

FILED  
May 9, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74366-0

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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BILLY COLBURN,

Appellant,

v.

DAVID J. TREES and JANE DOE TREES husband and wife, and the  
marital community composed thereof,

Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Janet M. Helson

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

This case involves a two-vehicle accident in the intersection of Twenty Third Avenue East and East John Street in Seattle, Washington. Appellant Billy Colburn (“Colburn”) was broadsided with great force by Respondent David Trees (“Trees”) after nearly completing a left turn onto Westbound East John Street. Due to Trees’ unlawful driving, Colburn believed he was safe to execute the left turn. In the moments just before the collision, Trees violated numerous traffic statutes, which both deceived Colburn and caused the accident. Both Colburn and an independent witness attributed the cause of the collision to Trees’ inattentive driving.

Colburn filed suit alleging negligence. Trees subsequently moved for summary judgment arguing that Colburn’s claims were barred under RCW 46.61.185 because he was turning left at the time of the collision.

In his response, Colburn argued Trees unlawful actions satisfied the Deception Doctrine requirements which removed Trees’ “favored driver” status under RCW 46.61.185, leaving clear questions of fact about who caused the accident, and allowing Colburn to proceed with the suit with negligence as his cause of action. Colburn presented substantial evidence of Trees’ numerous statutory violations and deceptive actions, including: 1) a declaration from a disinterested witness stating Trees’

inattentive driving caused the accident; and 2) portions of Trees' deposition testimony in which he admitted to violating multiple traffic statutes by speeding, failing to appropriately reduce his speed before entering a blind intersection, failing to properly signal a lane change, and unlawfully changing lanes.

Colburn also presented substantial evidence that Tree's actions deceived him into reasonably believing he could safely execute a left turn. Colburn argued all Deception Doctrine requirements were met relieving him of the duty to yield imposed by RCW 46.61.185, and leaving him free to pursue his negligence claim against Trees for breaching his statutory duty to exercise due care and caution.

Approximately six weeks after the hearing on summary judgment, the trial court issued an order granting summary judgment and dismissing the case. The trial court issued no findings of fact or conclusions of law, and gave no insight on the basis for its decision.

As addressed below, Trees lost his favored driver status under the Deception Doctrine due to his unlawful driving. Moreover, there is an abundance of evidence that Trees' negligence caused the collision, which create clear issues of material fact, and make summary judgment wholly inappropriate. This Court should overturn the order dismissing Colburn's claims against Trees and give Mr. Colburns his day in court.

## **II. ASSIGNMENT OF ERROR**

- A. The Superior Court of King County, State of Washington, erred in failing to properly follow the legal requirements mandated under Rule 56 of the Washington Civil Rules for Superior Court (CR) by granting David Trees' motion for summary judgment and dismissing Billy Colburn's complaint for damages where genuine issues of material fact existed that Mr. Trees' negligence caused the accident.
- B. The Superior Court of King County, State of Washington, further erred in granting Respondents' motion for summary judgment where clear genuine issues of material fact existed that Mr. Trees' actions deceived Mr. Colburn into believing he could safely turn left into the intersection, and where Mr. Trees drove negligently and committed numerous traffic statute violations.
- C. The Superior Court of King County, State of Washington, likewise erred by presumably holding that the "favored driver" status under RCW 46.61.185 entirely shields a driver from liability when proceeding through an intersection while operating a vehicle in a negligent and deceitful manner.

## **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. Whether the superior court failed to properly follow the legal requirements mandated under Rule 56 the Washington Civil Rules for

Superior Court (CR) when granting Mr. Trees' motion for summary judgment and dismissing the Mr. Colburn's complaint for damages where clear issues of material fact existed that Mr. Trees' negligence caused the accident?

- B. Whether the superior court erred in granting Mr. Trees' motion for summary judgment and dismissing Mr. Colburn's case where substantial evidence was presented establishing Mr. Trees violated multiple traffic laws and drove in a negligent manner, that his actions deceived Mr. Colburn into believing he could safely turn left, and the Deception Doctrine eliminated Mr. Trees' favored driver status?
- C. Whether a person given "favored driver" status under RCW 46.61.185 and driving in a negligent manner is entirely shielded from liability where he or she collides with an oncoming vehicle turning left turn in an intersection?

#### **IV. STATEMENT OF THE CASE**

##### **A. SUBSTANTIVE FACTS**

This case arises out of an August 23, 2011 collision between Appellant Billy Colburn and Respondent David Trees, which occurred at approximately 9:00 a.m., at the intersection of Twenty Third Avenue East and East John Street, in Seattle, Washington. CP 26, 34, 52, 76:20-21. Twenty Third Avenue East has two northbound lanes (inside and curbside)

and two southbound lanes (inside and curbside) at the intersection of East John Street. Cp 33, 34, 76:21-25. There are no left turn lanes in either direction and the intersection is controlled by traffic signals. CP 81:21-25, 8. According to the officer responding to the accident, the speed limit for both drivers was 20 mph. CP 97, 101-102. Trees testified at his deposition the speed limit was 35 mph. CP 86.

Colburn was driving his minivan northbound on Twenty Third Avenue East in the inside lane, approaching the intersection of East John Street, where he intended to turn left onto westbound East John Street. CP 59-60. There was a large Metro bus (“Bus”) approaching the intersection from the opposite direction in the inside southbound lane of Twenty Third Avenue East, which slowed to a stop and waited for oncoming traffic to clear before turning left (east) onto eastbound East John Street. CP 62. The Bus was not an articulated bus and was approximately 40 feet long. CP 83, 88-89. It pulled forward to the edge of the crosswalk. CP 87.

Northbound Twenty Third Avenue East has an upward slope as it approaches East John Street but levels out at East John Street. CP 69. This allowed Colburn to see under the Bus and observe the oncoming southbound traffic traveling behind the Bus as he approached the intersection. CP 69. While approaching the intersection and still able to see under the Bus, Colburn saw three (3) cars traveling in the southbound

curbside lane and one (1) car, driven by Trees, travelling in the southbound inside lane approaching the intersection behind the Bus. CP 63-64, 69-70. Once Colburn reached the top of the slope at the intersection he could no longer see under the Bus. CP 69.

Trees had turned onto Twenty Third Avenue East from eastbound East Aloha Street, which is approximately 10 blocks north of East John Street. CP 81-82. Trees then traveled in the inside lane of Twenty Third Avenue East and maintained a speed of 35 to 40 mph. CP 80, 86.

As Trees approached the intersection at East John Street, he was directly behind the Bus, which partially obstructed his view of the intersection. CP 85-86, 89. Trees was aware there was northbound traffic passing through the intersection. CP 84. The Bus also partially obstructed the northbound traffics' view of the inside and curbside lanes of southbound Twenty Third Avenue East. CP 54-55.

Upon reaching the intersection, Colburn stopped at the green light, and waited for all oncoming traffic to clear the intersection before turning left onto westbound East John Street. CP 61, 69-70. Tricia Tuttle was also traveling on northbound Twenty Third Avenue East, and stopped her vehicle directly behind Colburn at the intersection as she also intended to turn left onto westbound East John Street. CP 54.

While stopped at the intersection, Colburn observed Trees continue to maintain travel in the inside lane behind the bus and reach close proximity to the bus, describing Trees's vehicle as coming "up right behind the bus, as if it was going to stop behind the bus." CP 73, 64-65. At no time did Colburn see Trees engage his turn signal or give any indication he intended to change lanes. CP 74. Based on Trees's actions, Colburn believed Trees would stay in the inside lane behind the Bus. CP 73, 74.

After all oncoming southbound traffic cleared the intersection, Colburn proceeded into the intersection and made sure the southbound curbside lane was clear of oncoming traffic before proceeding to execute a left turn. CP 65, 69-70, 54. At that time, Trees was still traveling in the inside southbound lane behind the Bus. CP 73. Once Colburn entered the intersection, the Bus obstructed his view of Trees. CP 74. With the curbside southbound lane clear, Colburn entered the intersection and committed to his left turn onto westbound East John Street. CP 73. Just after Colburn committed to executing his left turn, Trees abruptly changed lanes, moving from behind the Bus into the southbound curbside lane of Twenty Third Avenue East. CP 65, 69-70, 76.

Prior to the lane change, Trees maintained a speed of 35 to 40 mph in the southbound inside lane. CP 86. Trees engaged his right turn signal

when he was just 20 to 30 feet behind the stopped Bus, drove about 10 feet with his turn signal engaged, and entered the curbside lane when he was approximately 20 feet behind the Bus. CP 86. Trees stated he was 70 feet from the intersection when he moved into the curbside lane. CP 91. Trees also testified the bus would have obstructed northbound traffic's view of his turn signal by the time it was engaged. CP 93. Colburn had already committed to his left turn and began to cross into the southbound curbside lane when Trees abruptly changed lanes. CP 65. Therefore, Colburn was visible to Trees for approximately 70 feet before Trees entered the intersection.

As Trees passed the Bus, it obstructed much of his view of the intersection. CP 89, 85-86. Trees failed to reduce his speed of 35 to 40 mph prior to entering the intersection despite his obstructed view of the intersection, his awareness of northbound traffic passing through the intersection, and his view of Colburn after changing lanes. CP 91- 92. He stated at his deposition "[i]t was an open green light. I was going with the same speed I'd been going through on the block is basically with the flow of traffic, so no, It didn't occur to me to slow down." CP 91- 92. Trees assumed there were no pedestrians in the intersection because "it was a green light." CP 92. Instead Trees accelerated into the intersection. CP 91-92, 70.

Although Colburn had nearly completed his left turn onto East John Street, and would have been visible to Trees for at least 70 feet and several seconds before he entered the intersection, Trees failed to notice Colburn until the moment just prior to impact. CP 70, 55. Trees never engaged his brakes prior to impact, and took no action to avoid the collision until an instant before impact, when he abruptly veered right (west), the same direction Colburn was traveling, and collided with Colburn. CP 70, 55. Colburn was surprised Trees did not veer left (west), away from Colburn and attempt to avoid the collision, rather than steer directly into Colburn. CP 70. The impact moved Colburn's vehicle 5 feet. CP 90. Colburn's vehicle came to rest in the crosswalk on the west side of East John Street. CP 71, 55.

Tricia Tuttle witnessed the collisions and stated Trees was driving inattentively, noting 1) he failed to notice Colburn until the instant before impact even though he had nearly completed his left turn onto East John Street and would have been visible to Trees for several seconds before the collision, and 2) once Trees noticed Colburn, Trees panicked and abruptly veered to the right, the direction Colburn was traveling, steering into Colburn rather than veering left to avoid the collision. CP 54-55.

B. PROCEDURAL FACTS

On August 22, 2014, Colburn filed a Complaint for Personal Injuries and Damages against Trees. CP 1. On September 22, 2014, Respondent Trees filed his Answer. CP 7. On August 13, 2015, Trees moved for summary judgment. CP 12. Trees argued that because Colburn failed to yield the right of way while making a left turn in violation of RCW 46.61.185, Colburn could not establish Trees conduct was the proximate cause for his injuries, and the case should therefore be dismissed as a matter of law. CP 13. On September 16, 2015, Colburn filed his Opposition to Summary Judgment arguing that the Deception Doctrine was applicable and relieved Colburn of the duty to yield to oncoming traffic imposed by RCW 46.61.185, and could therefore pursue his claims based on Trees' negligence. CP 103, 109. On September 17, 2015, Trees moved to strike Colburn's Opposition to Summary Judgment as untimely. CP 103. On September 21, 2015 Trees filed his Reply Brief on Summary Judgment. CP 114. In his reply, Trees argued portions of Colburn's summary judgment response materials were inadmissible. CP 117.

At the September 25, 2015, summary judgment hearing, the court denied Tree's motion to strike. VR 4:22-25. During the hearing, the court acknowledged Trees' violation of traffic statutes, stating "Well, I think there is evidence that your client was speeding quite a bit over the speed

limit, and there is evidence that your -- that your client may have failed to signal sufficiently far in advance.” VR 8:24-9:2. The court went on to state “your client admitted in his deposition that he was driving 35 to 40 miles an hour. VR 9:13-14.

At the conclusion of the hearing, the court did not rule from the bench, and indicated it would issue an order shortly thereafter. VR 30:21-23. On November 9, 2015, the trial court issued its order granting summary judgment and dismissing the case. CP 149. The order contained no findings of fact, conclusions of law, or ruling on the admissibility of Colburn’s summary judgment response materials.

Billy Colburn now appeals the trial court’s ruling granting summary judgment and dismissing his claim against David Trees.

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE MATERIAL ISSUES OF FACT EXIST SUPPORTING TREES’ NEGLIGENCE.**

##### **Standard of Review for Summary Judgment**

An appellate court reviews summary judgment de novo and engages in the same inquiry as the trial court. *Heath v. Uraga*, 106 Wn. App. 506, 512, 24 P.3d 413 (2001). Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, show that there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the burden of proving there are no genuine issues of material fact. CR 56(c); *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 863, 147 P.3d 600 (2006).

In ruling on motion for summary judgment, court must consider all evidence and all reasonable inferences therefrom most favorable to nonmoving party, and if there is genuine issue as to any material fact, summary judgment cannot be granted. *Maki v. Aluminum Bldg. Products*, 73 Wn.2d 23, 26, 436 P.2d 186 (1968). Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper. Summary judgment is not well suited to actions where the central issues of fact focus on the negligence of a party or the reasonableness of his or her actions. *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). Even if the adverse party fails to contest the motion the court still must determine if the grant of summary judgment is legally “appropriate” before entering an order. *Gerrard v. Craig*, 67 Wn. App 394, 399, 836 P.2d 837 (1992) (over returned on other grounds).

The essential elements of a negligence action are (1) the existence of a duty to plaintiff; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury. *Hutchins v. 1001*

*Fourth Ave. Associates*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991), citing *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989); *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984). Proximate cause is usually a question for the jury, but it may be decided as a matter of law if the causal connection between the act and the injury is "so speculative and indirect that reasonable minds could not differ." *Cho v. City of Seattle*, 185 Wn. App. 10, 341, (2014)(citing *Moore v. Hagge*, 158 Wn. App. 137, 48, 241 P.3d 787 (2010)). "The cause of [the] accident [is] speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another." *Moore*, 158 Wn. App. at 148 (internal quotation marks omitted).

As discussed in depth below, there is an abundance of evidence in the record that Trees' negligence caused the accident. This raises clear issues of material fact making summary judgment entirely inappropriate in this case.

**B. TREES LOST FAVORED DRIVER STATUS UNDER THE DECEPTION DOCTRINE AND THERE IS AN ABUNDANCE OF EVIDENCE HIS NEGLIGENCE CAUSED THE ACCIDENT.**

Under Washington law, all drivers possess a duty to exercise ordinary care while operating a motor vehicle. *Robison v. Simard*, 57 Wn.2d 850, 851, 360 P.2d 153 (1961). A statute may also impose a duty additional to the duty to exercise ordinary care, the violation of which

constitutes negligence. *Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431 (1996).

It is the duty of every person using the public streets to exercise care to avoid a collision. WPI 70.01; *Bennett v. Karnowsky*, 24 Wn.2d 487, 491, 166 P.2d 192 (1946)(“All rights of way are relative, and the duty to avoid accidents or collisions at street intersections rests upon both drivers.”). Both drivers and pedestrians must exercise a degree of care which a reasonably prudent person would exercise under the same or similar circumstances even though they may have the right of way or be the favored driver. *Robison v. Simard*, 57 Wn.2d 850, 360 P.3d 153 (1961); *Hanson v. Anderson*, 53 Wn.2d 601, 335 P.2d 581 (1959); WPI 70.01.

Moreover, the favored driver is only entitled to assume the right of way will be yielded until he knows or should know in the exercise of reasonable care that the disfavored driver will not yield. Once that is apparent, the favored driver is allowed a reasonable amount of time to react. *Grobe v. Valley Garbage Service*, 87 Wn.2d 217, 551 P.2d 748 (1976). If he fails to do so, and a collision occurs, he may be found at fault. *Jones v. Widing*, 7 Wn. App. 390, 499 P.2d 209 (1943).

RCW 46.61.185, provides that "the driver of a vehicle intending to turn left within an intersection... 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." Ordinarily, under the statute, the left turning "disfavored driver," has a duty to yield the right-of-way to the oncoming "favored driver." *See* WPI 70.02.01; *Mossman v. Rowley*, 154 Wn. App. 735, 741, 229 P.3d 812 (2009). However, under the Deception Doctrine, the additional duty imposed by RCW 46.61.185 on "disfavored drivers" to yield the right-of-way to approaching vehicles is relieved when certain conditions are met. The Washington Pattern Jury Instruction addressing the Deception Doctrine provides the following:

The right of way statute does not apply where:

- (1) the driver who had the right of way wrongfully, negligently, or unlawfully operated his or her vehicle in a manner that would deceive a reasonably careful driver who did not have the right of way so as to cause that driver to proceed on the assumption that there was a fair margin of safety; and
- (2) the driver who did not have the right of way was in fact so deceived."

WPI 70.02.06.

The Deception Doctrine 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, 952-3, 682 P.2d 949 (1984). As such, the doctrine is applicable where the favored driver has by some wrongful driving conduct

deceived a reasonably prudent disfavored driver into believing that he or she can make a left turn with a fair margin of safety. *Chapman v. Claxton*, 6 Wn. App. 852, 856, 497 P.2d 192 (1972); *Oliver v. Harvey*, 31 Wn. App. 279, 282, 640 P.2d 1087 (1982). If the favored vehicle in an intersection is negligent or is unlawfully operated as to deceive the disfavored driver on the left to warrant the assumption that has the right to proceed, the favored driver's right-of-way does not apply. *Key v. Reiswig*, 55 Wn.2d 512, 348 P.2d 410 (1960).

Thus the disfavored driver will be excused from his or her duty to yield the right of way if the driver is deceived by the action of the favored driver. For the deception doctrine to properly apply, however, the deception 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." *Mondor v. Rhoades*, 63 Wn.2d 159, 385 P.2d 702 (1960). *See also*, *State v. Souther*, 100 Wn. App. 701, 998 P.2d 350 (2000); *Gray v. Pistorresi*, 64 Wn.2d 106, 110, 390 P.2d 697 (1964).

The Deception Doctrine is generally applied in two (2) situations. The first is when the disfavored driver *sees* the favored vehicle, but is misled by the actions of that driver into thinking it is safe to proceed. The second is when the disfavored driver is deceived by a "clear stretch of the

road.” *Oliver v. Harvey*, 31 Wn. App. 297, 640 P.2d 1087 (1982). The facts in this case are sufficient to establish satisfy either the “Clear Stretch of Road” test or the “Deception” test.

Once the Deception Doctrine requirements are satisfied and the disfavored driver is excused from his duty to yield the right of way, the once favored driver can be held liable for the harm his negligent acts caused. To interpret the Deception Doctrine’s effect on RCW 46.61.185 otherwise, would effectively discharge a favored driver of the duty to exercise ordinary when encountering a disfavored driver in an intersection and create immunity for even the most egregious driving violations committed by a favored driver.

**1. The “Clear Stretch of Road” Requirements are Satisfied Removing Trees’ Favored Driver Status.**

The “Clear Stretch of Road Rule” rule applies when the disfavored driver carefully looked from a point where oncoming traffic should be visible and could not see a negligently operated favored vehicle because of physical obstruction on the roadway. To prevail, a disfavored driver must establish entrapment by showing *both* that the favored driver was concealed by an obstruction, and that the favored driver was negligent.

*Ward v. Zeugrer*, 64 Wn.2d 570, 392 P.2d 811 (1964); *Watts v. Dietrich*, 1

Wn. App. 141, 460 P.2d 298 (1969); *Oliver v. Harvey*, 31 Wn. App. 279, 640; and, *Hammel v. Rife*, 37 Wn. App. 577, 952-3, 682 P.2d 949 (1984).

**a. The Metro Bus Obstructed Appellant's View of Respondent Satisfying the Obstruction Prong of the Clear Stretch of Road Test.**

It is uncontested that the Bus stopped at the intersection in the inside southbound lane of Twenty Third Avenue East, waiting to turn left onto eastbound E. John Street, and obstructed both Colburn and Trees's view of the intersection. Moreover, Trees acknowledged that because he was only 20 to 30 feet from the Bus at the time he engaged his right turn signal, and only 20 feet from the Bus when he began his lane change, the Bus obscured northbound traffics' view of the signal. Therefore Colburn had no indication Trees intended to enter the curbside lane and proceed through the intersection. Moreover, Colburn carefully verified that the southbound curbside lane was clear of traffic before executing his turn, and at that time the Bus obstructed Colburn's view of Trees who was still behind the Bus. The Bus clearly constituted a "physical obstruction on the roadway" satisfying the first prong of the "Clear Stretch of Road Rule" rule.

In addition, Trees committed multiple traffic violations immediately preceding the collision, establishing his negligence and satisfying the second prong of the "Clear Stretch of Road Rule."

**b. Trees Violated Multiple Traffic Statutes Satisfying the Negligence Prong of the Clear Stretch of Road Test.**

- i. Trees violated RCW 46.61.400 and SMC 11.52.040 by exceeding the speed limit.

Pursuant to RCW 46.61.400 and SMC 11.52.040, it is unlawful to operate a vehicle at a speed in excess of the posted speed limit. The posted speed limit at the intersection was 20 miles per hour. CP 97; CP 101-102. Trees admitted he exceeded the speed limit by maintaining a speed of 40 miles per hour while driving southbound on Twenty Third Avenue East. Even if evidence of the posted speed limit was not considered, SMC 11.52.080 sets the maximum speed limit on all Seattle's arterial streets at thirty (30) miles per hour. Trees admitted to violating SMC 11.52.080 as a matter of law by driving 35 to 40 miles per hour when he entered the intersection.

Under RCW 5.40.050, any breach of a duty imposed by statute, ordinance, or administrative rule may be considered by the trier of fact as evidence of negligence. While speed alone may not be sufficient to meet the requirements of the Deception Doctrine, it is evidence of Trees' negligence for purposes of the "Clear Stretch of Road" test and there is substantial additional evidence, including Trees' admissions, that he violated numerous other traffic statutes in the moments preceding the collision.

- ii. Trees violated RCW 46.61.400(3) and SMC 11.52.020 by failing to appropriately reduce his speed prior to entering a blind intersection.

Trees' speeding, failure to reduce speed before entering the intersection, and complete failure to engage his brakes prior to the collision establish his negligence and satisfy the negligence prong of the "Clear Stretch of Road Rule."

RCW 46.61.400(3) provides that drivers shall drive at an appropriate reduced speed in the following circumstances: (1) when approaching and crossing an intersection or railway grade crossings, (2) when approaching or rounding a curve, (3) when approaching a hill crest, (4) when traveling upon narrow or winding roadways, or (5) when special hazards exist with respect to pedestrians, traffic or weather. SMC 11.52.020 imposes a nearly identical duty on drivers.

Reduced speeds have been required where a driver's vision is obstructed or limited. *See, Mina v. Boise Cascade Corp.*, 37 Wn. App. 445, 681 P.2d 880, aff'd 104 Wn.2d 696, 710 P.2d 184 (1984) and *Pidduck v. Henson*, 2 Wn. App. 204, 467 P.2d 322 (1970). For example, in *Benedict v. Hines*, 110 Wash. 338, 188 Pac. 512 (1920), a driver approaching railroad tracks who failed to reduce his speed even though visibility was obstructed by boxcars was found contributorily negligent as a matter of law.

In *Hough v. Ballard*, 108 Wn. App. 272, 285, 31 P.3d 6 (2001), the court held that the defendant driver should have reduced his speed below the posted speed limit where the overhead traffic signals were inoperable and the defendant knew there was a power outage in the area. In *Hough*, the court outlined the analysis undertaken in determining whether a special hazard exists requiring reduced speed:

When there is conflicting evidence as to the proper speed on an approach to an intersection, it is for the jury to decide (a) what was a reasonable speed under all of the circumstances, (b) was that speed exceeded by the approaching driver, and (c) if so, was the speed a proximate cause of the accident. *Bohnsack v. Kirkham*, 72 Wn.2d 183, 432 P.2d 554 (1967); *Thompson v. Seattle*, 42 Wn.2d 53, 253 P.2d 625 (1953). The operator of a motor vehicle is required to drive at a speed that allows him to observe the roadway ahead and be able to take appropriate action in the event that hazards appear in his path. *James v. Edwards*, 68 Wn.2d 194, 412 P.2d 123 (1966). Whether a person has driven at a reasonable speed under the existing circumstances and conditions is for the jury. *Wolff v. Coast Engine Prods., Inc.*, 72 Wn.2d 226, 432 P.2d 562 (1967); *Ashley v. Ensley*, 44 Wn.2d 74, 265 P.2d 829 (1954); *Pancoast v. McLean*, 6 Wn. App. 592, 494 P.2d 1374 (1972). In addition, where two vehicles have simultaneously approached an intersection, the jury has the duty of deciding whether the disfavored driver was deceived by excess speed on the part of the favored driver or the favored driver's operation of his vehicle....

*Id.* at 285, citing *Harris v. Burnett*, 12 Wn. App. 833, 836-37, 532 P.2d 1165 (1975).

Trees admitted that he did not reduce his speed of 35 to 40 miles per hour prior to entering the intersection at East John Street, despite the fact that the Bus obstructed his view of the intersection. CP 91- 92. Even if Trees had not been exceeding the posted speed limit by 15 to 20 miles per hour when he entered the intersection, under RCW 46.61.400, he was required to drive at an appropriate reduced speed when approaching and crossing the intersection. This is especially true where the Bus substantially obstructed his visibility of the intersection. His failure to reduce his speed not only establishes he violated RCW 46.61.400(3) and SMC 11.52.020 and is evidence of his negligence, it also demonstrates he was driving inattentively and breached his statutory duty to exercise due care and caution while operating a motor vehicle.

- iii. Trees violated RCW 46.61.305 by failing to properly signal prior to changing lanes and entering the intersection.

Vehicles changing lanes are required to signal their intention prior to executing a lane change. Pursuant to RCW 46.61.305, a driver must engage a turn signal continuously for not less than the last 100 feet traveled by the vehicle before turning; and no turn shall be made unless it can be accomplished with reasonable safety, and then only after giving the appropriate signal. RCW 46.61.305(1) and (2); *Smith v. Foure*, 71 Wn. App. 304, 858 P.2d 276 (1993). However, signaling does not relieve a

driver of the responsibility to observe traffic in the lane they seek to enter. *Ashcraft v. Wallingford*, 17 Wn. App. 853, 565 P.2d 1224 (1977); RCW 46.61.140.

In *Harris v. Fiore*, 70 Wn.2d 357, 423 P.2d 63 (1967), the Court held the operator of a vehicle was negligent when he attempted to change lanes to the curb lane without signaling and collided with a vehicle entering the arterial from a side street. In *Harris*, the disfavored driver determined no vehicle was approaching in the curb lane into which he was about to enter prior to entering the arterial. *Id.* at 361. Although the disfavored driver saw headlights of vehicles approaching in the center lane, none of the drivers traveling in the center lane were indicating an intention to change to the curb lane. *Id.* The court found the Deception Doctrine applicable because the favored driver failed to indicate her intention to change her lane of travel from the center to the curb lane, in violation of the lane change statute. *Id.*

The facts in this case are similar to *Harris*. Trees, the favored driver, violated RCW 46.61.305 by engaging his turn signal continuously for only 10 feet before moving into the curbside lane. Colburn, the disfavored driver, carefully checked for oncoming traffic, determined traffic in the oncoming curbside lane had cleared and it was safe to proceed before crossing into the southbound curbside lane. Trees's

violation of RCW 46.61.305, deceived Colburn into the reasonable belief that Trees intended to stay behind the Bus in the inside southbound lane, and that oncoming traffic had cleared allowing Colburn to safely execute a left turn. CP 73. However, Trees abruptly changed lanes after Colburn had committed to his left turn and proceeded to accelerate into the intersection causing the accident.

If Trees had complied with the statute, he would have engaged his turn signal no less than 120 feet behind the Bus and put Colburn on notice of the intended lane change. Trees testified he saw the bus from a block away, thus he had ample time to make a lawful lane change. Trees' admitted violation of RCW 46.61.305 is evidence of his negligence, and satisfies the negligence prong of the "Clear Stretch of Road" test.

- iv. Trees violated RCW 46.61.140(1) by failing to safely change lanes.

No person shall turn a vehicle or more right or left upon a roadway until such movement can be made with reasonable safety. RCW 46.61.305; *Ashcraft v. Wallingford*, 17 Wn. App. 853, 565 P.2d 1224 (1977), remanded, adhered to, 579 P.2d 384, review denied. RCW 46.61.140(1) similarly provides that a "vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Trees testified he was driving 35 to 40 miles per hour, signaled his lane change when he was 30 feet behind the bus, and began his lane change when 20 feet behind the bus. At a speed of 35 miles per hour, Trees would have been traveling approximately 51 feet per second. Therefor Trees signaled his lane change approximately .6 seconds before he would have collided with the Bus and did not start his lane change until approximately .4 seconds before he would have collided with the Bus, thus according to Trees' own testimony, he changed lanes a split second before nearly rear-ending the Bus.

Trees's speeding, failure to properly engage his turn signal, and near collision with the Bus establish his lane change prior to entering the intersection was unsafe, in violation of RCW 46.61.305 and RCW 46.61.140(1), and evidence of his negligence.

v. Trees violated RCW 46.20.010 and SMC 11.58.008 by driving inattentively.

RCW 46.20.010 prohibits any person from operating a motor vehicle in an inattentive manner, and defines "inattentive" as: "a negligent lack of attentiveness to conditions, circumstances, and one's duties required to safely operate a motor vehicle." RCW 46.20.010 (A)&(B). It further defines "Conditions" as including, but are not limited to, "the nature and condition of the roadway, presence of other traffic, presence of pedestrians and weather conditions." RCW 46.20.010(B). SMC

11.58.008 similarly prohibits inattentive driving and provides “[n]o person shall operate a vehicle in an inattentive manner over and along the streets, alleys or ways open to the public of this City,” and defines “inattentive manner” as “a manner so as to fail to maintain a careful lookout for persons or property in the direction of travel.” SMC 11.58.008(A).

Both Colburn and Tricia Tuttle described Trees as driving inattentively, as evidenced by Trees’ 1) failure to reduce his speed before the collision, 2) failure to notice Colburn until the moment before impact, 3) complete failure to engage his breaks before the collision, 4) abrupt veering to the right just before impact, steering into rather than away from Colburn, and 5) failure to take any earlier action to avoid the collision despite Colburn being visible for several seconds and a minimum of 70 feet prior to Trees entering the intersection.

In addition, Trees’ failure to signal or begin a lane change until less than a second before colliding with the Bus is further evidence of his inattentive driving.

Trees’s driving violated no less than eight (8) traffic statutes and municipal codes. Those violations are clear evidence of his negligence and satisfy the second prong of under the “Clear Stretch of Road” Rule. Because both the “obstruction” and “negligence” prongs were satisfied, Colburn was excused from his or her duty to yield the right under RCW

46.61.185, and he entitled to pursue the recovery of damages caused by Trees' negligence.

**2. Trees Unlawful Driving Deceived Appellant Into Believing He Could Safely Turn Left, Satisfying the "Deception" Test.**

For the Deception Test to apply, the disfavored driver must *see* the favored vehicle. One cannot be deceived by that which he does not see. *Kerlik v. Jerke*, 56 Wn.2d 575, 354 P.2d 702 (1960). The disfavored driver's view of the favored car must also occur sooner than an instant before the collision, or there is no deception. *Tobias v. Rainwater*, 71 Wn.2d 845, 431 P.2d 156 (1967). The rule also does not apply when the disfavored driver looked but did not see a favored vehicle that was "obviously there to be seen." *Bockstruck v. Jones*, 60 Wn.2d 679, 682, 374 P.2d 996 (1962).

The deception rule may be applied in many circumstances: when the disfavored driver could have reasonably concluded that the favored driver was not speeding and that there was a fair margin of safety, *Mendelsohn v. Anderson*, 26 Wn. App. 933, 614 P.2d 693 (1980); when the favored driver was driving without lights in the fog, *Oliver v. Harvey*, 31 Wn. App. 279; or when the favored driver increased their speed after being seen by the disfavored driver, *Axness v. Edwards*, 9 Wn. App. 780, 551 P.2d 174 (1973).

Colburn was entitled to expect other drivers to obey the law: “A person using the highway is entitled to assume that other persons thereon will obey the traffic laws and he has the right to proceed upon such an assumption until he knows, or in the exercise of reasonable care should know, to the contrary. *Poston v. Mathers*, 77 Wn.2d 329, 335, 462 P.2d 222, 226 (Wn. 1969) (citing *Petersavage v. Bock*, 72 Wn.2d 1, 431 P.2d 603 (1967)).

As Colburn approached the intersection of E. John Street and could still see under the Bus, he saw Trees’s vehicle in the southbound inside lane approaching the stopped Bus. Trees gave no indication he intended to change lanes and proceed through the intersection. Colburn reasonably concluded Trees would comply the law, not make an unlawful lane change or fail to signal until he was only 20 to 30 feet behind the Bus. Trees’s actions deceived Colburn into believing there was a fair margin of safety to complete his left turn. As previously mentioned, Trees violated RCW 46.61.305 by engaging his turn signal for only 10 feet before changing into the curbside lane, rather than 100 feet as required by the statute, that violation resulted in the Bus obscuring Trees’ turn signal from Colburn’s view. Similar to the favored driver in *Harris v. Fiore*, Trees’ actions were thus tantamount to an entrapment. Moreover, by exceeding the posted

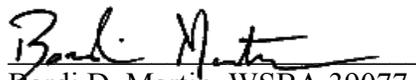
speed limit, Trees compounded the effect of the late turn signal by reducing the time between the lane change and collision.

If Trees had complied with the traffic law, he would have engaged his left turn signal at least 140 feet from the intersection, which would have alerted Colburn before he entered the intersection that additional oncoming traffic needed to pass before he could safely execute his left turn. Instead, Trees' violation of RCW 46.61.305, speeding, failure to appropriately reduce speed before entering the intersection, and inattentive driving combined to deceive Colburn into believing he could turn left into the intersection with a fair margin of safety. Consequently, Trees' favored driver status is eliminated under the Deception Rule and Colburn is entitled to seek recovery for damages caused by Trees' negligence.

#### IV. CONCLUSION

For the foregoing reasons, Mr. Colburn respectfully requests this Court reverse the trial court's order granting summary judgment and remand for trial.

Respectfully submitted this 9<sup>th</sup> day of May, 2016.

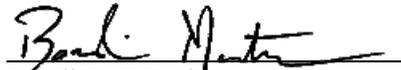


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**CERTIFICATE OF SERVICE**

I certify that I caused a true and correct copy of Appellant's  
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