

**COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION TWO**

Helen Mathioudakis, Appellant,

v.

Christina Fleming, Respondent

FILED
APR 11 2016
COURT OF APPEALS

BRIEF OF APPELLANT

**Thomas A. Brown
WSBA #4160
Attorney for Appellant
Brown Lewis Janhunen & Spencer
Bank of America Building
Suite 501
Post Office Box 1806
Aberdeen, Washington 98520
Telephone 360-532-1960**

Am 11-28-06

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 4

Assignments of Error 4

No. 1 4

No. 2 4

No. 3 4

No. 4 4

Issues Pertaining to Assignments of Error 5

No. 1 5

No. 2 5

No. 3 5

B. STATEMENT OF THE CASE 6

C. SUMMARY OF ARGUMENT 13

D. ARGUMENT 13

E. CONCLUSION 25

TABLE OF AUTHORITIES

Table of Cases

<i>Danley v. Cooper</i> , 62 Wn.2d 179, 381 P.2d 747 (1963)	22
<i>Fisher v. Allstate Insurance Company</i> , 136 Wn.2d 240, 961 P.2d 350 (1998)	14,15,16,17,18,19
<i>Hester v. Watson</i> , 74 Wn.2d 924, 448 P.2d 320 (1968)	22
<i>Baxter v. Greyhound Corp.</i> , 65 Wn.2d 421, 397 P.2d 857 (1964)	23
<i>Hough v. Ballard</i> , 108 Wn.App. 272, 31 P.3d 6 (2001)	22
<i>Lenzi v. Redland Insurance Company</i> , 140 Wn.2d 267, 996 P.2d 603 (2000)	13,14,15,17,18,19
<i>Meredith v. Hanson</i> , 40 Wn.App.170, 697 P.2d 602 (1985)	22
<i>Rumford v. Snider</i> , 31 Wn.2d 431, 197 P.2d 446 (1948)	22
<i>Talley v. Fournier</i> , 3 Wn.App. 808, 479 P.2d 96 (1970)	22
<i>Woods v. Goodson</i> , 55 Wn.2d 687, 349 P.2d 731 (1960)	23

A. ASSIGNMENTS OF ERROR

Assignments of Error

Assignment of Error No. 1. The Trial Court erred by failing to grant the Plaintiff's/Appellant's MOTION FOR CLAIM PRECLUSION, pursuant to *Lenzi v. Redland Insurance Company*, 140 Wn.2d 267, 996 P.2d 603 (2000)

Assignment of Error No. 2. The Trial Court erred by failing to grant the Plaintiff's/Appellant's MOTION FOR SUMMARY JUDGMENT on the question of the negligence of the Defendant/Respondent Christina Fleming.

Assignment of Error No. 3. The Trial Court erred by failing to grant the Plaintiff's/Appellant's MOTION FOR DIRECTED VERDICT on the question of the negligence of the Defendant/Respondent Christina Fleming.

Assignment of Error No. 4. The Trial Court erred by allowing the question of the negligence of the Defendant/Respondent Christina Fleming to go to the jury.

Issues Pertaining to Assignments of Error

No. 1. Should the “Finney-Fisher Rule” be adopted for situations that are the “mirror-image” of the situations where the rule applies?

No. 2. Should the “Finney-Fisher Rule” be adopted for the situation in this case, where wildly inconsistent results occurred after the Trial Court refused to invoke the rule?

No. 3. Should the Trial Court, either on Summary Judgment or at the time of trial, have ruled on the primary negligence of the Defendant/Respondent as a matter of law, and taken that narrow issue from the jury?

B. STATEMENT OF THE CASE

This lawsuit arises out of an automobile collision that occurred in November of 2001.

On November 14, 2001, Helen Mathioudakis and her husband George Belesiotis drove from Westport to Ocean Shores to meet some friends and have dinner. During the three hours that they were there, they ate dinner and visited with their friends. Neither one of them had anything alcoholic to drink. RP 29-32; RP 135-136.

At about 1:30 a.m., they bid their friends goodbye, and got in their car to drive back to Westport. RP 32-33.

In driving back to Westport, they got on the main highway, SR 109, and headed generally eastbound towards Aberdeen. George Belesiotis was driving. RP 33.

It was very windy out, so he was not driving the speed limit of 55 mph, but was driving closer to 50 mph. As they proceeded along the roadway, a car passed them going the other direction. George had his headlights on low beam because of this car. The combination of the low beam setting and the lights of the other car affected his vision briefly. Immediately after the car passed, George saw that there was something in the roadway. He applied his brakes immediately, and brought his car to a stop in time to avoid smashing into a huge tree that was lying across the roadway. As they stopped, one of the branches of the tree sticking out struck one of the headlights of their vehicle and cracked the lens. RP 34-36; RP 137-138.

George backed up a little bit and got out to examine the car and saw that one of the headlights was cracked, but the light was still on. He got back in the car and reported to his wife that everything looked “all right.” His wife called 911 to report the tree lying completely across the roadway, and the dispatcher told them to wait there. The road was completely blocked in both directions. As they waited, they saw the headlights of cars coming from the other direction up to the tree, stopping, and turning around and driving back toward Aberdeen. As they were sitting there, Mr. Belesiotis heard a noise, and got out of the car to check

on it. He saw that another tree was about to fall in the area where they were parked. He and Ms. Mathioudakis agreed that it would be prudent to move their car to the other side of the highway, to get out of the danger zone of the tree that looked like it was going to fall. Since the roadway was completely blocked, and no cars were able to come through from the other direction, that seemed to be a safe place to wait. George moved his vehicle away from the threatening tree, and over to the westbound lane, where they continued to wait for the State Patrol. (By the way, the tree did fall later, while the ambulance was there.) RP 37-41; RP 148-152.

After they moved the car over to the other lane, they continued to wait with their headlights on and blinkers flashing. As they waited, they continued to see cars coming from Aberdeen that would stop and turn around and go back to Aberdeen. One of those cars actually stopped and the driver got out and looked to see if he could maneuver around the tree by going onto the shoulder. George Belesiotis talked to that individual and he concluded that the road was completely blocked and he couldn't get around. He also turned around and went back towards Aberdeen. George also talked to other people that were coming from the same

direction that he and his wife and who were pulled off the road waiting.
RP 43-45.

After about 10 minutes of waiting, during which they saw the headlights of a number of cars coming from direction of Aberdeen, they saw the headlights of another car coming from the Aberdeen direction. To their shock, this particular car did not stop. This car, driven by Christina Fleming, *not only drove right into the tree, but actually plowed through the tree, emerging on the other side, and running into the vehicle occupied by Helen Mathioudakis and George Belesiotis.* RP 45; RP 230

Helen Mathioudakis was badly injured in the accident. She attempted to get out of the car and collapsed on the pavement. RP 45-46.

As she was being removed from the scene, the other tree (the one that had caused George to move the truck) actually did fall onto the roadway. RP 107-108.

The plaintiff Helen Mathioudakis made two claims for damages: one in this lawsuit, and also one against her own insurance carrier, in a UIM proceeding.

In the lawsuit, the Trial Court heard Motions for Summary Judgment, including a Motion by Plaintiff/Appellant to declare that the Defendant/Respondent was negligent as a matter of law. The Defendant/Respondent presented a blizzard of factual data about the relative negligence of George Belesiotis and Helen Mathioudakis, but nothing of substance regarding the actual negligence of the Defendant. Notwithstanding overwhelming evidence of negligence against the Defendant/Respondent, the Trial Court chose to – in effect – throw up its judicial hands and let the jury decide. The Court included this comment in its decision letter:

“Due to the convoluted factual positions of both parties, it is the position of this court that trial will need to determine resolution of this case.” CP 177

The arbitration in the UIM proceeding was held two months before this trial on December 8, 2005, and the three-member arbitration panel *unanimously* (including the *defense* panelist!) found that the defendant Christina Fleming was negligent and that neither Ms. Mathioudakis nor Mr. Belesiotis was negligent, and awarded \$250,000.00 in damages. CP 180-194.

As can be seen from the Affidavit of Thomas A. Brown, the attorney representing Ms. Fleming in this lawsuit, had had notice of the pendency of the UIM proceeding for nearly three years. In fact, the trial date in this case was moved twice, to allow the arbitration proceeding to go ahead first. CP 180-194.

The defendant in this case and the defendant's counsel took no steps to participate in, or provide information in the arbitration proceeding. CP 180-194.

Counsel for the Appellant filed a timely motion, prior to trial, asking the Court to follow the "Finney-Fisher" rule, and hold that the Defendant/Respondent was bound by the outcome of the UIM Arbitration. CP 178-179; 180-194; 197-202.

Without explanation, the Trial Court denied the motion, expressing the belief that defendant was entitled to a jury trial, notwithstanding the outcome of the prior Arbitration. A thorough and detailed Motion for Reconsideration was summarily denied. CP 203-207; 208; 209.

At trial, the Plaintiff/Appellant made a timely motion for a directed verdict on the negligence of Defendant/Respondent and also proposed instructions that would direct the jury to find her negligent. RP 403-404. The motion was denied and the instructions were refused, with the Court saying: "I'm going to leave it to the jury." RP 405

The jury was presented with a bewildering set of instructions regarding the negligence of the Defendant/Respondent and the Plaintiff and her husband.

Shockingly, the jury held that the Defendant Christina Fleming was not negligent at all. CP 218-220

After motions for a new trial were denied by the Trial Court, CP 221-223; 242-247, this appeal followed.

SUMMARY OF ARGUMENT

Under the “Finney-Fisher” Rule, the Trial Court should have ruled that the Defendant/Respondent was bound by the outcome of a UIM arbitration that had been previously held, dealing with exactly the same facts.

Both on the Motion for Summary Judgment and at Trial, the Court should have ruled that the Defendant/Respondent was negligent as a matter of law when she crashed through a fallen tree at high speed on a highway and struck the parties on the other side.

ARGUMENT

CLAIM PRECLUSION

The Appellant contends that the Respondent was bound by the theory of “claim preclusion” as set forth in *Lenzi v. Redland Insurance Company*, 140 Wn.2d 267, 996 P.2d 603 (2000), and this case never

should have gone to trial on the same issues that were already decided in the UIM arbitration.

The central question presented by this appeal is whether or not the defendant in this lawsuit is bound by the results of a UIM arbitration decided on exactly the same facts. It is already the well-established law of this state -- in the mirror-image situation -- that the results of the litigation are binding on the UIM arbitration. *Lenzi v. Redland Insurance Company*, 140 Wn.2d 267, 996 P.2d 603 (2000).

In an earlier case, the policy reasons for the *Lenzi* Rule were clearly explained, and those reasons are persuasive here. *Fisher v. Allstate Insurance Company*, 136 Wn.2d 240, 961 P.2d 350 (1998).

In the *Lenzi* case, the basic situation was exactly the same as in this case. An injured plaintiff had a claim against a third party arising out of an automobile accident, and also had a claim against the injured person's own insurance company for UIM coverage arising out of the same incident.

In the *Lenzi* case, the injured party pursued the third party lawsuit *first*, securing a default judgment against that person (who was uninsured). Then, the *Lenzi* plaintiff turned his attention to his own UIM carrier, and took the position that the result in the third party claim bound the UIM carrier.

The Washington Supreme Court agreed, relying on its earlier decision in *Fisher v. Allstate Insurance Company, supra*, where it delineated the “*Finney-Fisher Rule*.”

Simply stated, the Rule is that as long as the insurance company “. . . has notice and an opportunity to intervene in the underlying action against the tortfeasor, it will be bound by the findings, conclusions and judgment . . .” *Fisher*, at page 246.

The case before the Court today involves exactly the same underlying factual setting as *Lenzi* and *Fisher*. An injured plaintiff has claims against an uninsured or underinsured tortfeasor and against its own insurance company under the UIM coverage.

The different twist presented here today is that – in this case – the UIM arbitration occurred first, rather than the claim against the tortfeasor.

Logically, we submit that this mirror-image situation should have no impact on the efficacy of the *Finney-Fisher* Rule. All of the sound, persuasive reasons espoused in the *Finney-Fisher* cases exist in the mirror-image situation as well.

In *Fisher*, the Supreme Court said:

Considerations of fairness and the avoidance of redundant litigation are also served by this holding. Allstate argues Finney should be overruled because privity does not exist between the third-party tortfeasor's carrier and the UIM carrier to justify the application of collateral estoppel. Allstate is correct that the requisites of collateral estoppel are absent; however, while Courts recognize technical privity is absent, they nevertheless apply estoppel principles, concluding there is a sufficient identity of interests between the UIM insurer and the tortfeasor.

The possibility of anomalous results, redundant litigation, as well as preventing insurers from picking and choosing their judgments justifies application of such principles provided notice and an opportunity to intervene are afforded to the insurer. Likewise, the benefits of joining the UIM insurer and tortfeasor in a single action outweigh any conflict between an insurer and insured as well as the injection of insurance into the trial. Through joinder of the UIM insurer

society is benefited by the efficiency of judicial economy. The insured is benefited

by the elimination of multiple suit costs. The underinsurer is benefited by the elimination of anomalous results that could occur if the tort and contract actions were split. Last, the underinsurer may reap the additional advantage of a more zealous defense. (citation omitted).

Forcing the insured to re-litigate liability and damages against the UIM carrier only fosters inconsistent judgments and additional delay and expense for the insured (citations omitted). Re-litigation provides an unwarranted benefit to insurance companies as well. A UIM carrier could deny a claim, wait until litigation between the insured and tortfeasor was complete, and then assert its insured is collaterally estopped if the damage award is low, but avoid the damage award by relitigating if considered too high.” (emphasis supplied)

The *Fisher* Court spoke repeatedly of the considerations of fairness and avoidance of redundant litigation that supported this policy.

In reaffirming the *Finney-Fisher* Rule, the *Lenzi* Court spoke clearly about the legal basis of rule:

Although *Fisher* and *Finney* have spoken of collateral estoppel as the applicable doctrine under the circumstances, it is more correct to note res judicata or claim preclusion, is the operative principle. “Res judicata refers to the preclusive effect of judgments, including ‘the relitigation of claims and issues that were litigated, or *might have been litigated*, in a prior action.’ ” (citations omitted) (emphasis in the original quote)

There is nothing in the *Fisher* or *Lenzi* cases that suggests that the Rule should not operate exactly the same for the mirror-image situation that we have here. In fact, the policy reasons set forth by those decisions seem to mandate that this rule is a two-way street. Indeed, if the problem of anomalous or inconsistent results is one of the evils to be avoided, the wildly disparate outcomes in this case make it the “poster child” for application of the doctrine of *claim preclusion*.

The only possible contrary argument that can be imagined is that the tortfeasor might claim that it was impossible or difficult for it to intervene in the UIM proceeding, which was an arbitration rather than a lawsuit. We submit that this argument is disposed of by the simple fact that the underlying tort proceeding in the *Fisher* case also was an arbitration, and the Supreme Court held the parties to the same standard, holding that they should have intervened in the arbitration proceeding. Perhaps even more to the point, in our case the Defendant/Respondent took no steps for three years to participate in the UIM proceeding, and cannot now complain that it was difficult or impossible.

In conclusion, there is simply no basis for distinguishing between this case and the mirror-image holdings in *Lenzi* and *Fisher*. The Court

should hold that the Defendant/Respondent here is bound by the results of the UIM arbitration. The Defendant/Respondent had full notice of the pending arbitration proceeding for over three years and took no steps to protect its interest by intervening or involving itself in that proceeding. The rationales advanced in *Lenzi* and *Fisher*, about the evils of redundant litigation and inconsistent judgments, mandate application of the principle of *claim preclusion* to this case.

Liability of Christina Fleming

At two different points in this litigation, the Trial Court was asked to declare that the Defendant/Respondent Christina Fleming was negligent as a matter of law when she drove through the downed tree at highway speed on a dark and stormy night.

There is no doubt about the conduct of Christina Fleming. The trooper testified at trial that she drove right through the tree. RP 230. He testified that she was traveling at the speed limit on a dark stormy night. RP 231. He testified that there was no reason for her not see the tree. RP

233. He testified that all of the other cars before her were able to see the tree and stop and turn around. RP 237.

On the earlier motion for Summary Judgment, CP 53-54, the Court had her sworn answers to interrogatories, in which she describes what happened as follows:

“I was heading home from Aberdeen, WA, at about 1:40 a.m., from work. It had been windy but there wasn’t anything on the road. I was traveling about 55-60 mph. Another car on the opposite side of the road flashed it’s (sic) high-beam lights at me. I started slowing down and I looked up and saw a tree and slammed on my brakes. The next thing I remember is a paramedic asking me what happened.”

The statement she gave to the trooper, CP 123-126, was similar:

“At approximately 2:00 a.m. on Wednesday/Thurston, 11/15/01, I left Aberdeen/Hoquiam heading west on State Route 109. The wind was slightly blowing and the road was wet and clear. I was heading home to Ocean Shores, driving between 55 and 60 miles an hour. I saw a vehicle on the left-hand shoulder of the road flashing its high beams at me, and next thing I saw was a tree laying in the road. I hit the brakes. The next thing I remember is laying in the ambulance, where the EMT told me that I had hit the tree.”

The testimony of the witnesses is unanimous and overwhelming that Christina Fleming not only struck that tree that was across the roadway, she drove right through it and emerged on the other side, striking the parked Belesiotis/Mathioudakis vehicle.

The State Trooper stated in his deposition that was advanced in support of the Motion for Summary Judgment that Christina Fleming “. . . should have observed the hazard in the roadway sooner and brought her vehicle to a stop prior to driving through it.” CP 85-104.

He went on to say:

“Even though there are no overhead lighting, the visibility was sufficient with headlights to see a large tree in the roadway. And in her statement, she advised that there was a – another unidentified vehicle on her side of the tree on the shoulder that was flashing their lights at them to get her attention.”

When Ms. Fleming’s attorney challenged Trooper Drake on the question of visibility, he testified as follows:

“But I feel that in that – in this particular instance, it was enough visibility in the roadway despite the weather and despite the darkness for her to bring her vehicle to a stop, recognize the obstruction and bring her vehicle to a stop.”

In her answers to interrogatories and in her deposition, she admits that following a shift of work that lasted approximately five hours, she went to Captain’s Corner and stayed there for four hours drinking beer and singing karaoke.

Christina Fleming was clearly negligent as follows:

- She failed to keep a proper lookout. *Hester v. Watson*, 74 Wn.2d 924, 448 P.2d 320 (1968); *Danley v. Cooper*, 62 Wn.2d 179, 381 P.2d 747 (1963); *Meredith v. Hanson*, 40 Wn.App. 170, 697 P.2d 602 (1985).

- Operating her motor vehicle at an excessive speed, taking into account the conditions. *Hough v. Ballard*, 108 Wn.App. 272, 31 P.3d 6 (2001); *Rumford v. Snider*, 31 Wn.2d 431, 197 P.2d 446 (1948); *Talley v. Fournier*, 3 Wn.App. 808, 479 P.2d 96 (1970).

- Failure to keep the automobile under control. *Woods v. Goodson*, 55 Wn.2d 687, 349 P.2d 731 (1960); *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 397 P.2d 857 (1964).

The evidence was overwhelming. The defendant admits that she was driving faster than the speed limit. The State Trooper states that the accident was caused by her failure to observe the hazard and bring her vehicle to a stop. She was negligent *as a matter of law*.

The Court and the jury were obviously distracted from the core issue by the questions regarding the independent negligence of George Belesiotis and the comparative negligence of Helen Mathioudakis. We are not arguing that they were free of negligence as a matter of law. Their negligence is irrelevant to whether Christina Fleming was negligent. The core issue – WAS FLEMING NEGLIGENT? – was crystal clear as a matter of law. She drove through the tree. By deciding to “leave it to the jury” (RP 405), the Court allowed a peripheral issue (the negligence of other parties) to cloud the deliberations and result in a verdict that just didn’t make sense.

Lawyers who lose cases are always complaining about this error or that error, forgetting that the goal is to find some objective basis for discerning the truth. Here, it's not just a sour-grapes lawyer, picking away at a negative result with self-serving arguments. Instead, we have a definitive standard to assist us in determining the way this case should have come out. Two months before the trial, a panel of three lawyers (one of whom was chosen by an insurance company to be an advocate on the panel) – in an adversarial situation, with both sides represented – looked at the same facts and *unanimously* concluded that the Defendant was negligent. It's not a burning bush, but it certainly beats the summary judgment standard.

Reasonable minds could not differ about the negligence of Christina Fleming. She not only failed to keep a reasonable lookout for obstructions in the roadway, she failed to reasonably respond to the situation that was presented. She not only didn't stop, she crashed through the tree, emerging on the other side and hitting a vehicle parked on the roadway.

CONCLUSION

This is a case that gives us a stark demonstration of the need for the “Finney-Fisher Rule” of claim preclusion. Because the Trial Court refused to follow that rule, the exact problem that the rule addresses – wildly inconsistent results – occurred. In one proceeding, the defendant was found totally responsible, and damages were assessed at \$250,000.00. In another proceeding, on exactly the same facts, the finding was that the Defendant was not negligent *at all*, resulting in zero damages for the Plaintiff.

Claim preclusion is already the law of this state. It is based on sound policy reasons. It should be applied equally to the mirror-image situation presented by this case.

The Defendant/Respondent in this case drove too fast on a dark and stormy night and did not pay attention to what was clearly there for her to see – a huge tree lying across the road, blocking both lanes of travel.

She not only hit the tree; she drove completely through the tree and ran into innocent people on the other side. The evidence from the plaintiff, from the plaintiff's husband, from the Trooper, and from the Defendant herself was all amazingly consistent. Driving too fast for conditions; not keeping a lookout; not maintaining control of her vehicle; driving after the use of alcohol after a long shift at work.

There is a reason for directed verdicts and summary judgments. The law and its officers have a duty to make sure that a strong, righteous case does not lose its way in the blizzard of facts that inevitably is generated in a hotly contested lawsuit. While, it may be seen as safe or conservative to "leave it to the jury" to sort out; that course of action does not serve the ends of justice, when the case is clear.

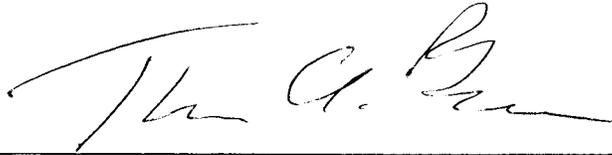
Either on summary judgment, or at the time of trial, the Trial Court should have taken the issue of Defendant's/Respondent's primary negligence away from the jury, so the jury could concentrate on the other legitimate liability issues and on the damages issues.

This case should be reversed and returned to the Trial Court with directions consistent with the "Finney-Fisher" Rule; and – to the extent

necessary – with directions regarding the handling of the issue of the Defendant's/Respondent's primary negligence in the event of a re-trial.

Dated: November 28, 2006.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Thomas A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Thomas A. Brown
Brown Lewis Janhunen & Spencer
WSB # 4160
Attorney for Appellant Helen Mathioudakis