing the jury on the issue of comparative fault without a factual basis supported by substantial evidence to put that issue to the jury. (ASSIGNMENT OF ERROR 1) (ASSIGNMENT OF ERROR 2)

ISSUE 2: Alternatively, if the trial court was correct to give the contributory negligence instruction, whether it should have included plaintiff's proposed Instruction 15 when that instruction explained the juxtaposition of contributory negligence, reasonable reaction time, and point of notice. (ASSIGNMENT OF ERROR 3)

III. STATEMENT OF THE CASE

This case arises out of a motor vehicle collision that occurred on 14th day of May, 2008. Deann Tinnon, Appellant, was driving southbound on A.P. Tubbs Road East, approaching 157th Street East in Buckley, Pierce County, Washington. CP 1-2. David Vawter, who was employed by White River School District (*hereinafter* White River), Respondent, was driving a school bus eastbound on 157th Street East, controlled by a stop sign, and executed a left turn onto A.P. Tubbs Road East. CP 1-2. There is conflicting testimony as to whether or not the Mr. Vawter could have, or should have, seen Ms. Tinnon prior to entering the intersection of 157th Street and A.P. Tubbs Road. Ms. Tinnon collided with the school bus sustaining damage to her vehicle and her person. *See generally*, RP III, IV.

Ms. Tinnon passed through sharp "S" curves that inherently limit speed prior to entering the final stretch of roadway prior to impact with the bus. RP III, p. 18, ll. 18-23; p. 16, ll. 16-20; and p. 18, ll. 18-23. Ms. Tinnon also testified to witnessing the school bus stop and then proceed through the intersection well after she had rounded the corner, but she could not place the exact spot where she was when she realized the bus was not going to stop. RP III, p. 18, ll. 10-17.

> Q: But when the bus pulled out, do you know for sure that you were up around the corner? A: Yes. Q: And do you know for certain that you actually were able to see the bus pull up to the intersection and stop? A: Yes. Q: And you were able to observe the bus stop and then pull out in front of you, correct? A: Yes. Q:

> Is it then just where on that particular road you were, whether you were halfway or whatever, is that just where you were on the road when the bus pulled out and you can't be sure? A: No, I can't be positive. I know I was past the corner.

RP III, p. 20, ll. 19 to p. 21, l. 7.

> Q: So you slammed on the clutch and the brake? A: Yes. Q: Do you have a specific memory of that? A: Yes.

RP III, p. 21, l. 25 to p. 22, ll. 1-3.

> A: I believe the first thing I did was slam on my brake and the clutch. I reacted as fast as I could. Q: When you slammed on the brakes, did your car slow down at all before the car ran into the bus? A: I believe so, but there wasn't a whole lot of time.

RP III, p. 60, ll. 10-14.

At the end of trial, Ms. Tinnon moved for directed verdict on the issue of contributory fault and the trial court denied the motion. RP VI, p. 4, l. 23 to p. 12, l. 20. The jury returned a verdict for the White River on January 30, 2014. CP 84. Judgment on the verdict was entered on February 14, 2014. CP 88-89. Ms. Tinnon timely filed a notice of appeal on February 25, 2014. CP 86.

IV. ARGUMENT

This Court should reverse and remand this case for a new trial because the trial court erred when it allowed the defendant to introduce the issue of contributory negligence to the jury without support of substantial evidence and that error prejudiced Ms. Tinnon. Alternatively, even if there was substantial

evidence to support a finding of contributory negligence, the trial court erred when it failed to instruct the jury of the relevant duties of the favored driver.

1. The trial court erred when it denied the Ms. Tinnon's motion for directed verdict and instructing the jury on the issue of comparative fault without a factual basis supported by substantial evidence to put that issue to the jury.

Negligence has four elements: (1) existence of a duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) proximate causation. *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005). "A comparison of fault for any purpose under RCW 4.22.005 through RCW 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages." RCW 4.22.015. "Contributory negligence is an affirmative defense and the burden of proving it rests on the defendant." *Hughey v. Winthrop Motor Co.*, 61 Wn.2d 227, 229, 377 P.2d 640 (1963).

a. Contributory negligence must be supported by substantial evidence.

Substantial evidence is evidence "sufficient. . . to persuade a fair-minded, rational person of the truth of a declared premise." *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963). Substantial evidence is a higher bar than a "mere scintilla" of evidence. *Id.*

The Washington Supreme Court has consistently ruled on the requirement of substantial evidence in order to give a contributory negligence instruction. The early cases outlined a need of **some** showing of evidence to support the defendant's theory of the case. *See eg.*, *Cote v. Allen*, 50 Wn.2d 584, 313 P.2d 693 (1957) ("While every party is entitled to have the jury instructed upon his theory of the case, that rule presupposes evidence to support such theory."). In a later case, the Court found that, although there was some evidence of drinking and the plaintiff's knew the driver had a significant limp, this knowledge did not amount to **substantial evidence** of the passenger's knowledge of the driver's inability to control his vehicle. *White v. Peters*, 52 Wn.2d 824, 827, 329 P.2d 471 (1958) ("It is prejudicial error for the trial court to submit an issue to the jury when there is no substantial evidence concerning it.").

Here, the only "evidence" of speeding is the speed calculations by an expert who based his entire set of calculations off of the Mr. Vawter's statement that he did not see Ms. Tinnon. Thus, the only actual evidence of Ms. Tinnon's speed as presented by White River is that the driver of the bus did not see her prior to the impact. Even in a light most favorable to the non-moving party, simply stating that he did not see her is not enough. This is not substantial evidence on which reasonable minds could differ; rather, it is a mere scintilla.

b. Even if the Court finds that there was substantial evidence of speeding, that finding alone is not enough to give the contributory negligence instruction.

A finding of possible speeding alone does not support the instruction of contributory negligence. In examining whether to allow the contributory negligence instruction to go in front of the jury in a remanded case, the Washington Supreme Court analyzed all claims of contributory negligence under two prongs: "(1) whether there is evidence upon which reasonable minds could differ on the question of whether [plaintiff] exercised reasonable care; and (2) whether there is substantial evidence that such negligence, if it existed or could be found to have existed, proximately contributed to causing the accident." *Bohnsack v. Kirkham*, 72 Wn.2d 183, 191, 432 P.2d 554 (1967). This means that even if there is substantial evidence of Ms. Tinnon's speed, there must also be substantial evidence that the her speed contributed to causing the accident.

"Every driver has the right to assume that other users of the highway will obey the traffic laws and rules of the road." *Martin v. Hadenfeldt*, 157 Wash. 563, 567, 289 P. 533 (1930). "A favored driver who has done nothing to confuse or deceive a disfavored driver is entitled to assume that the latter will yield the right of way." *Id.* "The favored driver may rely upon this assumption until he becomes aware, or in the exercise of reasonable care should have become aware, that the right of way will not be yielded." *Id.* "At the exact instant when the favored driver sees or should see that the disfavored driver will not yield the right-of-way, 'a

reasonable reaction time must be allotted' the favored driver to avoid a collision." *Bellantonio v. Warner*, 47 Wn.2d 550, 553, 288 P.2d 459 (1955).

This critical moment has been labeled by this Court as the "point of notice." *Bowers v. Marzano*, 170 Wn. App. 498, 290 P.2d 134 (2012)[1] ("To show proximate cause, [the party claiming negligence] must produce evidence from which the trier of fact can infer the favored driver's approximate point of notice."); *Theonnes v. Hazen*, 37 Wn. App. 644, 681 P.2d 1284 (1984). The burden is on the defendant to produce evidencethat Ms. Tinnon had sufficient time after the point of notice to avoid the collision. Here, similar to *Bohnsack*, no evidence at all was presented by White River regarding reasonable point of notice and a failure to apply the brakes in a careful and prudent manner to avoid collision. 72 Wn.2d at 192.

Even assuming, *arguendo*, that Ms. Tinnon was speeding at the time of the collision, there is no substantial evidence demonstrating that her speed was the proximate cause of the collision. The speed of a favored driver is **irrelevant** unless it prevents the favored driver, between the point of notice and the point of impact, from avoiding a collision. Even more specifically, the point of notice is not the first time the favored driver sees the disfavored driver -- it is the point at which the favored driver realizes the disfavored driver "will not yield the right of way." *Bellantonio*, 47 Wn.2d at 553. In *Channel v. Mills*, the Court stated that:

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[1] This case was originally unpublished but a later motion to publish was granted. *Bowers v. Marzano*, 170 Wn. App. at 513.

> A number of cases have said that speed in excess of that permitted by statute or ordinance is not a proximate cause of a collision if the favored driver's automobile is where it is entitled to be, **and the favored driver would have been unable to avoid the collision even if driving at a lawful speed. A necessary corollary is that speed is not a proximate cause if it does no more than bring the favored and disfavored drivers to the same location at the same time, and the favored driver has the right to be at that location.**

Channel v. Mills, 77 Wn. App. 268, 277-78, 890 P.2d 535 (1995) (emphasis added).

When one party claims that the proximate cause of the accident was the opposing party's speed, there must be a secondary analysis of point of notice. Here, the only evidence of point of notice was given by Ms. Tinnon herself who stated that by the time she saw the bus and went to apply the brakes she impacted the bus. The burden is on White River to produce admissible evidence that demonstrates Deann Tinnon saw or should have seen the bus pull out and had no apparent intention of yielding the right of way early enough for her to react to avoid the collision. White River did not offer any evidence on this issue. Thus, with the evidence presented, reasonable minds could not differ that Ms. Tinnon's speed was not the proximate cause of her impact with the bus.

When ruling on the evidence during a motion for judgment as a matter of law, the judge walked through what he would consider to be reasonable inferences by the jury, but failed to include any evidence of reasonable point of notice in the analysis.

> Mr. Lewis testified at various rates of speed how fast you would cover that distance. I think it's a jury question about whether or not at the posted speed limit Mr. Vawter, in the operation of his bus, started from the intersection too early and pulled in front of Ms. Tinnon or not. …

RP VI, p. 11, ll. 13-18.

> This is a 40-foot long school bus, that by all accounts is unlikely to perform some kind of jackrabbit start maneuver. …

RP VI, p. 11, ll. 21-24.

> Given that, the jury can conclude from the evidence that Ms. Tinnon was driving either inattentively or too fast to react to what would be a reasonable entry into the intersection by the school bus, and that if she was driving at a reasonable rate of speed, she could have seen the bus and stopped before she impacted the bus.

RP VI, p. 11, l. 25 to p. 12, l. 6.

This Court has ruled that you cannot make the "too fast to react" determination without first showing where the reasonable point of notice would have been. *Bowers*, 170 Wn. App. at 506. The only testimony regarding the speed of the bus is from Mr. Lewis who testified that it would take the bus five seconds to move from its stopped location to the point of impact. RP II, p. 42, l. 1 to p. 43, l. 25. While this case is riddled with calculations on speed and reaction times, there is no testimony regarding a reasonable point of notice. *Tobias v. Rainwater*, 71 Wn.2d 845, 431 P.2d 156, 162 (1967) ("(T)he right of way granted to the driver on the right is a strong one and ought not to be lost in the maze of details arising from split-second computation of time and distance."). This leaves the

glaring question: at what point during that five seconds was it reasonable for Ms. Tinnon to observe that the bus was going to continue to proceed through the intersection despite her approach? Vague references to Mr. Vawter's speed calculations based on assumptions are exactly the type of evidence that this Court has declined to find relevant to the determination of proximate cause as it relates to motor vehicle speed. *Id.*; *Theonnes*, 37 Wn. App. at 648-49.

2. Alternatively, even if the trial court was correct to give the contributory negligence instruction, it should have included Plaintiff's proposed Instruction 15 when that instruction explained the juxtaposition of contributory negligence, reasonable reaction time, and point of notice.

A trial judge's decision not to issue a jury instruction is reviewed for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). When the Washington Supreme Court reviews jury instructions, it looks to the jury instructions as a whole, with the primary purpose of allowing both parties to fairly state their case. *Rekhter v. State, Department of Social and Health Services*, 86822-1 (2014) (citing *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 616-18, 707 P.2d 685 (1985)) (finding that the trial court's did not abuse its discretion because both parties were able to fairly state their theories of the case).

The jury in this case did not have the benefit of a full understanding of the relevant duties of the favored driver. The complete duties of the favored and disfavored drivers must be presented to the jury in order for the jury to make an accurate determination of a breach of those duties. *Poston v. Mathers*, 77 Wn.2d

329, 333-334, 462 P.2d 222 (1969). Because speed as contributory negligence in an auto accident places very specific duties on the driver, those duties must be defined clearly for the jury and include reasonable reaction time. *See, Id.* at 336 (finding reversible error in an instruction on contributory negligence that does not include reasonable reaction time); *Bowers*, 170 Wn. App. at 506.

> The problem posed by the failure to instruct on respondent's duty is not difficult to describe. Neither negligence nor contributory negligence exists in the abstract. If the jury was not properly instructed and was unaware of the duty which respondent breached, it was unable to determine rationally if appellant's breach of his related duty contributed to the cause of the accident.

Poston, 77 Wn.2d at 333-34.

No instruction was given to the jury regarding the consideration of reasonable reaction time or point of notice. Ms. Tinnon proposed the following instruction:

> . . .
>
> **The favored driver is, however, entitled to reasonable reaction time after it becomes apparent, in the exercise of due care, that the disfavored driver will not yield the right of way.** It is not sufficient to attempt to prove comparative negligence on the part of the favored driver by means of split-second computations of time, speed and/or distance.

CP 31, Plaintiff's Proposed Instruction 15 (emphasis added).

During colloquy regarding the jury instructions, counsel for Ms. Tinnon explained that the proposed instructions fully informed the jury of the duties of the respective parties and was cut off by the trial judge when attempting to explain reasonable reaction time.

> And that apparently informs the jury of the duties of the respective parties, and it allows me to argue my theory of the case.

RP VII, p. 12, ll. 12-14.

> And I would just like to note, Your Honor, the issues down below, the favored driver is entitled to reasonable reaction time --

RP VII, p. 13, ll. 8-10.

While some of the trial court's instructions did explain that any negligence of the plaintiff must be the proximate cause of the collision, the court did not instruct on the method of determining proximate cause that is specific to this type of contributory negligence claim. CP 62, 65-66. This left open to the jury that speed alone is contributory negligence. This was further aggravated when the trial court added a duty not to speed instruction without giving the counter balancing point of notice instruction. CP 72.

The jury instructions, considered as a whole, allowed the jury to find no negligence on behalf of the bus driver on possibly the issue of speed alone. The jury was not given all of the relevant duties of the favored driver, and thus, Ms.

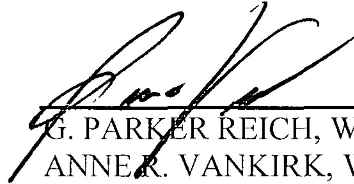
Tinnon could not effectively argue her theory of the case. Because of this substantial prejudicial error, Ms. Tinnon respectfully requests that she be granted a new trial.

V. CONCLUSION

The verdict in this case supports a showing that putting the issue of contributory negligence to the jury, or alternatively, a failure to properly instruct the jury with how to consider any evidence of contributory negligence, was prejudicial to Ms. Tinnon's claim. Therefore, Ms. Tinnon respectfully requests that the Court reverse and remand this case for a new trial with instructions on how contributory negligence should be applied, if at all, to this case.

Dated this 15th day of August, 2014.

JACOBS & JACOBS



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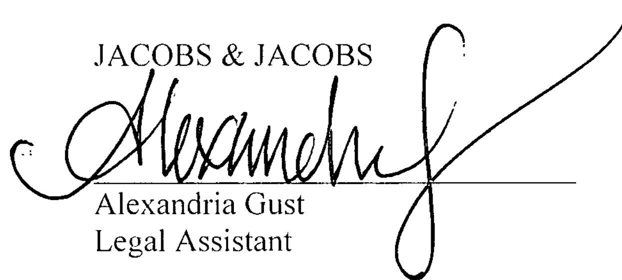
I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 15th day of August, 2014, at Puyallup, Washington.

JACOBS & JACOBS



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