

65838-7

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NO. 65838-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JAMES ANTHONY "TONY" ZAHAN AND CARLA COLWELL

Appellants,

v.

SAFEWAY, INC., TERESA CHENG AND JOHN DOE CHENG

Respondents

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES D. CAYCE

REPLY BRIEF OF APPELLANT

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JAMES D. CAYCE

SUPPLEMENTAL ARGUMENT IN REPLY TO RESPONDENTS
APPELLATE BRIEF

The Chengs, in their response brief boldly state that the plaintiff should be penalized for failing to request that the court strike the unsworn, recorded statement of Marvin Thompson, submitted by the respondent/defendants in support of their motion for summary judgment. However, this is very misleading. The record clearly reflects that Safeway, Inc. specifically requested that Mr. Thompson's statement be stricken. CP 77. Further, Safeway, Inc. also requested that the police report that the Chengs relied upon be stricken. CP 77. Once that request is made to the lower court, it is not required that every non-moving party involved in a motion for summary judgment to make the identical requests to preserve the issue for appeal.

On February 21, 2006, the Plaintiff James Zahran hit from behind by Ms. Cheng twice. The first time she hit the plaintiff, it was due to her failure to stop and keep a safe distance from the plaintiff and in the second instance, it was due to the fact that a Safeway, Inc. owned semi-truck, driven by Marvin Thompson, hit Ms. Cheng and caused her car to collide into the back of the plaintiff's 2004 Dodge Ram Pickup. The very next day, on February 22, 2006, the Plaintiff reported the incident to his medical provider at Overlake Hospital Emergency Room CP 75, 82.

The Chengs argue that this statement is inadmissible hearsay and therefore unworthy of the court's consideration. See Respondents' Brief at p. 14. However,

the statement falls into several of the hearsay exceptions outlined in ER 803.

On February 22, 2010, when describing the February 21, 2006 Motor Vehicle Accident, less than 24 hours later, Plaintiff James Zahran reported that his vehicle was rear-ended by a sedan which was then rear-ended by a large Safeway truck. CP 82. (“He was fully restrained full-size pickup truck driver at a complete stop on the freeway when he was rear-ended by a sedan which was then rear-ending (*sic*) by a large Safeway truck, causing a second impact to his vehicle.”)

Under Evidence Rule, the following out-of-court statements are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter....
- (2) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
- (3) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (4) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient

recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The statement made to plaintiff's doctor was made relatively contemporaneous with the collision. It was made for purposes of Medical Diagnosis and Treatment. It was a recorded recollection concerning a matter about which the plaintiff once had knowledge but at the time of his deposition, some two years later. The plaintiff's present sense impression of the incident explained to his doctor hours after the collision is certainly more reliable than his recollections two years later during the course of a deposition.

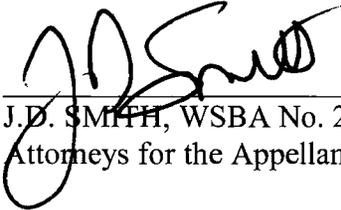
VI. CONCLUSION

Because Respondent had a duty to Mr. Zahran under applicable Washington law, and because a reasonable jury could have found that Respondent breached that duty, summary judgment was improperly granted, so the decision of the trial court should be reversed and this case remanded for further proceedings and trial.

DATED this 6th day of January, 2010.

RESPECTFULLY submitted,

WARD SMITH PLLC

By: 

J.D. SMITH, WSBA No. 28246
Attorneys for the Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the foregoing:

AMENDED APPELLATE BRIEF

TO:

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Dated at Seattle, Washington, this 6th day of January, 2011



J.D. Smith

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