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No. 71535-6-I

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

JOHNNY FERARA
PLAINTIFF, APPELLANT

V.

MICAELA (sic) AND JOHN DOE RICH
DEFENDANTS, RESPONDENTS

BRIEF OF RESPONDENT

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I. INTRODUCTION

This lawsuit arises from an automobile accident that occurred on May 25, 2010. At that time, appellant Johnny Ferara was a passenger in a vehicle driven by his nephew Tyler Ferara. The collision occurred when Tyler Ferara, the disfavored driver, failed to yield the right of way and made a left turn at an intersection in front of the favored driver, Ms. Makayle Rich. The intersection was controlled by a stop light and Ms. Rich had a green light.

Ms. Rich brought a motion for summary judgment. King County Superior Court Judge William Downing granted Ms. Rich's motion for summary judgment because Ferara's attempts to establish a point of notice for Ms. Rich was based on conjecture and speculative opinions which failed to establish (1) the location and speed of Ms. Rich's vehicle at the moment a reasonable person would have notice of Tyler Ferara's failure to yield; and (2) how much time Ms. Rich had to perceive and react to the hazard, once she had notice.

II. ISSUE PRESENTED FOR REVIEW

Whether the trial court correctly granted summary judgment in

finding that Ferara failed to submit any evidence showing Ms. Rich's actions were a proximate cause of the accident and in finding that Ferara failed to submit any evidence showing the approximate point of notice where it was apparent to Ms. Rich that the disfavored driver would not yield the right of way to the favored driver?

III. STATEMENT OF THE CASE

At the time of the subject accident, Ms Rich was driving southbound on 100th Avenue at the intersection of 137th St NE in Kirkland, Washington. As she approached the intersection traveling in the rightmost lane, Tyler Ferara was traveling northbound on 100th Avenue, preparing to take a left turn across traffic onto 137th Street NE. Appellant Johnny Ferara was a passenger in Tyler Ferara's vehicle. Both drivers had a green light for north and southbound traffic.

As Ms. Rich proceeded through the intersection, Tyler Ferara made a left turn directly in front of her vehicle, causing a collision. Ms. Rich was unable to avoid the collision after the Ferara vehicle turned in front of her and struck her vehicle.

IV. SUMMARY OF ARGUMENT

Ferara failed to submit competent evidence and analysis showing

the approximate point of notice where Ms. Rich could realize that the disfavored driver, Tyler Ferrara, would not yield the right of way. Therefore Appellant Ferrara was unable to establish that the speed or reaction of Ms. Rich, the favored driver, was a proximate cause of the collision. Ferrara's entire analysis in opposition to the summary judgment motion was based solely on his own unsupported, conjectural and speculative assumptions.

V. ARGUMENTS IN SUPPORT OF SUMMARY JUDGMENT RULING.

A. Applicable law regarding point of notice for the favored driver.

The primary duty to avoid a collision is on the disfavored driver. A disfavored driver must yield to an oncoming vehicle even if it can be shown that the oncoming vehicle was proceeding unlawfully. *Mossman v. Rowley*, 154 Wn. App. 735, 741(2009); *State v. Carty*, 27 Wn. App. 715 (1980); *Doherty v. Municipality of Metro. Seattle*, 83 Wn. App. 464 (1996).

Speed in excess of that permitted by statute or ordinance, in and of itself, is not a proximate cause of a collision if the favored driver's vehicle 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. *Channel v. Mills*,

77 Wn. App. 268, 276-277 (Div. 2,1995); *Mossman* 154 Wn. App. at 741. Speed which does nothing other than bring two drivers to the same location at the same time is a remote, rather than a proximate cause of an accident. *Channel*, 77 Wn. App. at 277. As the court held in *Channel*, it cannot be said that the favored driver hit the disfavored driver because they were driving over the speed limit; rather, it can only be said that the favored driver hit the disfavored driver because they were not driving at any particular speed whether above or below their actual speed.

Even expert testimony showing that if the favored driver had been driving more slowly the collision would have been avoided is insufficient to defeat a motion for summary. *Mossman* 154 Wn. App. at 741-742; *Theonnes v. Hazen*, 37 Wn. App. 644, 648-650 (1984).

Additionally, in order to establish excessive speed by a favored driver as a proximate cause of an accident with a disfavored driver, a party must establish the favored driver's point of notice. *Channel*, 77 Wn. App. at 276-280, n.16; *Whitchurch v. McBride*, 63 Wn. App. 272, 275-277 (1991) *review denied*, 118 Wn.2d 1029 (1992). The point of notice is that point at which a reasonable person would have realized the disfavored driver was not going to yield the right of way. *Channel*, 77 Wn. App. at 280, n.16; *Kilde v. Sorwak*, 1 Wn. App. 742, 746 (1970), *review denied*, 77 Wn. 2d 963 (1970).

B. As a matter of law, the favored driver, Ms. Rich, is entitled to a reasonable perception time from the point of notice.

Even after it becomes apparent to the favored driver that the right of way will not be yielded, the favored driver is entitled to a “reasonable reaction time” to permit the favored driver to act in the exercise of due care. *Olpinski v. Clement*, 73 Wn.2d at 949 (1968); *Grobe v. Valley Garbage Service*, 87 Wn.2d 217, 551 P.2d 748 (1976). Split second computations of time and/or distance, even by experts, are insufficient to prove negligence on the part of the favored driver. *Theonnes*, 37 Wn. App. at 646, citing *Kilde*, 1 Wn. App. 742.

In *Whitchurch*, the Court held that without evidence showing the approximate point at which a reasonable person would realize the disfavored driver would not yield the right of way, one cannot prove “cause in fact”, or that the favored driver could have avoided a collision between point of impact and point of notice but for speed. *Whitchurch*, 63 Wn. App. at 277. In other words, if there is no evidence showing the approximate location of the point of notice, the reasonable person's conduct cannot be compared with the favored driver's and plaintiff has not met the burden of producing evidence sufficient to support a finding that the accident would not have happened but for the favored driver's speed. Without evidence of where the favored driver was located when a

reasonable person in her position would have noticed the failure to yield of the disfavored driver, speed of the favored driver cannot be presented as the “cause” of the accident. *Whitchurch* 63 Wn. App at 276-277 (favored driver's speed of 43 mph in a 25 mph brought vehicles to same location at the same time but evidence was insufficient to establish point of notice to permit case to go to the jury).

The term “reaction time” means the time from the point of notice to the time the brakes are first applied. *Channel* 77 Wn. App. at 280. In *Channel*, the plaintiff's expert testified that a reasonable reaction time for the favored driver was 1.75 seconds. *Channel*, 77 Wn. App. at 280. In *Holmes v. Wallace*, 84 Wn. App. 156, 161-162 (1996), plaintiff's expert testified a reasonable perception reaction time for a favored driver was 1.5 seconds.

Knowledge of the disfavored driver's negligence must be followed by a reasonable perception reaction time for the favored driver to determine if they had an opportunity to avoid the collision. *Bellantonio v. Warner*, 47 Wn.2d 550, 461-462 (1955). Here, as noted by the court below, Ferara failed to produce *any* evidence, expert or otherwise, regarding Ms. Rich's speed, her point of notice or her reasonable perception time. In fact, Ferara conducted no discovery at the trial court level to ascertain Ms. Rich's knowledge, observations or actions.

C. As a matter of law, Ms. Rich had no notice that the disfavored driver would not yield the right of way at the intersection.

The inquiry in this type of case is whether speed prohibited the favored driver from avoiding the collision between the point he/she realized the disfavored driver was not going to yield the right of way (point of notice) and the point of impact after applying a reasonable reaction time in the exercise of due care. *Channel*, 77 Wn. App. 268. Cause in fact does not exist as a matter of law if the causal connection is so speculative and indirect that reasonable minds could not differ. *Doherty*, 83 Wn. App. at 469.

A favored driver is not required to anticipate the disfavored driver's negligent conduct. *Kilde*, 1 Wn. App. at 746. A favored driver has the right to expect to have the right of way, and is entitled to rely on the disfavored driver to yield the right of way, until the favored driver reaches that point at which a reasonable person exercising reasonable care would realize that the disfavored driver is not going to yield. *Whitchurch*, 63 Wn. App. at 275-276. This is the "point of notice."

Ferara's entire claim and argument hinges on his two self-serving assumptions:

It seemed to me, on a more likely than not basis, that Rich was traveling at a speed greater than prudent when the collision occurred.

It seemed to me that there was ample opportunity for Rich to stop once she realized Tyler Ferara was turning in front of her, but failed to do so.

CP 41.

Appellant Ferara offers no foundation or testimony as to when Ms. Rich observed Tyler Ferara beginning a left turn across traffic directly in front of her and offers no foundation or testimony regarding her reaction time or whether it was unreasonable. He offers nothing to dispute that a reasonable driver would expect a left-turning vehicle to stop and yield to approaching traffic with the right-of-way.

Despite the established legal requirements for determining the favored driver's point of notice, Ferara did not analyze the facts of this case from the reasonable person's perspective. *Whitchurch*, 63 Wn. App. at 276. Rather, he arbitrarily and ambiguously states ‘*it seemed to [him]*’ Ms. Rich could stop before the two cars collided. This is simply a speculative assumption as Judge Downing correctly concluded.

Speculative and argumentative assertions are insufficient to create a material dispute of fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 3 (1986); *Blakely v. Housing Authority of King County*, 8 Wn. App. 204 (1973). An opinion that is only a conclusion or based on an assumption does not satisfy the summary judgment standard. *Lilly v. Lynch*, 88 Wn. App. 306, 319-320 (1997). Furthermore, such speculation

is insufficient to establish causation. *Miller v. Likins*, 109 Wn. App. 140, 145 (2001); *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 326-327 (1980). Speculation, conjecture, or mere conclusions in an opinion are insufficient to resist such a motion. *Theonnes*, 37 Wn. App. at 648. The bare allegation of fact by affidavit without any showing of supporting evidence is insufficient to raise genuine issue of fact for purposes of motion for summary judgment. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 955-956 (1966). Yet this is exactly what Ferrara did at the trial court level in response to Ms. Rich's summary judgment motion. As a matter of law, reasonable minds could not differ that Ms. Rich was the favored driver and there was no competent testimony offered to defeat her motion for summary judgment.

D. As a matter of law, Ms. Rich was not required to approach the intersection at a certain speed.

The only evidence regarding Ms. Rich's speed as she approached the intersection, from both Ms. Rich and an independent witness, indicates that Ms. Rich was traveling at or below the posted speed limit. CP 23-27; CP 28-32. Ferrara's assertions that Ms. Rich was "traveling at a speed 'greater than prudent'" offers nothing to the case. There is no legal basis requiring Ms. Rich, at the time of this accident, to be driving one-half or two-thirds of the speed limit. There is no legal requirement that she

reduce her speed in response to the presence of a controlled intersection with a green light in her favor and Ferara has offered none. Second, Ms. Rich had no reason to expect a hazard or that a disfavored driver would not yield the right of way. *Kilde*, 1 Wn. App. 742, 746 (1970). Finally, Ferara has no basis for concluding Ms. Rich had any opportunity to avoid the collision. He identifies no factual foundation supporting any of his self-serving assumptions.

In any event, excessive speed can only be causal if it prevents the favored driver, between the point of notice and the point of impact, from avoiding a collision. *Mossman* 154 Wn. App. at 741-42. (favored driver driving anywhere between 45 to 60 mph in a 30 mph zone hit car turning left in front of him was granted summary judgment due to plaintiff's failure to show that he had enough time between point of notice and point of impact to avoid the collision). Therein, the court stated:

Mr. Lee [plaintiff's accident reconstructionist] gave his expert opinion that had Mr. Rowley been driving more slowly, the collision would not have happened. This is exactly the analysis that the courts have held to be incorrect because, had Mr. Rowley been driving faster, the collision would have been avoided as well.

Mossman 154 Wn. App. at 741-742. Similarly, Ferara apparently opines that if Ms. Rich was traveling slower, the accident would have been avoided. However, a plaintiff must produce evidence from which the trier

of fact can infer the approximate point of notice before consideration can even be given to whether a lawful speed would have avoided the collision. *Holmes*, 84 Wn. App. 156, 161-162 (1996).

To say this accident would not have happened if Ms. Rich was proceeding at a speed not “greater than prudent” is simply speculation and conjecture. This accident would not have happened if the Ferara vehicle was traveling slower or faster moments before the collision. Nor would it have occurred if Tyler Ferara had left his house 5 minutes before or after the time he left. Nor would it have happened if Tyler Ferara had, as he should have, yielded the right of way before making a left turn. Nor would it have happened if Ms. Rich had been traveling at a speed of 45 or 50 mph instead of at or below the speed limit. This is the very rationale used by the Court to articulate why speed in and of itself is too arbitrary to assign negligence to a favored driver. *Channel*, 77 Wn. App. at 271-279. Plaintiff must establish the point of notice. *Channel*, 77 Wn. App. at 271-279; *Mossman* 154 Wn. App. 735 (trial court properly dismissed claim against speeding driver where plaintiff was disfavored driver and did not produce evidence that collision could have been avoided at slower speed); *Claar ex rel. Claar v. Auburn School Dist.* 408, 126 Wn. App. 897 (2005) (claim against driver was properly dismissed on summary judgment where

driver had no notice that child was behind school bus, and slower speed would not have prevented collision).

Additionally, as stated in *Theonnes*, 37 Wn. App. at 648-650, an accident reconstructionist's testimony that if the favored driver was proceeding at 30 mph, rather than at 42 mph, in a 35 mph zone, he could have avoided an accident constituted speculation and was insufficient to avoid summary judgment motion in favor of favored driver:

The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury. Here the affidavits of the expert contain opinions that the driver could have avoided the accident while driving straight ahead at a speed of 30 m.p.h. or by taking evasive action at a somewhat higher speed. These are mere conclusions. They are not based on evidence as was the case with the speed and distance calculations from skidmarks and coefficient of friction. There is no evidence to support the expert's opinion that the collision could have been avoided or that evasive action would have been successful.

Theonnes, 37 Wn. App. at 647-649. Similar to the expert in *Theonnes*, Ferrara's own declaration contains nothing but conclusions based on unsupported assumptions and therefore were, and are, insufficient to present a material issue of fact.

VI. CONCLUSION

Judge Downing correctly identified and summarized the deficiency

in Ferrara's opposition to the summary judgment motion when he determined that Ferrara failed to produce any competent evidence regarding the point of notice or a reasonable reaction time for Ms. Rich to avoid the accident. The lower court found that plaintiff's argument was merely speculation and was built on conjectural and unsupported assumptions.

On appeal, as in the trial court below, every aspect of Ferrara's theory of liability against Ms. Rich is built on speculation and assumption. The required foundation simply does not exist either factually or legally. Therefore, Ms. Rich respectfully requests Judge Downing's ruling regarding the Motion for Summary Judgment be affirmed and Ferrara's appeal be denied.

REPECTFULLY SUBMITTED this 7th day of July, 2014

LAW OFFICES OF SHAHIN KARIM



By: _____
Dan L. Johnson, WSBA# 24277
Attorney for Respondent Rich

DECLARATION OF SERVICE

I hereby declare under the penalty of perjury under the laws of the State of Washington that I have served a true and correct copy of the foregoing document to which this is attached upon the individuals listed by the following means:

| | |
|---|---|
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| Copy to: Mr. Matthew R. King The Law Offices of Matthew R. King1420 Fifth Avenue, Suite 2200 Seattle, WA 98101 Attorney for Plaintiff | <input type="checkbox"/> U.S. Mail (First Class) <input type="checkbox"/> Facsimile <input type="checkbox"/> Express Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Legal Messenger |

DATED: July 7, 2014

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