

74638-3

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NO. 74638-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MITCHELL KANE,

Appellant

v.

BETHANY COMMUNITY CHURCH,

Respondent.

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON

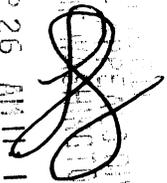


TABLE OF CONTENTS

	Page
I. Bethany Relies On Proximate Cause Authorities That Do Not Apply _____	1
II. Bethany's Evidence Does Not Prove As A Matter Law, That The Stop Sign Was Irrelevant _____	5
III. Obstruction of Stop Sign Not Excused By Fault Of Approaching Driver _____	6
IV. Nuisance Amendment _____	8
A. Impact On Evidence And Jury Instructions _____	8
B. Court Rules Do Not Prevent Pleading The Nuisance Claim _____	9
V. Conclusion _____	10

TABLE OF AUTHORITIES

<u>Citations</u>	<u>Page</u>
<i>Cho v. City of Seattle</i> , 185 Wn. App. 10 (2014) _____	3
<i>Johanson v. King County</i> , 7 Wn.2d 111 (1941) _____	2
<i>Kristjanson v. Seattle</i> , 25 Wn. App. 324 (1980) _____	2
<i>Little v. Countywide Homes</i> , 132 Wn. App. 777 (2006) _____	1
<i>Unger v. Cauchon</i> , 118 Wn. App. 165 2003 _____	6
<i>Watson v. Emard</i> , 165 Wn. App. 694 (2011) _____	10
<i>Wilson v. Steinbach</i> , 98 Wn,2d 434 (1982) _____	5
 <u>Other Authorities</u>	
CR 8 _____	9
RCW 7.48.120 _____	8
WPI 60.01 _____	9
WPI 60.03 _____	8

I. BETHANY RELIES ON PROXIMATE CAUSE AUTHORITIES THAT DO NOT APPLY

Bethany relies on the following 4 cases to argue that, as a matter of law, obstructing the view of the stop sign could not be a proximate cause of Hilton's failure to stop. As discussed below, none of these cases apply.

1. *Little v. Countywide Homes*, 132 Wn. App. 777 (2006).

Jared Little was injured while installing gutters on a house... Jared and Kenny [his brother] were finishing work on a house... when he [Kenny] heard Jared call him. Kenny could not see Jared, but when he went to investigate, he found Jared on the ground trying to stand up. Jared's ladder was on the ground. Jared seemed disoriented and did not know what happened... Little, however, has no memory of the accident and no one else witnessed it. Because he could offer only a theory as to the cause of his injuries, he could not establish proximate cause and could not withstand summary judgment... Little could not prove breach of duty and/or proximate cause because neither Little, nor anyone else, knew how he was injured. The trial court [correctly] granted the motion.

p. 788

The *Little* opinion was based on facts very different than the present case. Here, we know that an intoxicated driver failed to observe a stop sign that was unlawfully obscured by branches of Bethany's tree. The *Little* case does not apply.

2. *Johanson v. King County*, 7 Wn.2d 111 (1941).

Plaintiff claimed an old yellow lane marker leading to a newly widened roadway confused a driver that turned into an oncoming car. The court said:

“There is no testimony that, at any time, the Rian car was nearer to the yellow line than as hereinbefore indicated [420 feet], until it suddenly pulled out of the line of traffic into lane 2, and collided with the Tholstrup car. To say that the act of Rian in pulling out into lane 2 was in any way connected with or induced by the location of the yellow line, would, in our opinion, be to indulge in the rankest speculation.”

p. 121

In contrast to the *Johanson* case there is no speculation that the stop sign posted at the edge of the intersection was obscured. The *Johanson* speculation analysis does not apply to the present case.

3. *Kristjanson v. Seattle*, 25 Wn App. 324 (1980). The Court said:

The accident took place... on a curve on Golden Gardens Drive N.W., a steep, sharply curving, 2-lane road through a wooded area... Kristjanson was proceeding downhill at 17 m.p.h.; Tolliver was going uphill at 54 m.p.h. at the time of impact and had crossed over the roadway's center line when the cars were about one length apart. Tolliver had stopped at the bottom of the hill and offered transportation to two unidentified hitchhikers who had seated themselves on the front passenger seat and on

the center console of his car. As they proceeded up the hill, one of the passengers steered while Tolliver operated the gas and brake pedals. As Tolliver increased the speed of his car, the passengers yelled at him to slow down, but he instead accelerated. Despite a warning from one of the passengers to “look out,” Tolliver did not see Kristjanson’s car until after impact. Approximately 45 minutes after the collision, Tolliver had a .21 Breathalyzer reading... a curve warning sign, which faced [Tolliver], was partially obscured by foliage and an advisory speed sign, which faced [Tolliver], was totally obscured by foliage... [But] “[Tolliver] was very familiar with the road because he had driven on the road almost every day, and he knew the curves and the approximate speed limits.” The trial judge ... concluded that the sole proximate cause of the collision “was [Tolliver’s] incredibly reckless driving.” We agree.

pp. 325, 326

The extreme circumstances of the *Kristjanson* case do not support Bethany’s argument that its unlawful foliage could not, as a matter of law, have been one of the causes of Mr. Hilton’s failure to observe the stop sign.

4. *Cho v. City of Seattle*, 185 Wn. App. 10 (2014).

Ms. Mars stated: “I was drinking to excess and was not focusing on my driving and failed to slow down while approaching an intersection with a large group of pedestrians and ignored the waving of a construction worker.” Mars had a blood-alcohol level of 0.29, three and a half times the legal limit.”... I was drinking to excess

and was not focusing on my driving and failed to slow while approaching an intersection with a large group of pedestrians and ignored the waving of a construction worker... The City contends that its failure to install a light, a pedestrian crossing, or an island did not proximately cause the accident... She stated she was crying and constantly drying her face because of the tears. She was “surprised [she] even saw the road through all the tears and the headache.” She stated that she “was not in any shape [and] never should have got[ten] behind the wheel... Mars further stated that before the point of impact, she was yelling at the front seat passenger and was not looking ahead or paying attention.

pp. 12-15

Summary Judgment was affirmed because, given the circumstances of the case, it would require speculation to find that lack of a traffic island or pedestrian signal was a proximate cause of the accident.

The *Cho* case deals with a driver who was totally out of control. To the contrary, it is not beyond reason to conclude that Mr. Hilton probably would have responded to the stop sign had it been visible as required.

II. BETHANY'S EVIDENCE DOES NOT PROVE, AS A MATTER OF LAW, THAT THE STOP SIGN WAS IRRELEVANT

Bethany twice argues that obstruction of the stop sign could not be one of the proximate causes of harm because “the trial court correctly concluded Bethany did not owe Kane a duty to protect him against a drunk speeding driver” (Brief of Respondent at pp. 13 & 20). Though this citation to the trial court’s comment may be irrelevant to the appellate court’s *de novo* review of a summary judgment, it may cast light on the trial court’s error.

First of all, the most favorable “speeding” evidence was 5 m.p.h. over the posted limit. Further, there was *no* evidence that Mr. Hilton was intoxicated to the degree that he would not respond to a legally displayed stop sign. There is insufficient evidence to hold *as a matter of law* that a “speeding drunk” driver was the *sole* proximate cause of this accident.

It is undisputed that Mr. Hilton’s blood alcohol level was .11 g/100 mL.¹ Importantly, this does not establish the *degree of impairment*. “A person’s sobriety must be judged by the way she appeared to those around her, not by what a blood alcohol test may subsequently reveal. *Wilson v. Steinbach*, 98 Wn,2d 434 (1982).

¹ Mistakenly over quoted as .12 g/100mL in Brief of Respondent

Some of the evidence (both direct and circumstantial) that Mr. Hilton probably would have responded to a properly displayed stop sign is listed in Appellant's Brief at pp. 14 & 15.

Bethany's argument that the sole cause of the accident was a "drunk speeding driver" is unsupported by evidence capable of sustaining a summary judgment.

III. OBSTRUCTION OF STOP SIGN NOT EXCUSED BY FAULT OF APPROACHING DRIVER

Unger v. Cauchon, 118 Wn. App. 165 (2003), is a good example of the rule that the duty to make the road safe is not necessarily excused by a driver's own negligence.

Unger died in a single car accident when his vehicle went off a Camano Island roadway that was reported to have loose gravel, mud and debris at the time of the accident. Unger had been trying to elude another driver in a contest that:

...lasted about 30 minutes and involved high rates of speed, swerving, crossing center lines, and turning headlights on and off. The weather that evening was severe. It was raining and reports indicated alert conditions for slides as arising temperatures melted heavy snowfall.

p. 68

...
It is undisputed that up to one quarter mile from the accident site, which is where the chase ended

and the last time anyone saw Unger, he was driving in excess of 70 m.p.h. where the posted speed was between 35 m.p.h. and 50 m.p.h., and he was driving with his headlights off.

Footnote p. 20

...

The trial court granted Island County's motion for summary judgment, concluding that the defendant was driving recklessly and "the county had no duty to foresee and protect [the decedent] against his extreme reckless driving.

p. 190

On appeal the Unger court held:

Accordingly, the trial court erred in this case by concluding that because Unger was driving recklessly, the County owed him no duty as a matter of law. Although the jury instruction approved in Keller does not say so, we read the opinion to require the court to determine, or properly instruct a jury to determine, that a municipality's duty is independent of the plaintiff's negligence. Thus, the County owed Unger a duty, regardless of his allegedly negligent conduct, to make the road safe for ordinary travel. It is for the jury to decide whether the County's construction or maintenance of Camano Hill Road created a condition that was unsafe for ordinary travel and whether the condition of the road contributed to Unger's accident and death. Genuine issues of material fact exist about the proximate cause of Unger's death, which makes summary judgment improper.

Like the County, Bethany likewise violated its critical duty to keep the road safe. A question of fact exists about whether that violation was one of the proximate causes of Mr. Kane's injuries.

IV. NUISANCE AMENDMENT

1. Impact On Evidence And Jury Instructions.

The nuisance claim amendment is not just listed to restate a negligence claim.

For the purposes of the summary judgment under review, Bethany has not challenged the claim that it negligently obstructed the view of the stop sign. However, Bethany's pleadings continue to deny it was negligent. Therefore, plaintiff will be required to present evidence of Bethany's negligence at trial.

Plaintiff's evidence is sufficient to prove a statutory nuisance.

RCW 7.48.120 Nuisance defined.

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act ... render[s] dangerous for passage, any street or highway...

Plaintiff has a right to a jury instruction that violation of the nuisance statute is "evidence of negligence." (WPI 60.03). He also

has a right to an instruction that sets forth the statute defining nuisance. (WPI 60.01)

Plaintiff cannot collect twice for the same harm, and the jury can be so instructed. However, for pleading purposes he should not be denied a statement of his statutory cause of action for nuisance.

2. Court Rules Do Not Prevent Pleading The Nuisance Claim.

Alternative claims are specifically allowed.

CR 8 includes the following:

*(e) Pleading to Be Concise and Direct;
Consistency.*

...

(2) A Party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in rule 11.

Plaintiff should be allowed to include his statutory nuisance claim in his pleadings. Jury instructions and interrogatories can prevent any possibility of double recovery or prejudice to Bethany. Trial Court's denial was not supported by findings.

The trial court failed to state any reason for denial of the Motion to Amend Complaint. An explanation is required.

The leave sought should, as the rules require, be “freely given.” Although the grant or denial of a leave to amend is within the trial court’s discretion, outright refusal to grant the leave without any justification of reason is not an exercise of discretion; it is an abuse of that discretion.

Watson v. Emard, 165 Wn. App. 694, 702-703, (2011) (emphasis supplied)

The Order Denying Plaintiff’s Motion to Amend should be set-aside on remand.

V. CONCLUSION

The Summary Judgment Order should not stand given issues of fact on the degree and effect of the visual obstruction of the stop sign and the degree of the effect of alcohol on the driver that failed to stop for that sign.

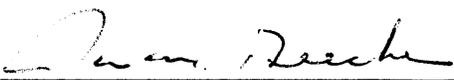
The Order denying amendment of the complaint neglected to provide the basis for the order and should be reversed.

Dated this 26th day of September 2016.

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CERTIFICATE OF SERVICE

Linda Voss, declares under penalty of perjury, that on date noted below, she caused to be delivered a copy of Appellant's Reply Brief via Email and ABC Legal Services to:

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Signed in Seattle, WA this 26th day of September 2016.



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