

66233-3

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

JOHN BOILEAU,

Respondent,

vs.

SANG RYONG YOO (aka Sam Yoo), Appellant,
CITY OF SEATTLE, Respondent,
ANNA MARIE SECRETO, MARK R. GREGG AND
JANE DOE GREGG, AMANDA McGARTY and JOHN DOE
McGARTY, Defendants.

FILED
COURT OF APPEALS
DIVISION I
2011 JUN -3 PM 2:17

RESPONDENT'S BRIEF OF DEFENDANT MCGARTY

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DATED this 3rd day of June, 2011.

JAMES N. MENDEL & ASSOCIATES

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I. STATEMENT OF THE CASE

The underlying personal injury lawsuit arises out of three separate motor vehicle accidents. The automobile accident that is the subject matter of this appeal occurred on June 14, 2006 at the intersection of North 80th Street and Fremont Avenue in Seattle. Plaintiff was the operator of a vehicle and his Complaint alleged negligence against Appellant Yoo who was the operator of another vehicle. Plaintiff amended his Complaint to allege negligence against Respondent City of Seattle and Defendant Amanda McGarty for the manner in which the intersection of the June 14, 2006 accident was maintained (CP 36). More specifically, the allegations against Defendant McGarty were that she failed to maintain the planting/parking strip abutting her property and it allegedly obscured Appellant's visibility of the stop sign. *Id.*

The City of Seattle brought Motions in Limine regarding evidence to be excluded at trial (CP 94 and 96), which were opposed by Plaintiff (CP 112). Defendant McGarty joined in the relief sought by the City of Seattle in its Motions in Limine (RP, Motions in Limine, September 15, 2010, page 20, lines 13-20 and page 32, line 7 to page 33, line 15). The

Court granted these motions and certain evidence regarding the intersection was excluded.

Following the close of Plaintiff's case Respondent City of Seattle's motion for directed verdict was granted (CP 138). The case continued against the other Defendants and the jury was instructed with respect to the negligence and duties owed by a property owner/Defendant McGarty (CP 133A). The jury returned a verdict in favor of Defendant McGarty (CP 135).

In addition to the factual recitation provided in Appellant's Brief, Defendant McGarty submits the following additional facts that are relevant to the appeal.

On September 20, 2010 Appellant testified in court that:

- a) His shift at work at the Marco Polo started at noon and the accident took place at noon (RP, Testimony of Yoo, page 15, line 24 – page 16 line 4);
- b) On his way to work he was thinking he could be late so he looked for an alternate route to avoid traffic (RP, Testimony of Yoo, page 16 lines 8-11);
- c) He probably took this alternate route two or three times before this accident because it's a quicker route (RP, Testimony of Yoo, page 16 lines 17-19 and page 17, lines 2-4);
- d) He is aware that he needs to slow as he approaches an uncontrolled intersection (RP, Testimony of Yoo, page 17, lines 17-20);
- e) As he was approaching the intersection with 80th Street he could see the roadway ahead of him and he realizes there is

- an intersection ahead (RP, Testimony of Yoo, page 17, lines 21-25 and page 18 line 1);
- f) At no time before the accident did he slow his vehicle before entering the intersection (RP, Testimony of Yoo, page 18, lines 2-4);
 - g) Customarily he slows his vehicle before entering an intersection, but he did not do this in this case (RP, Testimony of Yoo, page 26, lines 1-7 and page 26, line 21 to page 27, line 1);
 - h) His decision not to slow before entering the intersection had nothing to do with whether he saw a stop sign (RP, Testimony of Yoo, page 27, lines 2 – 4);
 - i) He might have been exceeding the 25 mph speed limit (RP, Testimony of Yoo, page 27, lines 5-8);
 - j) As he enters the intersection the plaintiff's vehicle is coming from his right and he realizes that if there was no stop sign or any traffic control device he would've had to have yielded to that vehicle (RP, Testimony of Yoo, page 18, lines 8-14);
 - k) He didn't see the stop sign on the other side of the street (the one he eventually crashed into) (RP, Testimony of Yoo, page 19, line 23 to page 20 line 2);
 - l) He never observed the red and white pole that was holding the stop sign and he doesn't know if any tree branch was blocking the pole (RP, Testimony of Yoo, page 21, lines 4-10);
 - m) He never observed the stop bar on the roadway (RP, Testimony of Yoo, page 21, lines 11-23);
 - n) He did not tell the police his view of a stop sign was obstructed (RP, Testimony of Yoo, page 22, lines 3-5);
 - o) He was wearing a baseball cap at the time (RP, Testimony of Yoo, page 25, lines 10-11);
 - p) He returned to the scene of the accident one or two days later (RP, Testimony of Yoo, page 9, lines 14 – 16 line);
 - q) When he returned he did not get out of his car and he could have observed the stop sign from up to 25 feet away, but his observations and measurements were 'reasonable conjecture' (RP, Testimony of Yoo, page 24 line 4 to page 25, line 9);

- r) He can't recall how close the tree branches were to the stop sign itself (RP, Testimony of Yoo, page 10, line 11 – 13); and
- s) He doesn't know what type of tree it was or if it was one branch or more, but believes it was green (RP, Testimony of Yoo, page 11, lines 7-11, page 20, line 22 to page 21, line 3).

On September 29, 2010 Defendant McGarty testified in Court that:

- a) The trees in the planting strip are purple plum trees with purple leaves (RP, Testimony of McGarty, page 12, lines 3-4);
- b) The trees in the planting strip were present when she purchased the house (RP, Testimony of McGarty, page 7, lines 18-19 and page 25, lines 14-16);
- c) Similar trees line both sides of the street (RP, Testimony of McGarty, page 8, lines 8-10);
- d) She and her tenant would trim the trees, mow the lawn, rake leaves and take care of the planting strip (RP, Testimony of McGarty, page 13, lines 6-8);
- e) She did not learn about the subject accident until she was brought into this lawsuit several years (RP, Testimony of McGarty, page 11, lines 9-12 and 18-19 and page 23, lines 16-25);
- f) The stop sign is approximately one foot from the curb (RP, Testimony of McGarty, page 22, lines 1-3);
- g) The trees were further in from the curb than the stop sign (RP, Testimony of McGarty, page 22, lines 4-8);
- h) You can see through the leaves of the trees (RP, Testimony of McGarty, page 22, lines 20-23);
- i) The first tree is about one to one and a half car lengths from the stop sign (RP, Testimony of McGarty, page 24, lines 8-11);
- j) She believes there was a stop line on the roadway and it had not been paved over before June 2006 (RP, Testimony of McGarty, page 19, lines 13-20); and
- k) She believes the stop sign was on a red and white striped pole (RP, Testimony of McGarty, page 13, lines 21-23);

On September 27, 2010 Seattle Police Officer Pio testified in Court

that:

- a) She investigated the June 14, 2006 accident (RP, Testimony of Pio, page 5, lines 14-18);
- b) Mr. Yoo told her that he was in a hurry and never saw the stop sign (RP, Testimony of Pio, page 6, lines 14-18);
- c) Mr. Yoo did not say anything about the stop sign being obstructed by tree limbs (RP, Testimony of Pio, page 6, lines 17-23);
- d) She walked around the intersection and made observations in order to draw her sketch/diagram for her report and the stop sign was clearly visible (RP, Testimony of Pio, page 9, line 12 to page 10, line 1); and
- e) The trees and intersection have changed over the 15 years she has worked in the north precinct (RP, Testimony of Pio, page 13, lines 9-23);

II. ARGUMENT

Defendant McGarty was not named as a Respondent in the Notice of Appeal or Appellant's appellate brief; however, Appellant's request for relief seeks a new trial against both the City of Seattle and Defendant McGarty. As such, Defendant McGarty submits the following brief in support of the trial court's appropriate rulings excluding evidence of a 2002 incident, photographs that do not accurately depict the conditions at the scene of the accident on the day of the accident and the testimony from lay witness Andrew Finseth.

A. **Standard of Review**

Admission of evidence lies largely within the sound discretion of the trial court; absent abuse of that discretion there is no error. *Goodell v. ITT-Federal Support Servs., Inc.*, 89 Wash.2d 488, 493, 573 P.2d 1292 (1978). Evidence of other accidents may be admissible to establish a dangerous condition and notice of a defect where there are substantial similarities between the prior accidents and the accident in issue. *Blood v. Allied Stores Corp.*, 62 Wash.2d 187, 381 P.2d 742 (1963); however, since it may inject collateral issues, related to the prior accident, admission of such testimony is largely discretionary. *Id.* at 189, *Hinkel v. Weyerhaeuser Co.*, 6 Wash.App. 548, 555, 494 P.2d 1008 (1972), *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979). Like other evidentiary rulings, the determination of the admissibility of such evidence is generally left to the discretion of the trial court. *Seay v. Chrysler Corp.*, 93 Wash.2d 319, 324, 609 P.2d 1382 (1980).

The trial court's admission or exclusion of evidence of prior accidents should be reviewed only for abuse of discretion. E. Cleary, *McCormick's Evidence* S 200, at 473 (2d ed. 1972). A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Reese v. Stroh*, 128 Wash.2d

300, 310, 907 P.2d 282 (1995); *Havens v. C & D Plastics, Inc.*, 124 Wash.2d 158, 168, 876 P.2d 435 (1994).

In *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979) the court noted that there was a substantial question regarding the similarities of the circumstances in the prior accident that was attempted to be introduced into evidence; however, the trial court carefully weighed the matter, considered the cases and ruled that the “probability of misuse substantially exceeds the potential relevancy of the prior accident.” This was deemed to be within the trial court’s discretion. “Rather than being an abuse of discretion, the record shows a careful, thoughtful and balanced exercise of that discretion and the evidence was properly excused.” *Id.* at 305, citing *Hinkel v. Weyerhaeuser*, 6 Wash.App. 548, 555, 494 P.2d 1008 (1972).

B. The trial court did not abuse its discretion when excluding evidence of a 2002 incident.

As the Respondent City of Seattle stated in its Motions in Limine (CP 94 and 96) and argued in front of the court (RP, Motions in Limine, September 15, 2010, page 21, line 1 to page 25, line 5), the 2002 incident was too far removed to have any relevance with respect to the June 14, 2006 accident. *See* ER 402 and 403. The conditions existing at or around 2002 were fully resolved and more than four years passed before the

subject accident occurred, therefore, it was simply too remote in time to attempt to prove that it was more likely than not that foliage was blocking the stop sign as Appellant drove southbound on Fremont Avenue North on June 14, 2006 accident.

The 2002 evidence fails to prove notice of the condition of the foliage as the condition could not have been the same four years later since that alleged condition is completely transitory.

The transitory nature of the conditions distinguishes this case from that of *Boeing Co. v. State*, 89 Wash.2d 443, 572 P.2d 8 (1978), which allowed evidence of prior accidents that occurred at an overpass on SR 167. The *Boeing Co.* decision confirmed the trial court's admission of evidence of prior incidents; however, those incidents involved a bridge, the height, nature and details of which did not change over the years.

In this case the condition of the foliage at the intersection changes and in fact did so according to the records and pictures from the 2002 incident. The 2002 records fail to show what the condition was like in 2006 or that Respondent or Defendant McGarty were aware of whatever alleged dangerous conditions may have existed in 2006. Whatever relevance could have been afforded this evidence would have been overshadowed by the prejudicial effects of their admittance and the trial court correctly weighed those issues prior to issuing its ruling. (ER 403).

Another case involving an inanimate object versus a transitory condition is *Evans v. Miller*, 8 Wash.App. 364, 507 P.2d 887 (1973). In that case the Court of Appeals, division two, allowed evidence of a prior identical accident involving operators of motorcycles who crashed into a rusty cable that was stretched across a roadway as a barricade. In allowing the evidence of the prior similar incident to be admitted the *Evans* court noted that “the plaintiff could not adequately portray the alleged deceptive and dangerous condition of the rusty cable except by proving the prior accident.” *Id.* at 366.

In this case, the alleged condition of the tree(s) that blocked Appellant’s visibility of the stop sign was described by him so the missing facts, needed by the plaintiff in the *Evans*, case do not exist here. Further, a description of the trees in the planting strip, the planting strip itself and their proximity to the stop sign were described by Defendant McGarty. Officer Pio was also able to describe the conditions that she observed or would have noted if observable during her investigation on the day of the accident. As such, Appellant had multiple sources of testimony in which to present an adequate description of the condition that existed at the time of his accident.

The trial court in this case reviewed all of the evidence submitted by Plaintiff regarding the 2002 notice, incident and remedial action and heard argument regarding the applicability of the *Boeing* case before it

rendered its decision excluding this evidence. This ruling was not an abuse of discretion and the exclusion of this evidence did not preclude Plaintiff or Appellant from presenting other direct evidence of the alleged condition.

C. The trial court did not abuse its discretion when excluding Mr. Finseth's testimony.

The admissibility of testimony concerning prior accidents involving similar circumstances is generally left to the discretion of the trial court. *Seay v. Chrysler Corp.*, 93 Wash.2d 319, 324, 609 P.2d 1382 (1980) citing E. Cleary, *McCormick on Evidence* 200, at 473 (2d ed. 1972) and *Blood v. Allied Stores Corp.*, 62 Wash.2d 187, 381 P.2d 742 (1963).

In *Hinkel v. Weyerhaeuser*, 6 Wash.App. 548, 494 P.2d 1008 (1972) the court confirmed the trial court's denial of the admissibility of testimony about an accident that had occurred merely three hours before the accident involved in that lawsuit. The Court, citing, *Turner v. Tacoma*, 72 Wash.2d 1029, 435 P.2d 927 (1967) held that due to the prejudicial effect such testimony has, it is usually not admissible as proof of negligence. This type of testimony interjects numerous collateral issues into the trial-issues related to the prior accident and irrelevant to the case

at hand. For this reason the admission of such testimony is largely discretionary. *Hinkel* at 1012-1013.

On two occasions the trial court reviewed the anticipated testimony/offer of proof by Plaintiff regarding witness Andrew Finseth. The first occurred during the argument of the Motions in Limine (RP, Motions in Limine, September 15, 2010, page 34, line 15 to page 35, line 7, page 36, line 12 to page 37, line 14) and the second time occurred several days later, after the court allowed the parties additional time to obtain a more detailed and expansive offer of proof (RP, Offer of Proof, September 20, 2011 page 4, line 9 to page 10, line 21 and page 12, line 22 to page 14, line 1). On both occasions the anticipated testimony of Mr. Finseth was scrutinized by the trial court and failed to provide any relevant (ER 401, 402, 403) or admissible testimony (ER 801 and 802). At no time did Appellant provide any additional evidence or a separate offer of proof to support the admission of this testimony.

Admission of evidence concerning a comparable happening experienced by a witness who came upon the scene of an accident after it had occurred was within discretion of the trial court in the products liability lawsuit of *Breimon v. General Motors*, 8 Wash.App. 747, 509 P.2d 398 (1973). The trial court's rulings came after it had considered

extent of similarity, presence of modifying circumstances, and absence or presence of same essential conditions. *Id. at 755.*

Unlike the *Breimon* case, Mr. Finseth did not make any direct observations regarding the subject accident nor was he going to testify regarding the condition at a time even close to the June 14, 2006 accident. Mr. Finseth did not make any complaints regarding the intersection until 2007. The evidence presented by him regarding incidents in 2005 were too far removed with respect to the subject accident and also failed to provide any direct eyewitness evidence. Relevance of similar accidents to prove likelihood that cause of accident in question was the same as the cause of prior accident is within discretion of trial court. *Id.* citing *Blood v. Allied Stores Corp.*, 62 Wash.2d 187, 381 P.2d 742 (1963) and *Alumbaugh v. Underwriting Members of Lloyd's*, 51 Wash.2d 331, 317 P.2d 1064 (1957).

Further, there was no other evidence offered by Plaintiff or Appellant (i.e. police reports, accident investigations, photographs) that confirmed or documented that the alleged events in 2005 were so similar as to make them slightly relevant for admissibility regarding the nature of the 2006 condition or notice of any such conditions on either Respondent or Defendant McGarty.

Appellant and Plaintiff were able to submit direct evidence regarding the condition of the intersection on June 14, 2006 from the Appellant and Officer Pio. These witnesses testified regarding their actual observations and that testimony was heard and considered by the jury prior to rendering its verdict.

D. The trial court did not abuse its discretion when excluding the 2003 photographs.

Appellant's brief correctly states the standard of review for this court in regards to the admissibility of photographs by the trial court. In this case the trial court reviewed several photographs submitted by plaintiff from 2002, 2003 and 2009 and correctly determined that they were not admissible.

Appellant's brief argues that Mr. Finseth would have authenticated the 2003 photographs; however, nowhere in Mr. Finseth's offer of proof is that established. In fact, the photographs are from July 2003 and Mr. Finseth did not move to the area until August 2003 (RP, Offer of Proof, September 20, 2010, page 4, line 22).

The 2003 photographs are too far removed in time to the 2006 accident to have them deemed relevant (ER 402, 403) with respect to any of the conditions that existed at the intersection when the 2006 accident occurred. Appellant argues that the pictures are only being offered to show the location of the tree and stop sign; however, direct evidence

regarding the tree and the stop sign was presented or could have been presented to the jury via the testimony of Appellant, Defendant McGarty and Officer Pio. As such, these photographs are cumulative and duplicative evidence (ER 403).

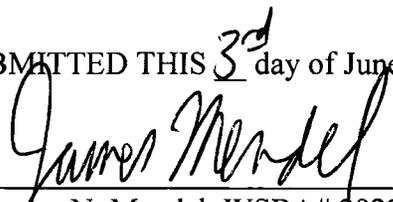
III. CONCLUSION

After considering the relevant evidence, the jury instructions and argument from Plaintiff and Appellant the jury in this case determined that the sole proximate cause of the June 14, 2006 accident was Appellant's failure to operate his vehicle in a reasonable and prudent manner. The jury heard that Appellant was in a hurry and late for work when he failed to see the stop sign, which he was able to observe when he returned to the scene and drove at an appropriate rate of speed. The jury heard that Appellant did not see any stop bar on the roadway and did not see the red and white pole on which the stop sign was affixed and that regardless of his lack of observances of these signs he still failed to slow his vehicle as he entered an obvious intersection and failed to yield to a vehicle that was to his right. The jury's verdict was rendered after they heard Appellant's testimony regarding the visibility at the intersection as well as the descriptions of the intersection by Defendant McGarty and Officer Pio.

The jury did not hear argument or instructions against Respondent City of Seattle as they were already dismissed from the case at that time; however, with respect to Defendant McGarty, the Appellant and Plaintiff presented evidence and argued their theories of liability against her prior to the jury's verdict.

The focus of Appellant's appeal is against Respondent City of Seattle; however, his request for relief also seeks a new trial against Defendant McGarty. The record reflects that the trial court scrutinized all of the proposed evidence, testimony and offers of proof and determined that such evidence was not substantially similar to the case at bar, was too remote or was based upon speculation with little or no probative value. The Appellant has not shown that trial court abused its discretion in rendering its rulings excluding evidence and this Court should uphold those rulings and deny Appellant's request for relief in its entirety.

RESPECTFULLY SUBMITTED THIS 3rd day of June 2011.


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CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and
competent to be a witness herein.

I certify under penalty of perjury of the laws of Washington that I
caused to be served the following document to all parties or their attorneys
of record on the 3 day of Friday, June, 2011 as follows:

DOCUMENT: DEFENDANT MCGARTY'S RESPONDENT'S
BRIEF

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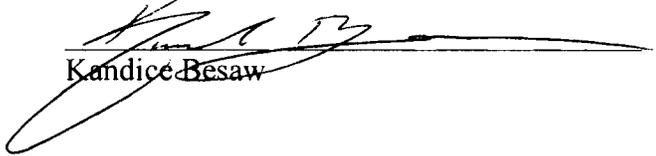
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