

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

Colin Bowers, Appellant,

v.

Pamela M. and Jerry Marzano, Respondents

REPLY BRIEF OF APPELLANT

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FILED
11 OCT 20 PM 2:03
CLERK OF COURT
COURT OF APPEALS
DIVISION II
SEATTLE, WA

P.M. 6-27-2011

TABLE OF CONTENTS

Introduction	5
Assignment of Error re CR 56 (f) Motion	6
Facts and Argument re Estoppel and CR 56 (f)	6
Background	6
Marzano's Stipulation to Subaru speed to avoid CR 56 (f) continuance	8
Argument re mootness and/or estoppel, etc	9
Argument re CR 56 (f)	10
Further Reply Argument	11
Evidence to be considered	11
Want of due care:	11
▪ As she approached the intersection Ms. Marzano was travelling 41 mph in a posted 35 mph zone	12
▪ Ms. Marzano should reasonably have reduced speed to 30 mph as she approached the intersection	12
▪ Ms. Marzano was inattentive and did not see what was there to be seen.	13
Point of notice	14

1) Notice of Hazard. The Subaru put a reasonable person on notice of hazard when he “blew through the stop sign”.	15
Link to CP 135, video 3	16 (fn 2)
2) Point of Notice (in time). The point of notice was 2 - 2.5 sec pre-accident when the Subaru “blew through the stop sign”	18
Illustration 1 (Point of notice 2.53 sec pre-accident)	19
Illustration 2 (Point of notice 2.0 sec pre-accident)	19
Illustration 3 (Point of notice 1.53 sec pre-accident -- Marzano expert’s stop bar point of notice)	20
3) Reaction. Because of the heightened vigilance called for by the warning sign a reasonable person should have begun to take action .67 seconds after notice of hazard.	21
4) Sufficiency. Subtracting a .67 second reaction time from 2.5, 2.0, or 1.63 second pre-accident point of notice (from her own expert) still left Ms. Marzano with sufficient time to brake and stop short of the crash.	24
Point of notice calculation for purpose of enhanced injury claim	25
Conclusion	28

TABLE OF AUTHORITIES

WASHINGTON CASELAW

<i>Bernal v. American Honda Motor Co., Inc.</i> , 87 Wn.2d	27
--	----

406 (1976)	
<i>Brevick v. City of Seattle</i> , 139 Wn.App. 373 (2007)	9
<i>Coggle v. Snow</i> , 56 Wn.App. 499 (1990)	10
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wn.App. 222 (2005)	9
<i>Doherty v. Metro. Seattle</i> , 83 Wn. App. 464 (1996)	27
<i>Felsman v. Kessler</i> , 2 Wn. App. 493 (1970).	14
<i>Holmes v. Wallace</i> , 84 Wn. App. 156 (1996)	23
<i>Hough v. Ballard</i> , 108 Wn. App. 272 (2001)	5,6, 12, 13, 22, 23
<i>Mossman v. Rowley</i> 154 Wn.App. 735 (2009)	9
<i>Pacific Land Partners, LLC v. State, Dept. of Ecology</i> , 150 Wn.App. 740 (2009)	11
<i>Riley v. Andres</i> , 107 Wn. App. 391 (2001)	14
<i>Walker v. King County Metro</i> , 126 Wn.App. 904 (2005)	13

WASHINGTON COURT RULES

CR 56 (f)	6, 8, 10
-----------	----------

WASHINGTON STATUTES

RCW 46.04.220	12
RCW 46.61.400	12, 13, 22

Introduction

A substantial part of Ms. Marzano's Response Brief is devoted to pointing out inferences in her favor which would be permissible at trial, but are of no moment on Summary Judgment; and in knocking down the straw man of an impermissible argument relating to speed¹ which was not even raised by Mr. Bowers. In this Reply Mr. Bowers demonstrates that taking all permissible inferences in his favor this case involves the conduct of a favored driver who barreled her oversized SUV/pickup into an intersection at 11 mph over the reasonable speed while on cruise control, who failed to see what was there to be seen due to inattention, who took no evasive action, and who broadside another vehicle, causing significant injury to its blameless passenger. The nub of the case is whether her status as a favored driver completely insulates Ms. Marzano from examination of her conduct by a jury of her peers. Even a favored driver must exercise reasonable care for **potential** hazards, particularly those about which she has been warned. *Hough v. Ballard*, 108 Wn. App. 272 (2001) In this Reply Mr. Bowers demonstrates that the evidence supports a jury question on point of notice, even under the notice scenario posed by Ms. Marzano's own expert.

¹ Ms. Marzano repeatedly suggests (e.g. Resp. Br. at 23-24;) that Mr. Bowers is arguing that excess speed caused the accident because the vehicles would have missed at a different speed.

In this Reply Mr. Bowers also raises the error of failure to grant CR 56 (f) relief, brought up now due to argument being raised in Response which should have been mooted by an in-court Stipulation.

Assignment of Error re CR 56 (f) Motion.

- **Was it reversible error to deny CR (f) motion at Summary Judgment and Reconsideration based on unavailability of Walter Bowers?**

Facts and Argument re Estoppel and CR 56 (f)

Background

Colin Bowers had no memory of the accident. Although she had told a different story to the police at the scene, discussed infra, by the time of hearing Ms. Marzano claimed she couldn't estimate the Subaru's speed because it "appeared... and was immediately in front of me". CP 25 In 19 – 22. Jennifer Anderson, the other passenger of the Subaru, didn't know its speed. Finally, the Subaru driver, Walter Bowers, was incarcerated and unavailable for testimony before the summary judgment hearing. CP 180-181. In responding the Motion Colin Bowers sought CR 54 b) delay to obtain Walter Bowers' testimony (CP 79-80), which was denied. CP 308.

Colin Bowers did his best with the limited evidence available to estimate the speed of the Subaru and the time elapsed from when it ran the stop sign to the crash. Eyewitness Niccole Johnson watched the Subaru slow for the stop sign to ~ 10 mph or less before she turned away and then

heard and saw the crash a few seconds later. CP 168 ln 10 – CP 169 ln 5. Police photos showed the Subaru in 1st gear after the accident (CP 97, CP 99, CP 161 ln 3-10, CP 185 ln 5-7) and it could not exceed 22 mph in 1st gear. CP 160 ln 3- CP 161 ln 2. Speeds were checked against Mr. Becinski's SLAM accident reconstruction program for plausibility. CP 184 ln 15 – CP 185 ln 15-22; CP 311 ln 9-11.

Based on this information Colin Bowers' litigation team made several videos (CP 135) at the accident scene using a similar Subaru slowing to ~ 10 mph for the stop sign at 66th Ave. E and then accelerating across 152nd St. E. in first gear. See videographer's Declaration, CP 174-177. Ms. Johnson viewed the videos and picked video 3 as the one most closely approximating the speed and time interval she recalled. CP 169 ln 12-13. As discussed in more detail supra, in video 3 the Subaru's top speed was ~ 15 mph and ~ 2.53 seconds elapsed between the Subaru starting to run the stop sign and the crash.

Ms. Marzano objected to the video and evidence of speed and time between the Subaru running the stop sign and the crash, and moved to strike the declarations of the videographer, of Ms. Johnson, and of Mr. Becinski. CP 227 – 234. The court denied Ms. Marzano's objections, while granting summary dismissal. RP 39, ln 12-13; CP 308-309.

Marzano's Stipulation to Subaru speed to avoid CR 56 (f) continuance

Colin Bowers finally deposed Walter Bower the day before the Reconsideration hearing and represented at hearing that

the deposition of Walter Bowers ... confirms that ... they went through [the stop sign] at 10 miles an hour, and then he steadily sped up, probably got to 15 miles an hour when he was in the intersection....

RP 45 ln 9-16.

When the Court declined to entertain the deposition, Mr. Bowers moved for continuance (RP 53 ln 3-4) and Ms. Marzano responded

[Marzano counsel] ... from the very beginning ... I have conceded ...they can assume plaintiff's theory of the case, that the car is moving 10 to 15 miles per hour through this. It doesn't make any difference whether Walter Bowers testified to that, ...you can assume whether it comes from Walter Bowers or it's Becinski .. that for purposes of this motion, the Bowers' vehicle is moving from 10 to 15 miles per hour. It doesn't make any difference here.

THE COURT: Okay. So, we will take that assumption that [Colin] Bowers is indicating, and I think it does make a difference whether it comes from Becinski or [Walter] Bowers because [Walter] Bowers is an actual participant and Becinski is a witness who is hypothesizing.

RP 53-54

The court denied Reconsideration without further mention of continuance. It is apparent that Ms. Marzano made her in-court Stipulation to influence the Court to deny continuance on the ground that the deposition of Walter Bowers would then be cumulative. See, e.g.

Mossman v. Rowley 154 Wn.App. 735 (2009) (CR 56 f continuance properly denied when evidence sought is cumulative).

Argument re mootness and/or estoppel, etc

Ms. Marzano now bases a significant part of her argument on either the speculative nature of the video or on claimed inferences contrary to her Stipulation. See Resp.Br. at 12- 18. To give one specific example, Ms. Marzano argues that in the video the Subaru seems to be still slowing after the stop sign, which would cause a reasonable person to believe it might stop before the roadway. Resp. Br. p. 16. Yet the video was made before there was testimony of Walter Bowers that the Subaru went through the stop sign at 10 miles an hour and **steadily sped up** to 15 miles an hour (RP 45, full quote supra), to which Ms. Marzano Stipulated. RP 53-54, full quote supra. Ms. Marzano can't have her cake and eat it too. Having obtained favorable ruling by Stipulating to the Subaru's speed and steady acceleration Ms. Marzano should be barred by estoppel or waiver from arguments like the one above and others claiming the video and evidence relying on it are speculation and conjecture. See *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App. 222 (2005)(judicial estoppel); *Brevick v. City of Seattle*, 139 Wn.App. 373, 378-379 (2007) (equitable estoppel and waiver).

Argument re CR 56 (f)

In the interest of avoiding unnecessary issues and premised on his belief regarding mootness (communicated this to Ms. Marzano in Appellant's Opening brief p. 12, fn 2) Mr. Bowers did not raise denial of the CR 56 (f) motion as error. In light of the importance of the arguably moot issues to Ms. Marzano's arguments in Response, Colin Bowers requests leave to raise at this time error based on denial of CR 56 (f) continuance of Summary Judgment. Walter Bowers was the only witness with testimonial knowledge of the Subaru's speed and acceleration through the stop sign up to the crash, and this information was an integral part of any analysis of point of notice. Colin Bowers had a legitimate reason for not having that testimony at Summary Judgment in that Walter Bowers was unavailable due to incarceration and so advised the trial court. CP 180-181, CP 79-80. The case was dismissed due to inadequacy of proof of point of notice.

These facts established the basis for continuance under CR 56(f); *Coggle v. Snow*, 56 Wn.App. 499, 784 P.2d 554 (1990), and for error in the trial court's failure to grant that relief. Leave to raise the error not appearing in the initial assignments of error may be granted in the interests of justice. See, e.g. *Pacific Land Partners, LLC v. State, Dept. of Ecology*, 150 Wn.App. 740, 749 (2009).

Further Reply Argument

Evidence to be considered

The trial court declined to grant any of Ms. Marzano's Motions to Strike, specifically stating at the Summary Judgment Hearing "...in making my decision, I am not striking, or disregarding any of the plaintiff's submittals." RP 39, In 12-13; See also Order, CP 307, 308 In 19. The court underscored this point at Reconsideration Hearing:

[by plaintiff counsel] "I am a little unclear when you said "speculative", that sounds like a matter of evidence that's not going to come in...

THE COURT: Well, no. I am considering all of the evidence and all of the inferences. Is there sufficient evidence and/or inference to establish the point of notice? That seems to be the critical point for me.

RP 44 In 24 – RP 45 In 6. In light of these rulings all the evidence and reasonable inferences in Mr. Bowers' favor must be considered, unless doing so would be abuse of discretion.

Want of due care

Absent some evidence of Ms. Marzano's failure to exercise due care there would be no need to reach the point of notice issue. Inferences available from the evidence established the following acts and omissions showing Ms. Marzano's lack of due care for purposes of summary judgment.

- **As she approached the intersection Ms. Marzano was travelling 41 mph in a posted 35 mph zone**

Traffic safety expert and accident reconstructionist Walter Becinski so testified in Declaration based on his accident reconstruction program. CP 184 In 15 –CP 185 In 4. Dr. Daly, whose qualifications included accident reconstruction (CV at CP 156), agreed. CP 165 In 6-10. It is irrelevant that Ms. Marzano’s expert says she was going 39 mph.

- **Ms. Marzano should reasonably have reduced speed to 30 mph as she approached the intersection**

It was the expert of opinion Mr. Becinski that the crossroad warning sign in Ms. Marzano’s lane (CP 107, CP 112) was supposed to signal to drivers exactly what is stated in the Washington Drivers’ Manual: “slow down and be prepared to stop if necessary”. CP 185 In 20-21. It was Mr. Becinski’s further opinion that

had Ms. Marzano been exercising reasonable caution she would have slowed to no more than 30 mph when she saw the warning sign.

CP 186-187. This opinion was bolstered by RCW 46.61.400(3), providing

The driver of every vehicle shall... drive at an appropriate **reduced speed** when approaching and crossing an intersection

(**emphasis added**). See also RCW 46.04.220 (subject crossroad is an intersection). Mr. Becinski’s opinion was also bolstered by *Hough v. Ballard*, supra, which was mischaracterized by Ms. Marzano as a holding

limited to cases where it is not clear which driver was favored. While *Hough* did contain that issue, the court also made a point of holding that even the favored driver could be found negligent for failing to obey the above statute and not slowing appropriately for an intersection.

In opposing Mr. Bowers' use of the Washington Drivers' Manual Ms. Marzano cited *Walker v. King County Metro*, 126 Wn.App. 904 (2005), where it was proper to exclude such evidence without foundation testimony or case law supporting consideration of a commercial driver's manual as a standard of care in that situation. Unlike *Walker* at bar there was supporting testimony by a long time traffic officer and safety expert that the driver's manual set forth a standard of care for approaching an intersection that was subject to a warning sign. There was also RCW 46.61.400(3) and *Hough*, supra, consistent with the claimed duty to slow down. At best Ms. Marzano's arguments show why the jury would not be *required* to reach this conclusion.

- **Ms. Marzano was inattentive and did not see what was there to be seen.**

Ms. Marzano's admitted failure to see the warning sign, her failure to slow down at all (as evidenced by the constant rpm), her failure to react until less and 1/10 of a second before the crash, and the inconsistencies between her statements to the police and sworn testimony (detailed at

Appellant's Brief, p. 37 - 38) would justify a jury in finding that Ms. Marzano was not paying attention despite her testimony to the contrary. This was Mr. Becinski's opinion for the same reasons. CP 186 ln 3-5, 11-13. It was also Mr. Becinski's opinion that her constant rpm suggested that Ms. Marzano had her truck in cruise control. Id.

While Ms. Marzano's testimony that she was attentive and that she was not in cruise control could be believed, there is no basis to hold that the trier of fact **had to** believe her. In fact summary judgment may be denied solely for the reason that material facts are particularly within the knowledge of the moving party, and the nonmoving party should have the opportunity to expose the moving party's demeanor while testifying at trial. *Riley v. Andres*, 107 Wn. App. 391, 398 (2001); *Felsman v. Kessler*, 2 Wn. App. 493, 496-97 (1970).

Point of notice

While the above elements establish breach, the right of way doctrine requires as a matter of proximate cause that the disfavored driver establish a point in time or distance before the accident when the favored driver should have appreciated the risk and reacted to avoid the accident.

Under the theory set forth above this would require Mr. Bowers to prove that a reasonable driver in Ms. Marzano's position, but proceeding at 30 mph and with appropriate attention, would have appreciated the

danger posed by the Subaru in time to take evasive action and avoid the crash. Mr. Bowers believes in this case it will be useful to look at the issue in four parts: 1) Notice of hazard, 2) Point of Notice in time or distance from accident, 3) Reaction time, and 4) Sufficiency of time and distance to avoid the accident. Mr. Bowers will show that his evidence established jury question as to each part.

1) Notice of Hazard. The Subaru put a reasonable person on notice of hazard when he “blew through the stop sign”.

Colin Bowers presented sworn declaration from his expert that a reasonable person would have been on notice of the hazard when the Subaru began to run the stop sign in full view of Ms. Marzano’s lane. CP 187 ln 6-7, 13-14. Ms. Marzano’s statement at the scene to the police seemed to indicate she appreciated this as an apparent risk.

She said the [Subaru] did not even stop... “..he blew through the stop sign”.

Bowers Ex V, Police Report, CP 284, 3rd full paragraph from bottom. If a jury could find that a Subaru in full view of Ms. Marzano “blowing through a stop sign” put her on notice of a hazard then Mr. Bowers has established this element. In support of this the jury could consider that Mr. Becinski, was a retired long-time Pierce traffic officer collision reconstructionist and an expert in traffic safety. CV at CP 92. They could also consider that Ms. Marzano’s lane was subject to a traffic warning sign

which was intended to tell drivers in Ms. Marzano's position to be vigilant for crossing traffic. The jury could also consider that Ms. Marzano's own expert opined that "The cause of the accident was [the Subaru's] failure to stop for the stop sign and to yield the right of way to the Marzano vehicle"(CP 60 ln 12.5-13.5; CP 61 ln 4-6), and conclude that this supports the conclusion that the Subaru going through the stop sign in full view was notice of hazard.

Mr. Bowers' position was illustrated in the video discussed previously, showing a similar Subaru wagon going through the stop sign at 10 mph and accelerating to 15 mph. Bowers Ex N (vid 3), CP 135.² A still from this video showing Mr. Bowers' claimed point of notice as the Subaru began to run the stop sign was Bowers Ex O, CP 137. Mr. Bowers' alternate theory that a jury could find point of notice when the Subaru was halfway through the stop sign (CP 323 ln 9-20; RP 62 ln 1-8) is illustrated in another still from the video, Bowers Ex CC, CP 331.

Ms. Marzano's expert opinion in reply to Mr. Bowers' Opposition to Summary Judgment was that a "person [in Ms. Marzano's position] could not possibly realize that the Subaru.... would fail to yield ... until

² A download of this video is available at <https://rept.yousendit.com/1158567929/3140529339d4f1b45f12c1ce08e9570f> For better quality picture, use Windows Media or VLC media. For single frame advance (but a blurrier picture) use Quick Time.

such time as the Subaru crosses over the stop bar”. CP 260 ln 25.5 – CP 261 ln 5. This stop-bar-notice scenario will be discussed in the following section.

On appeal Ms. Marzano claims for the first time that as a matter of statute the Subaru posed no hazard until it entered the intersection because it did not have to stop until then. Ms. Marzano never argued this statute below and in fairness should not be able to raise this for the first time on appeal, particularly where the facts would not require a jury to find this was the point of notice. This position is also inconsistent with Ms. Marzano’s earlier statement to the police on scene that she observed the disfavored Subaru “blowing through a stop sign”, not creeping forward as if ready to stop. It is also inconsistent with her experts’ opinions that the crash was caused by the Subaru running the stop sign, and that the first notice of hazard was when the Subaru passed the point of the stop bar.

All the evidence shows that the Subaru would have been fully within the view of a person in Ms. Marzano’s lane from the time it went through the stop sign (CP 137) and accelerated steadily from 10 mph to 15 mph up to the point of impact. CP 90; CP 298, RP 45, 53-54. While Ms. Marzano can argue her theory that she wasn’t on notice until the Subaru didn’t stop at the border of the intersection, Mr. Bowers should be able to argue his theory, based in part on Ms. Marzano’s evidence, that seeing a

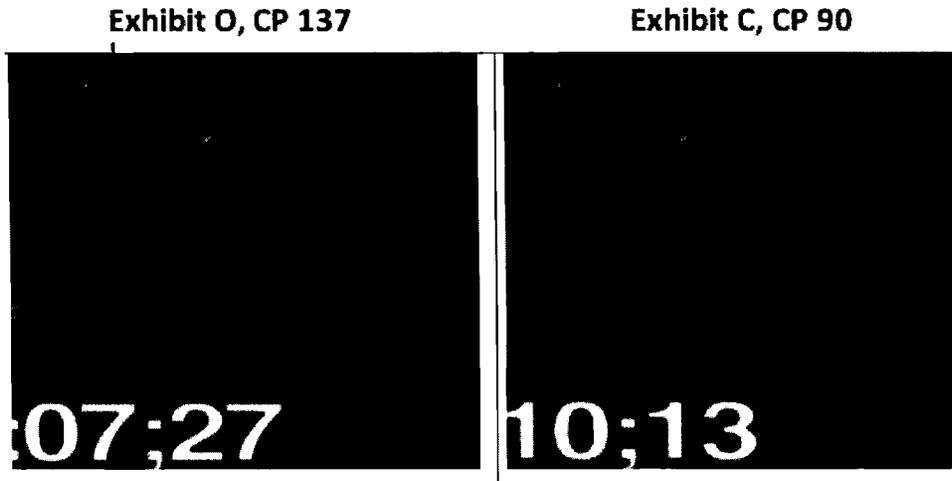
car “blowing a stop” and accelerating toward the intersection puts the favored driver on notice that the other car won’t stop and is a hazard. This is clearly a question for the jury to decide.

2) Point of Notice (in time). The point of notice was 2 - 2.5 sec pre-accident when the Subaru “blew through the stop sign”

Given that the Subaru was accelerating the whole way from the stop sign to the crash Mr. Bowers contends the point of notice was while the Subaru was running the stop sign, either when its nose began going through or it was half-way through.

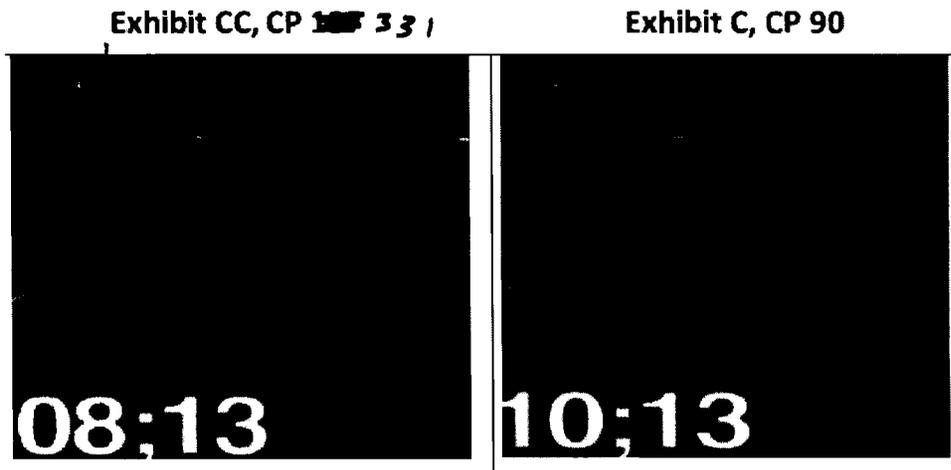
Mr. Bowers derived the time before collision for these two point-of-notice scenarios using stills from the time-stamped video Ex N, CP 135. At the bottom of the video is a number with digits on the left, a semi-colon(“;”), and digits on the right. The left digits are seconds; and the right digits are a frame count. There are 30 frames/sec, and therefore the frame count in seconds = [frame #]/30. Adding the frame count in seconds to the left hand digit gives the time of that still in seconds, and the time between two stills is a simple subtraction. **Illustration 1** shows a cropped portion of the two stills used for the 2.53 second pre-accident point of notice presented side by side; and **Illustration 2** shows a cropped portion of the two stills used for the 2 second pre-accident point of notice presented side by side. Calculations are set forth in the footers.

Illustration 1



Number at bottom stills: seconds on left; frames advanced on right.
30 frames/sec [Frame #]/30= fraction of a second (for frame count)
Converting to seconds: left still at 7.9 sec; right still at 10.43333 sec.
Time difference = 10.43333 sec - 7.9 sec = 2.53 sec

Illustration 2



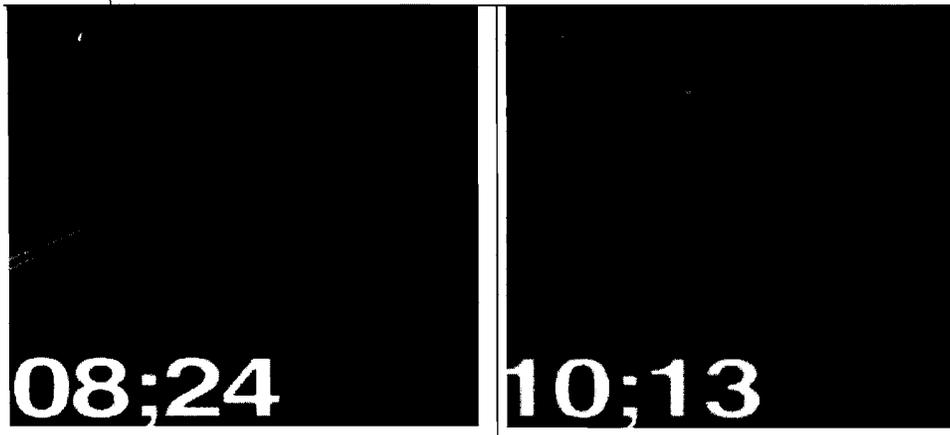
Number at bottom stills: seconds on left; frames advanced on right.
30 frames/sec [Frame #]/30= fraction of a second (for frame count)
No need for sec conversion here because the frames count is the same.
Time difference = 10 sec;13 frames - 8 sec;13 frames = 2.0 sec

Point of Notice under Marzano's Expert opinion, shown in Illustration 3 below. Ms. Marzano's expert claimed the earliest notice of hazard was the point when the Subaru was passing through the stop bar. CP 261 ln 14-17; Resp. Br. p. 17. While this expert also claimed this was 1.4 seconds before impact based on Mr. Bowers' methodology (Id), under the summary judgment standard Mr. Bowers need not accept this if another reasonable inference is permissible. Mr. Bowers has done his own calculations, explained in the footer to Illustration 3 below and has shown that the time between the Subaru's front bumper passing the stop bar (shown on the left below) to the crash point was 1.63 seconds.

Illustration 3

Still from CP 135, vid 3

Exhibit C, CP 90



Number at bottom stills: seconds on left; frames advanced on right.
30 frames/sec [Frame #]/30= fraction of a second (for frame count)
Converting to sec: left still at 8.8 sec; right still at 10.43333 sec
Time difference = 10.43333 sec - 8.8 sec = 1.63 sec

Full sized color copies of Illustrations 1, 2, and 3 is included in Appellant's Reply Appendix at A-2, A-3, and A-4, respectively.

3) Reaction. Because of the heightened vigilance called for by the warning sign a reasonable person should have begun to take action .67 seconds after notice of hazard.

Reaction time was clearly a jury question based on the evidence presented. Mr. Becinski's credentials as a traffic safety expert were not disputed. He stated his opinion that "...had Ms. Marzano observed and heeded the warning sign and [driven] attentively and with reasonable vigilance as she approached the intersection she would have been prepared to react to someone running the stop sign and her perception/reaction time would have been reduced." CP 186 In 16-19. He further stated

In my opinion if she had been driving with appropriate attentiveness Ms. Marzano would have seen the Subaru going through the stop sign and would have begun to brake within .67 seconds.

Id In 19-22.

Ms. Marzano's expert offered no alternative to what he said was a standard 1.5 second perception-reaction time applicable to **general** driving conditions. CP 59 In 25- CP 60 In 7. Because Ms. Marzano's expert did not specifically contest the notion that drivers subject to a warning sign before a cross road should proceed with heightened vigilance for cross traffic, he essentially conceded the field to Mr. Becinski and a

jury would be entitled to agree that a 0.67 second perception-reaction time was reasonable here.

Ms. Marzano claims that a need for heightened vigilance cannot be found as a matter of law because she had the right of way and could assume other drivers would yield the right of way. The flaw in this approach is evident from the holding *Hough v. Ballard*, supra, which included the following language:

Even a favored driver must slow down when approaching an intersection and must exercise reasonable care under the conditions present....Thus, RCW 46.61.400 imposes a duty to drive at a prudent speed, not only for known conditions, but also for **'potential'** hazards.

Id at 284 (**emphasis added**). In *Hough* the potential hazard was drivers traversing a normally controlled intersection where the traffic lights were out. At bar the potential hazard was the subject of a warning sign, and was drivers traversing the intersection who had miscalculated how much time they had to cross. Ms. Marzano's position that her right of way exempts her from any duty to look for potential hazards and that the warning sign had no significance is simply not the law. Based on the evidence presented it would be reasonable for a jury to conclude that this warning sign was there to warn approaching drivers to slow down and proceed with heightened vigilance.

Ms. Marzano has cited no rule of law setting a minimum perception-reaction time and there is no reason for this Court to fashion such a rule in this case. Such a dispute between experts is for the jury to sort out. See *Hough v. Ballard*, supra.

Ms. Marzano claims that split second computations of time and/or distance by experts are insufficient to prove negligence of a favored driver (Resp. Br. p. 10), but the cases don't set forth such a hard and fast rule. In *Holmes v. Wallace*, 84 Wn.App. 156 (1996) the disfavored pedestrian had encroached into the driving lane and was hit hard enough that she had no memory. Plaintiff's point of notice evidence was based entirely on the "split second" calculation of her expert that if the favored driver had slowed 8 mph to the posted speed of 35 mph he would have stopped just short of the accident, and this was deemed sufficient to support the jury verdict. In the same vein the court in *Hough v. Ballard*, supra, observed

The nature of intersection collisions makes timing an all pervasive element to be evaluated by the jury when the circumstances leave the imposition of fault open to question.

Id at 281.

- 4) Sufficiency. Subtracting a .67 second reaction time from 2.5, 2.0, or 1.63 second pre-accident point of notice (from her own expert) still left Ms. Marzano with sufficient time to brake and stop short of the crash.**

Mr. Becinski stated his opinion based on the .75 coefficient of friction that stopping distance for the Silverado on hard braking was 40.1 feet from 30 mph, and 75 feet from 41 mph (CP 333 ln 15-18) and Ms. Marzano's expert did not challenge this. Mr. Becinski stated his further opinion that had Ms Marzano been exercising due care she

should have been going no more than 30 mph, or 44 fps, should have begun braking 81.8 feet before collision ($1.86 \text{ sec} * 44 \text{ feet/sec}$) and would have stopped in 40.1 feet had she done so, leaving 41.7 feet to spare.

CP 334 ln 6-11. Mr. Becinski further explained that "1.86 seconds is derived by taking the time at notice of hazard minus the time to react and start braking. $2.53 \text{ sec} - 0.67 \text{ sec} = 1.86 \text{ sec}.$ " Id at FN 4.

Using the same methodology, but applied to Mr. Bowers' "halfway through the stop sign" Point of Notice scenario shown in Illustration 2, Ms. Marzano would have had $[2.0 \text{ sec} - .67 \text{ sec}] = 1.33 \text{ sec}$ in which to stop, or, $[1.33 \text{ sec} * 44 \text{ feet/sec}] = 58.2 \text{ feet}$ to stop. Since she would have stopped in 40.1 feet on hard braking from 30 mph, Ms. Marzano would have stopped 18 feet short of the accident if the point of notice was 2 seconds pre- accident.

Finally, even using the her expert's testimony that the earliest point of notice was when the Subaru began to cross the stop bar (Illustration 3) Ms. Marzano would have had $[1.63 \text{ sec} - .67 \text{ sec}] = .96 \text{ sec}$ to stop, or $[.96 \text{ sec} * 44 \text{ feet/sec}] = 42.24 \text{ feet}$. Subtracting the 40.1 feet to stop the Silverado from 30 mph, she would have stopped ~ 2 feet short of the accident.

Because these permissible inferences supported the conclusion that Ms. Marzano could have stopped short of the accident with due care, even under the stop-bar point-of-notice theory derived from Ms. Marzano's own evidence, this case should have gone to the jury.

Point of notice calculation for purpose of enhanced injury claim

This discussion is provided to cover the potential cause of action for enhanced injuries based on the eventuality that at trial Mr. Bowers would prove that with due care the Silverado should have begun braking from 30 mph and have slowed, but not stopped, before the collision⁹. This could arise on re-trial.

An example using the 1.4 sec pre-collision point of notice now alleged by Ms. Marzano will illustrate this. Taking all other facts in Mr.

⁹ Mr. Bowers also holds to his position, fully supported in the evidence, that had Ms. Marzano been going 30 mph, with no braking, his symptoms would have been limited to "very slight dizziness" (CP In 14-17) and that this states a claim for relief.

Bowers' favor (30 mph speed, heightened vigilance, .67 sec reaction time) Ms. Marzano would have had $[1.4 \text{ sec} - .67 \text{ sec}] = .73 \text{ sec}$ to stop, or $[\text{.73 sec} * 44 \text{ feet/sec}] = 32.12 \text{ feet}$ to stop. Given the 40.1 feet stopping distance of the Silverado from 30 mph this would not have been enough time to completely stop and avoid the crash.

However, that doesn't tell us how fast the Silverado would be traveling at impact. If deceleration took place in a steady straight line rate over time then you could say that the Silverado would have decelerated by $[32.12/40.1]$ or 80%, and would be traveling at 20% its initial rate, or $(.2 * 30) = 6 \text{ mph}$. Unfortunately the record does not include an equation or calculation showing how quickly the Silverado decelerates over time. However, from the Becinski Declaration (CP 333 ln 3-14, 334 ln 3-5) and associated Exhibit Z (CP 328) it is fair to infer that speed of the Subaru as a variable of time of hard braking would be a relatively straightforward mathematical calculation, as was the stopping distance in Exhibit Z.

Based on the opinion of Colin Daly, PhD, if the Silverado had slowed to 25 mph or less Mr. Bowers would have had no symptoms of injury. CP 165 ln 16-17. Thus unless Ms. Marzano proved that after .73 seconds of hard braking starting from 30 mph the Silverado would not have slowed by 5 mph, then she did not negate Mr. Bowers' claim that

but-for Ms. Marzano's excessive speed and inattention he would have suffered no injury.

Ms. Marzano mischaracterizes the record and the law in her arguments against consideration of the Declaration of Dr Daly. Since the trial court denied Ms. Marzano's motions to strike, Dr. Daly's evidence should come in unless it would be an abuse of discretion to consider it. See, e.g. *Bernal v. American Honda Motor Co., Inc.*, 87 Wn.2d 406, 413 (1976), Ms. Marzano's citation of *Doherty v. Metro. Seattle*, 83 Wn.App. 464 (1996) (endorsing trial court discretion to strike expert declaration in dictum while reversing on other grounds) was therefore off-point.

The record clearly supports consideration of Dr. Daly's Declaration on the issue of damage from trauma. Dr. Daly, Professor Emeritus at UW, is "an expert in biomechanical engineering, including the medical consequences of varying impacts on the human brain. ...[who has] qualified as an expert in this area in previous Washington superior court trials". CP 152, CP 164 In 19-22. He reviewed relevant police and medical records and examined the wrecked Subaru. CP 165 In 3-5. A significant number of Dr. Daly's publications (CP 153 – 156) have been related to the effects of physical stresses on physiology [e.g. "A Transducer to Record Normal and Shear Stresses at a Prosthetic Interface" (CP 153); "The Effect of Pressure Loading on the Blood Flow Rate in

Human Skin” (CP 155)], and include writings related to physiology of the brain [“Material Properties of Cerebral Blood Vessels”. CP 155]. Dr. Daly regularly consults to provide “expert testimony and advice on biomechanics of head injury ... due to trauma in motor vehicle accidents” CP 156.

While the showing by Mr. Bowers could have been stronger this court should take notice of the likelihood that on remand Mr. Bowers would be able to provide expert testimony based on mathematical calculation to show the speed of impact derived from different potential findings regarding when pre-accident hard braking began from 30 mph such that the jury could find a crash, but with impact speed of the Silverado of 25 mph or less.

Conclusion

Colin Bowers has demonstrated issues for trial: 1) Whether but-for Ms. Marzano’s excess speed and inattention she would have been able to see and react to the hazard posed by the Subaru in time to avoid the accident; and 2) Whether but-for Ms. Marzano’s excess speed and inattention the impact from the accident would have been measurably less so as to limit Mr. Bowers to either a) slight dizziness or b) no symptoms of injury.

Therefore the dismissal was error, and the case should be reversed and remanded for trial on all issues. The court should give guidance on , standards applicable to enhanced injury claim even if reversal is on the first ground, as this would be an issue on re-trial.

In the alternative this Court should reverse and remand to allow consideration of the deposition of Walter Bowers.

DATED June 27, 2011


George H. Luhrs, WSBA #7036
Attorney for Appellant


JUN 29 2011
11:29:26 AM '11

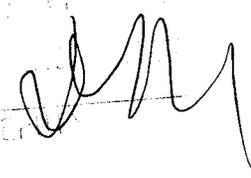
Certificate of Service

I certify that on 6/27/11, the undersigned served a copy of the Reply Brief and Reply Appendix on below counsel by U.S. mail.

Donald G. Daniel Jr., Attorney
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PO Box 11880
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George H. Luhrs

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

Colin Bowers, Appellant,

v.

Pamela M. and Jerry Marzano, Respondents

APPELLANT'S REPLY APPENDIX

George H. Luhrs, Attorney for Appellant
701 Fifth Avenue, Suite 4600
Seattle, WA 98104
(206) 632-1100
WSBA # 7036

FULL SIZE COPIES OF ILLUSTRATIONS FROM REPLY BRIEF

A2: Illustration 1

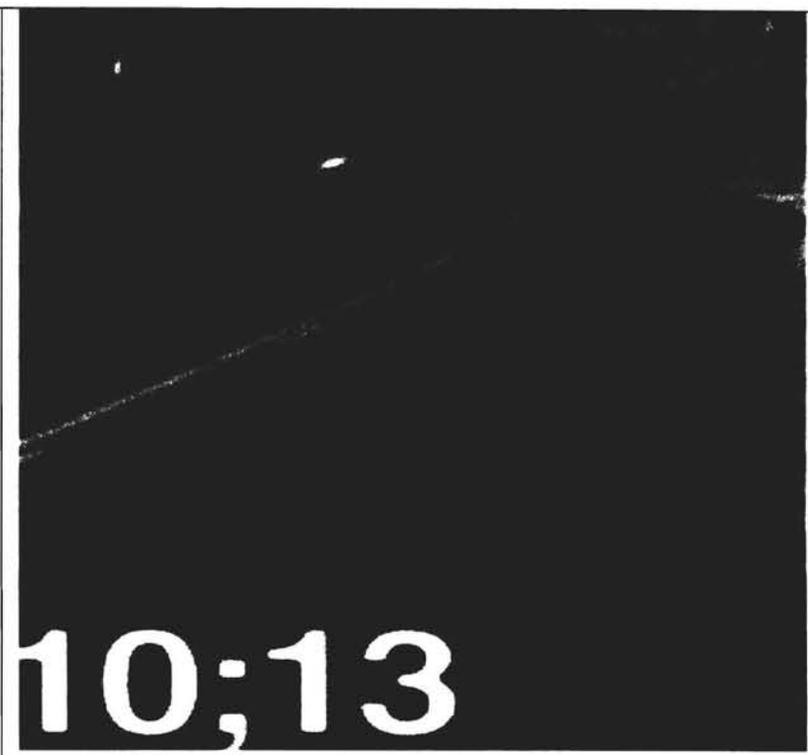
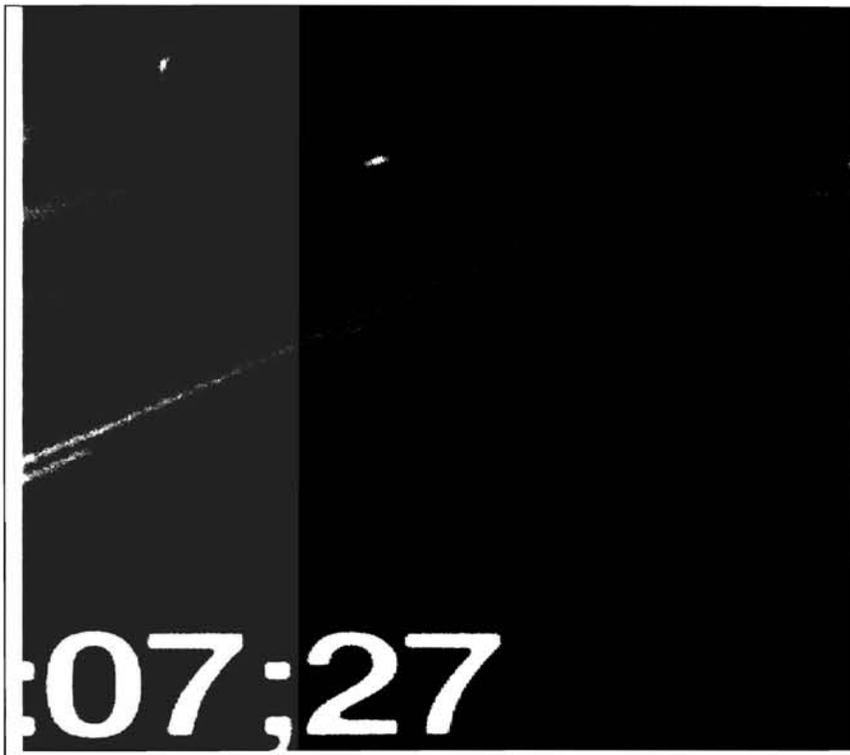
A3: Illustration 2

A4: Illustration 3

Illustration 1

Exhibit O, CP 137

Exhibit C, CP 90



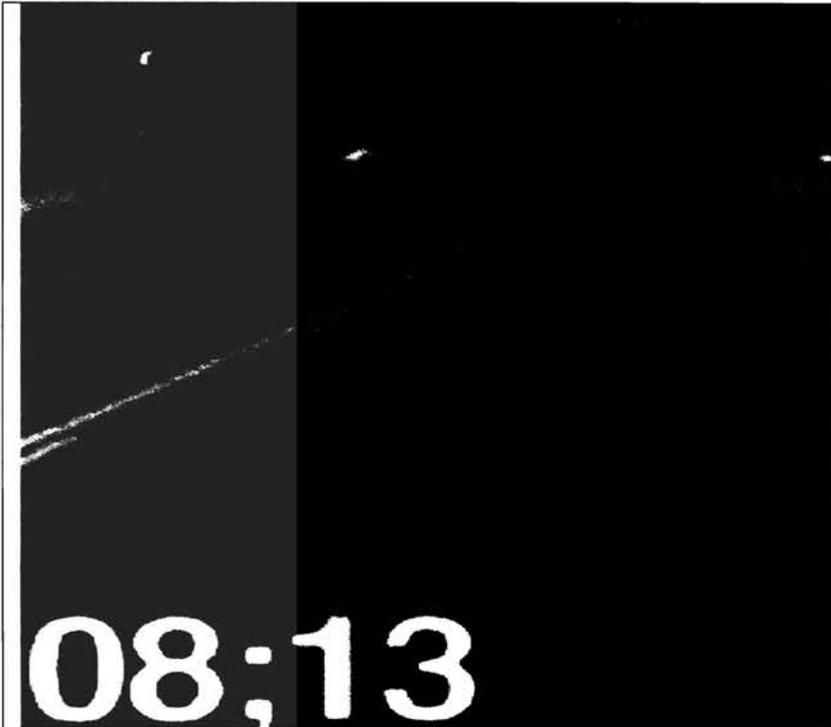
Number at bottom stills: seconds on left; frames advanced on right.
30 frames/sec [Frame #]/30= fraction of a second (for frame count)
Converting to seconds: left still at 7.9 sec; right still at 10.43333 sec.
Time difference = 10.43333 sec - 7.9 sec = 2.53 sec

Illustration 2

A.3

Exhibit CC, CP ~~331~~ 331

Exhibit C, CP 90



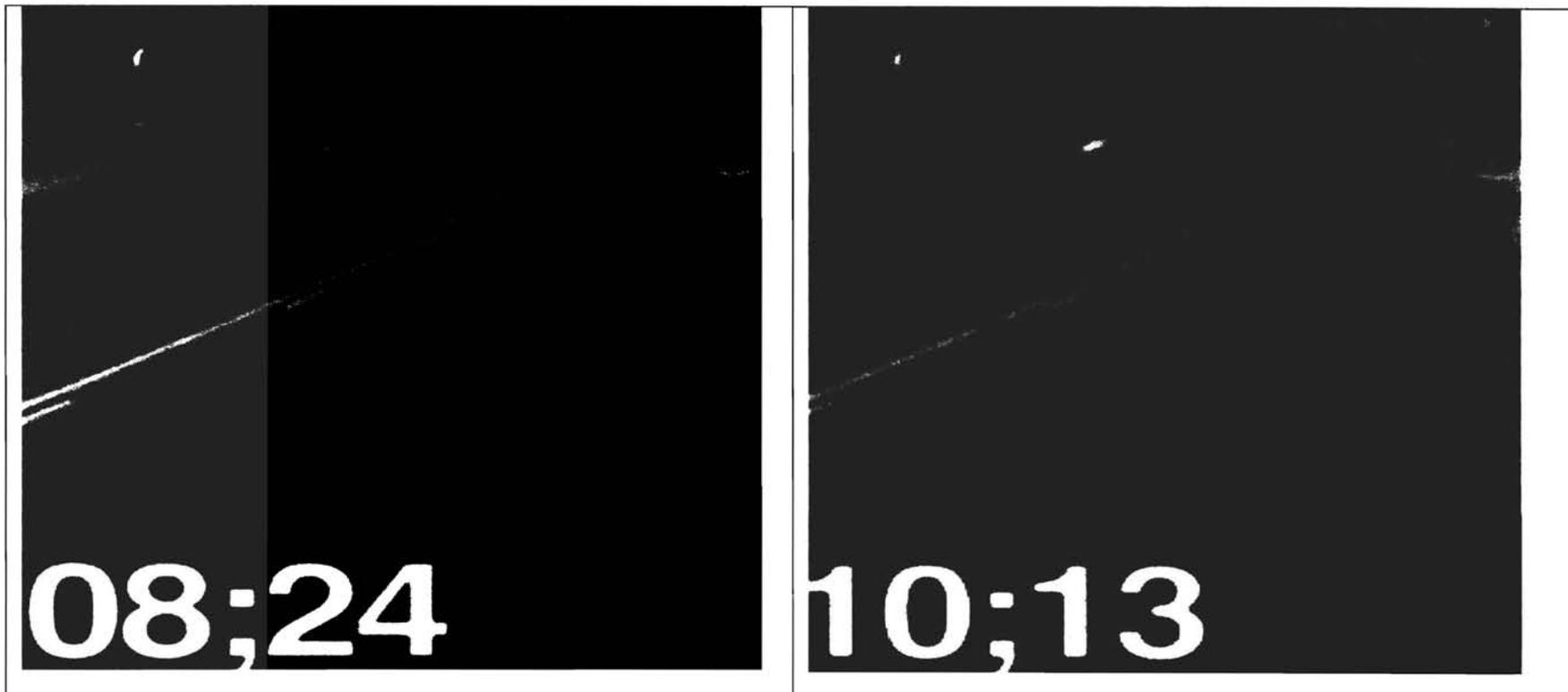
Number at bottom stills: seconds on left; frames advanced on right.
30 frames/sec [Frame #]/30= fraction of a second (for frame count)
No need for sec conversion here because the frames count is the same.
Time difference = 10 sec;13 frames - 8 sec;13 frames = 2.0 sec

Illustration 3

A-4

Still from CP 135, vid 3

Exhibit C, CP 90



Number at bottom stills: seconds on left; frames advanced on right.
30 frames/sec [Frame #]/30= fraction of a second (for frame count)
Converting to sec: left still at 8.8 sec; right still at 10.43333 sec
Time difference = 10.43333 sec - 8.8 sec = 1.63 sec

ADDITIONAL EXCERPTS OF CP

Filing Date	DOCUMENT	Exhibit#	CP #
04/20/2010	Still from video, point of impact	C	90
05/10/2010	Mathematical formula for stopping distance of Marzano Silverado	Z	328
05/10/2010	Still from video, Subaru halfway through stop sign	CC	331

TCR 00:11:21;02

TCR 00:12:01;16

TCG +00:00:10;13

EXHIBIT Z

Equation # 20 - Distance from Speed & Drag

$$D = \frac{S^2}{30 f}$$

D = Distance in ft
S = Speed in mph
f = Accel factor (inc slope & braking eff)

$$(40.1) = \frac{(30.0)^2}{30 (.75)}$$

ft g's

Equation # 20 - Distance from Speed & Drag

$$D = \frac{S^2}{30 f}$$

D = Distance in ft
S = Speed in mph
f = Accel factor (inc slope & braking eff)

$$(74.9) = \frac{(41.0)^2}{30 (0.75)}$$

ft g's

EXHIBIT CC



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June 29, 2011

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JUN 30 2011

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Attn Debbie, Case Manager
Clerk of Court
WA Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Re: Bowers v. Marzano, No. 41362-1-II; Color copies of Appellant's Reply Appendix

Dear Debbie:

You will recall that to make sure the Court had color Copies of Appellant's Appendix we sent additional color copies. With recently filed Appellant's Reply Brief we also included a short Appellant's Reply Appendix. As previously we want the Court to have color copies of the Reply Appendix, and therefore we are enclosing 8 copies of Appellant's Reply Appendix herewith.

Thanks for you kind attention to this matter.

Sincerely,


George H. Luhrs