

COURT OF APPEALS
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STATE OF WASHINGTON
BY 

NO. 41362-1-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

COLIN BOWERS,

Appellant,

v.

PAMELA & JERRY MARZANO

Respondents.

**On Appeal from Pierce County Superior Court
Cause No. 09-2-09689-4**

RESPONDENT'S BRIEF

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A. INTRODUCTION

This negligence case arises from a motor vehicle accident on August 31, 2008. Colin Bowers was a passenger in a Subaru driven by his brother Walter Bowers. The collision occurred when Walter Bowers, the disfavored driver failed to yield the right of way and entered an intersection in front of the favored driver, Mrs. Marzano. Walter Bowers' direction of travel was controlled by a stop sign. Mrs. Marzano did not have a stop sign. The Marzanos brought a motion for summary judgment. Judge Felnagle granted summary judgment for the Marzanos and dismissed the case, finding that Appellant failed to submit competent evidence establishing Mrs. Marzano's speed was a proximate cause of the accident.

Appellant's brief contains assertions and statements regarding the severity of his alleged injuries, the parties insurance coverage and policy limits, a policy tender by co-defendant Walter Bowers' insurance company, and his belief that there are inadequate resources available to compensate him. See Br. App.

at 6, 11, 17, 44. None of this is relevant to the issues pertaining to the summary judgment on appeal. Inclusion of these statements seem designed to make an emotional appeal, rather than a legal appeal to this Court. The Respondent disputes, and has always disputed, the nature and extent of the injuries and damages claimed by Appellant.

B. DECISION BELOW

Judge Felnagle granted Mr. and Mrs. Marzano's motion for summary judgment and denied Mr. Bowers' motion for reconsideration because his attempt to establish a point of notice for Mrs. Marzano was based on conjecture and speculative opinions which failed to establish (1) location of the Marzano vehicle at the moment a reasonable person would have notice of Bowers' failure to yield; and (2) how much time Mrs. Marzano had to perceive and react to the hazard, once she had notice. RP 39:6-40:1, 44:20-45:2, 45:20-22, 64:18-65:2.

C. ISSUE PRESENTED FOR REVIEW

1. Whether the trial court erred when it found that Appellant failed to submit competent evidence in the summary judgment motion showing the approximate point of notice where it was apparent to Mrs. Marzano that the disfavored driver would not yield the right of way to the favored driver?

D. STATEMENT OF THE CASE

The collision occurred August 31, 2008, at the intersection of 66th Avenue E. and 152nd Street East, in Pierce County. A stop sign for Walter Bowers' direction of travel is located in advance of the boundary for the intersection. CP 298, 300,137. According to Appellant, the Subaru slowed for the stop sign. Br. App. at 15; CP 168:10-14. The posted speed limit for Mrs. Marzano's direction of travel through this intersection was 35 mph. CP 57. Mrs. Marzano was the favored driver because there was no traffic control requiring her to yield or stop for traffic on the cross road. CP 126, 58-59. Walter Bowers was the disfavored driver and was required to yield the right of way to Mrs. Marzano. CP 58-59.

Walter Bowers was driving with a suspended license. CP 287. On November 19, 2009, Walter Bowers pled guilty to vehicular assault, a felony. CP 48-56. Walter Bowers admitted to being under the influence of alcohol and marijuana at the time of the collision. CP 47, 48.

Plaintiff's expert made the following assumptions regarding notice, perception reaction time, and speed for rendering his

opinions about whether Mrs. Marzano had an opportunity to avoid this collision: First he assumed the nose of the Subaru slowly rolling past the stop sign located in advance of the intersection boundary line constituted notice to a favored driver that Walter Bowers would not yield the right of way. CP 187:4-10. Second, he assumed that a disfavored driver will violate traffic laws and run a stop sign, and therefore an expected hazard perception reaction time should be used for the favored driver. CP 186: 8-19. Finally, he assumed Mrs. Marzano should have approached the location of the collision at a speed of 30 mph, rather than the posted speed limit of 35 mph. CP 187: 11-14. Each of these assumptions were based on speculation and conjecture and failed to establish Mrs. Marzano's approximate point of notice, meriting summary judgment in favor of Mrs. Marzano.

E. SUMMARY OF ARGUMENT

Appellant failed to submit competent evidence and analysis showing the approximate point of notice where it was apparent to Mrs. Marzano that the disfavored driver, Walter Bowers, would not yield the right of way. Therefore Appellant was unable to establish Mrs. Marzano, the favored driver's speed, was a proximate cause

of the collision. Appellant's entire analysis in opposition to the summary judgment motion was based on unsupported, conjectural and speculative assumptions. Those assumptions are as follows: First, the nose of a slowing Subaru rolling just past a stop sign located in advance of an intersection constitutes notice to a favored driver that the disfavored driver will not yield the right of way at the intersection. Second, that a favored driver is required to expect a disfavored driver will fail to yield the right of way at an intersection; and third, that .67 of a second perception/reaction time is a reasonable amount of time to allow a favored driver to perceive, understand, react and begin braking in response to a disfavored driver's failure to yield.

F. ARGUMENTS IN SUPPORT OF SUMMARY JUDGMENT RULING.

1. Appellant Failed to Meet His Burden of Production to Submit Competent Evidence from Which the Trier of Fact Could Approximate The Favored Driver's Point of Notice.

a. Applicable Law Regarding Point of Notice for the Favored Driver.

The primary duty to avoid a collision is on the disfavored driver. *Mendelsohn v. Anderson*, 26 Wn. App. 933, 37(Div.1,1980),

(excessive speed on the part of oncoming favored driver will not excuse disfavored driver's duty to yield.) A disfavored driver must yield to an oncoming vehicle even if it can be shown that the oncoming vehicle was proceeding unlawfully. *Mossman v. Rowley*, 154 Wn. App. 735, 741 (Div. 3, 2009); *State v. Carty*, 27 Wn. App. 715 (Div.1, 1980); *Doherty v. Municipality of Metro. Seattle*, 83 Wn. App. 464 (Div. 2, 1996).

Speed in excess of that permitted by statute or ordinance, in and of itself, is not a proximate cause of a collision if the favored driver's vehicle is where it is entitled to be and the favored driver would have been unable to avoid the collision even if driving at a lawful speed. *Channel v. Mills*, 77 Wn. App. 268, 276-277 (Div. 2, 1995); *Mossman*, 154 Wn. App. at 741. Speed which does nothing other than bring two drivers to the same location at the same time is a remote, rather than a proximate cause of an accident. *Channel*, 77 Wn. App. at 277. Excessive speed is not causal because the same argument can be made that if the disfavored driver had been going faster or slower in the same way as if the favored driver traveled slower the accident would have been avoided. *Mossman*, 154 Wn. App. at 741. The speed the

avored driver was traveling before the accident does not matter because the only inquiry is whether speed prevented the favored driver from avoiding the impact between the point he/she realized the disfavored driver was not going to yield the right of way (point of notice) and the point of impact. *Mossman*, 154 Wn. App. at 741.

As the court pointed out and held in *Channel*, 77 Wn. App. at 277, it cannot be said that the favored driver hit the disfavored driver because they were driving over the speed limit; rather, it can only be said that the favored driver hit the disfavored driver because they were not driving at any particular speed whether above or below their actual speed.

Expert testimony that if the favored driver had been driving more slowly the collision would have been avoided is insufficient to defeat a motion for summary judgment by the favored driver and is not a correct analysis to apply. *Mossman*, 154 Wn. App. at 741-742; *Theonnes v. Hazen*, 37 Wn. App. 644, 648-650 (Div.1, 1984).

This Division in *Channel*, 77 Wn. App. at 268, held that in order to establish excessive speed by a favored driver as a proximate cause of an accident with a disfavored driver, a party must establish the favored driver's point of notice. *Channel*, 77 Wn.

App. at 276-280, n.16; *Whitchurch v. McBride*, 63 Wn. App. 272, 275-277 (Div. 2, 1991) *review denied*, 118 Wn.2d 1029 (1992).

The point of notice is that point at which a reasonable person would have realized the disfavored driver was not going to yield the right of way. *Channel*, 77 Wn. App. at 280, n.16. The point of notice as been described as the point where it becomes **apparent** to the favored driver that a disfavored driver is not going to yield. *Kilde v. Sorwak*, 1 Wn. App. 742, 746 (Div. 3, 1970), *review denied*, 77 Wn. 2d 963 (1970); *Mossman*, 154 Wn. App. at 741, citing *Channel v. Mills*.

The favored driver is entitled to a reasonable reaction time after the point of notice is ascertained. *Whitchurch*, 63 Wn. App. at 276, n.4, citing *Poston v. Mathers*, 77 Wn. 2d. 329, 335 (1969); *Oplinski v. Clement*, 73 Wn.2d 944, 949 (1968). This Division held, in *Whitchurch*, that without evidence showing the approximate point at which a reasonable person would realize the disfavored driver would not yield the right of way, one cannot prove "cause in fact", or that the favored driver could have avoided a collision between point of impact and point of notice but for speed. *Whitchurch*, 63 Wn. App. at 277. In other words, if there is no evidence showing

the approximate location of the point of notice, the reasonable person's conduct, cannot be compared with the favored driver's and plaintiff has not met the burden of producing evidence sufficient to support a finding that the accident would not have happened but for the favored driver's speed. Without evidence of where the favored driver was located when a reasonable person in her position would have noticed the failure to yield of the disfavored driver, speed of the favored driver cannot be presented as the "cause" of the accident. *Whitchurch* 63 Wn. App at 276-277 (favored driver's speed of 43 mph in a 25 mph brought vehicles to same location at same time but evidence was insufficient to establish point of notice to permit case to go to the jury).

Besides submitting evidence from which the court can infer the point of notice, other factors which must be addressed by claimant to defeat a motion for summary judgment may include a "reasonable driver's" approximate reaction and/or braking distance. See, *Channel*, 77 Wn. App. 279, n.13.

b. The Favored Driver Is Entitled to a Reasonable Perception Reaction Time from the Point of Notice.

Even after it becomes apparent to the favored driver that the

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

The term “reaction time” means the time from the point of notice to the time the brakes are first applied. *Channel*, 77 Wn. App. at 280. In *Channel*, the plaintiff’s expert testified that a reasonable reaction time for the favored driver was 1.75 seconds. *Channel*, 77 Wn. App. at 280. In *Holmes v. Wallace*, 84 Wn. App. 156, 161-162 (Div. 2, 1996), plaintiff’s expert testified a reasonable perception reaction time for a favored driver was 1.5 seconds.

Knowledge of the disfavored driver’s negligence must be followed by a reasonable perception reaction time for the favored driver to determine if they had an opportunity to avoid the collision. *Bellantonio v. Warner*, 47 Wn.2d 550, 461-462 (1955).

c. **As a Matter of Law the Nose of a Slowing Subaru Moving Just past a Stop Sign Located in Advance of an Intersection Is Not Notice to a Favored Driver That a Disfavored Driver Will Not Yield the Right of Way at the Intersection.**

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

A favored driver is not required to anticipate the disfavored driver's negligent conduct. *Kilde*, 1 Wn. App. 742, 746 (1970). A favored driver has the right to expect to have the right of way, and is entitled to rely on the disfavored driver to yield the right of way, until the favored driver reaches that point at which a reasonable person exercising reasonable care would realize that the disfavored driver is not going to yield. *Whitchurch*, 63 Wn. App. at 275-276. This is the "point of notice".

Appellant claims Walter Bowers' Subaru was traveling at a

speed of 10-15 mph and slowing as it approached the stop sign. CP 315: 2-3; Br. App. at 15. The stop sign is located well in advance of the boundary line for the intersection. CP 298, 300, 137. Appellant asserted and submitted materials describing the action of the Subaru as it moved through the stop sign as a "California stop." CP 81, 284.

Mr. Becinski, Appellant's accident reconstructionist, asserted Mrs. Marzano should have noticed and reacted and began braking within .67 seconds from the moment when the bumper of the slowing Subaru rolls past the stop sign located in advance of the intersection. CP 187:7-9. Mr. Becinski did not offer any foundation as to why this moment provides notice to the favored driver that the disfavored driver will not yield the right of way. CP 187, 137, 315: 2-3. Mr. Becinski's analysis and opinions are based on a video and still photographs taken from this video which were offered in opposition to summary judgment. CP 135, 137, 90, 187. This video purports to show a staged representation of the Bowers' Subaru moving towards and through the intersection.

The video is not based on a reconstruction of the accident by Mr. Becinski and was created without his involvement. The

video depicts nothing but the movement of a red Subaru (the Bowers' Subaru was green), at a set speed on March 27, 2010, without any factual foundation, reconstruction or rendition as to how the Subaru moved during the accident. CP 192-222, 223-258, 259-64. Even if one were to assume this is how the Subaru moved at the time of the accident, the video does not establish the movement and location of the Marzano vehicle at any time when these Subaru movements occurred. Nor does the video in anyway depict or provide a factual foundation for or demonstrate Mrs. Marzano's point of notice, because a reasonable person wouldn't conclude Mr. Bowers was going to fail to yield until the Subaru actually entered the intersection.

What Mr. Becinski did with these photos and video is arbitrarily pick two points in time and conclude there is 2.53 seconds between them. These two points in time are illustrated by two photographs taken from the video. CP 187: 6-10, 137, 90. From these two moments in time Mr. Becinski extrapolates a conclusion that Mrs. Marzano should have perceived, realized, reacted and "hard" braked to a stop short of impact within 2.53 seconds if she was traveling at a speed of 30 mph and given a .67

of a second perception reaction time. CP 186-187. However, Mr. Becinski never established the point of notice where it became apparent to Mrs. Marzano that Walter Bowers was not yielding the right of way.

When one looks specifically at Appellant's video presentation, it becomes clear that the moment which Mr. Becinski relies on to initiate his analysis actually communicates to an approaching reasonable favored driver that the Bowers' vehicle is slowing to a stop for the intersection and is **not** a hazard. Slowing down for a stop sign, and rolling forward, is a common and expected practice typically used to obtain a better view of the intersection and oncoming traffic. Such a movement is provided for by law. RCW 46.61.190 (2) provides that a driver approaching a stop sign shall:

stop at a clearly marked stop line, but if none, before entering a marked crosswalk on the near side of the intersection or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the roadway, and after having stopped shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways.

Pursuant to this statute, Walter Bowers was permitted to stop at either a stop bar or at the point nearest the intersecting roadway and not at the exact location of the stop sign. There was no stop bar in place on the date of the accident. CP 86, 300. Appellant acknowledges and admits the Subaru performed a “California stop”, which he describes as “a slow down to roll through the stop sign.” RP 20:16-21, 24; 47, 49: CP 315. Based on the evidence relied upon and submitted by Appellant, the Subaru was slowing to 10 mph or less as it approached the stop sign. RP 20:11-22. In fact, Appellant acknowledges engaging in a “California stop” at a sign does not mean a person is failing to yield the right of way. RP 47. In light of this, a vehicle using a “California stop” to slowly roll past a stop sign located in advance of an intersection stop does not communicate a failure to yield.

Appellant’s video and photos establish the stop sign is located in advance of the beginning of the intersection. CP 137. This point is also illustrated in Appellant’s exhibits X (CP 300), AA (CP 329), BB (CP 330), V (CP 279) and W (CP 297-98). Diagrams AA (CP 330) and BB (CP 331) submitted in support of the motion for reconsideration. These exhibits were prepared by Mr. Luhrs and

were not prepared by, nor apparently reviewed by, Mr. Becinski. CP 326. However, they clearly illustrate the point that the nose of the Subaru at the stop sign does not convey the disfavored driver will not yield the right of way.

In fact, the video and photos actually depict how a favored driver is misled into concluding Walter Bowers is stopping for the stop sign and/or creeping forward to enhance his ability to detect oncoming traffic before entering the intersection or preparing for a right turn. CP 260:25-CP 261:24.

Mr. Bowers' video and photos further demonstrate a reasonable person would, at best, realize the Bowers' Subaru was not going to yield the right of way at the point when the Subaru enters into the intersection.¹ However, the only clear and unmistakable notice that Walter Bowers would not yield the right of way occurs when he enters Mrs. Marzano's actual lane of travel. Both vehicles actually move significantly closer to the point of impact during this time. From the video you can calculate the time

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In the videos, the Subaru does not enter the intersection until it crosses the stop bar depicted therein. Whether the stop bar was present or not at the time of the accident is not relevant, it is merely a point of reference for purposes of evaluating the video.

difference from when the Subaru starts to cross the stop bar (CP 135) to the time when it reaches the point of impact (CP 90), the elapsed time is 1.4 seconds. CP 261:14-19. This is clearly insufficient time for Mrs. Marzano to perceive, react and brake to a stop at a speed of 30, 35, 39 or 41- 42 mph. CP 261. (Supp. Decl. of John Hunter).

Therefore, the very information, speculative as it is, Appellant relied upon to oppose the summary judgment actually demonstrates Mrs. Marzano was not put on notice the Bowers' vehicle would fail to yield the right of way at the point Becinski selected to initiate his analysis. Reasonable minds could only reach one conclusion which is, it does not become apparent that the Subaru is not yielding the right of way until it enters the intersection and more likely when it enters Mrs. Marzano's actual traffic lane. The only reasonable inference that can be drawn from Appellant's submissions is that a reasonable driver would expect the slowing vehicle to stop and yield to approaching traffic.

Despite the established legal requirements for determining the favored driver's point of notice, Appellant did not analyze the facts of this case from the reasonable person's perspective.

Whitchurch, 63 Wn. App. at 276. Rather, he selected an arbitrary unreasonable and ambiguous moment in time as the point at which to analyze the time and distance available to Mrs. Marzano to perceive, realize, and react to Mr. Bowers' failure to yield. Perhaps this analysis was based on a speculative assumption because it is the only moment which allowed Mr. Bowers to argue Mrs. Marzano could have stopped prior to the collision. However, it did not establish the point of notice. Judge Felnagle concluded the following :

It is absolutely critical to establish the point of notice, and I don't think what Becinski does is the right methodology to do that...". " Using the methodology Becinski employs, it doesn't tell us where Ms. Marzano would have had notice that Bowers was going to disregard the signage and was going to enter the intersection. And I think that is fatal under the case law, and under logic, too.

RP 39. In further support of his decision to grant summary judgment Judge Felnagle further stated:

I just don't see how you can say that it affected causation without knowing where it was that she had some fair notice of the fact that he was going to enter that intersection, so I am prepared to grant summary judgment.

RP 39-40.

Speculative and argumentative assertions are insufficient to

create a material dispute of fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 3 (1986); *Blakely v. Housing Authority of King County*, 8 Wn. App. 204 (Div. 1, 1973). An opinion that is only a conclusion or based on an assumption does not satisfy the summary judgment standard. *Lilly v. Lynch*, 88 Wn. App. 306, 319-320 (Div. 2, 1997). Furthermore, such speculation is insufficient to establish causation. *Miller v. Likins*, 109 Wn. App. 140, 145 (Div. 1, 2001); *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 326-327 (Div. 1, 1980). Speculation, conjecture, or mere conclusions found in an expert's opinion are insufficient to resist such a motion. *Theonnes*, 37 Wn. App. at 648. The bare allegation of fact by affidavit without any showing of supporting evidence is insufficient to raise genuine issue of fact for purposes of motion for summary judgment. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 955-956 (1966). Yet this is exactly what Appellant did in response to this summary judgment motion.

As a matter of law, reasonable minds could not differ that the bumper of a slowing Subaru rolling just past a stop sign located in advance of the boundary line for the intersection is not notice that the disfavored driver will not yield.

d. Mrs. Marzano Was Not Required to Approach this Intersection at a Speed of 30 mph.

Appellant argues Mrs. Marzano should have slowed to 30 mph upon seeing a cross road ahead sign. There is no authority for this position within the traffic laws of Washington State. It is undisputed that the speed limit for the road Mrs. Marzano was on is 35 mph. CP 59. There is no legal basis requiring her, at the time of this accident, to be driving 30 mph in a 35 mph speed zone. First, there is no legal requirement that she reduce speed in response to the presence of a cross road sign, and Mr. Bowers has offered none. Second, there was no stop sign, signal or advisory speed plate requiring Mrs. Marzano to slow to 30 mph. The cross road sign did not contain an advisory speed. Third, there is no legal authority requiring Mrs. Marzano to reduce her speed to 30 mph due to the presence of a cross road sign. Fourth, Mrs. Marzano had no reason to expect a hazard or that a disfavored driver would not yield the right of way. *Kilde*, 1 Wn. App. 742, 746 (1970). Finally, Mr. Becinski has no basis for concluding Marzano did or did not see the cross road sign, that she was driving inattentively, or that she was required to reduce her speed to 30 mph. He identifies

no factual foundation supporting these conclusions.

Appellant relies on a copy of the *Washington Drivers Guide* (CP 111-112) in support of an assertion that the presence of a “cross road” sign required Mrs. Marzano to slow to 30 mph. Yet, Appellant has failed to prove or cite authority which provides that the *Washington Drivers Guide* defines the standard of care for drivers in the State of Washington. Without proof and/or authority that this handbook is the recognized and adopted standard applicable in the State of Washington and intended to form the basis for legal action against drivers, it may not be used for such purpose. *Walker v. King County Metro.*, 126 Wn. App. 904, 911 (Div.1, 2005)(holding the *Washington State Commercial Driver Guide* and the *Model Commercial Driver License Manual* did not establish a standard of care for bus drivers.)

Nonetheless, even the language of the *Drivers Guide* does not support Mr. Bowers' position. The language relied on provides: “These signs warn you to slow down and be prepared to stop if necessary.” These are generalized comments as they do not establish a specific duty or obligation and do not discuss the specific meaning, applicability and requirements of each sign.

Contrary to Appellant's suggestion on page 13 of his brief, he did not submit any evidence or authority establishing the legal intent and purpose of the "cross road" sign. Even if one were to assume the applicability of the Guide, the language would only apply "if necessary." Under the facts of the case at bar, it was not "necessary" for Mrs. Marzano as the favored driver to slow and prepare to stop until she has notice that Walter Bowers was not yielding the right of way.

Appellant says Mrs. Marzano should have been driving at 30 mph, but never set forth a foundation or facts supporting a conclusion that a reasonable speed for approaching this intersection as the favored driver is 30 mph, rather than 31, 32, 33, 34 or 35 mph. His only basis for claiming Mrs. Marzano should have been driving at 30 mph is the presence of a cross road ahead sign. CP 185, 107,112. But the sign does not impose a duty to drive at 30 mph.

Excessive speed can only be causal if it prevents the favored driver, between the point of notice and the point of impact, from avoiding a collision. *Mossman*, 154 Wn. App. at 741-42. (favored driver driving anywhere between 45 to 60 mph in a 30

mph zone hit car turning left in front of him granted summary judgment due to plaintiff's failure to show that he had enough time between point of notice and point of impact to avoid the collision).

Therein, the court stated:

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

Mossman, 154 Wn. App. at 741-742. Similarly, Bowers' expert Becinski, opines that if Mrs. Marzano was traveling slower the accident would have been avoided. However, a plaintiff must produce evidence from which the trier of fact can infer the approximate point of notice before consideration can even be given to whether a lawful speed would have avoided the collision. *Holmes*, 84 Wn. App. 156, 161-162 (1996).

To say this accident would not have happened if Mrs. Marzano is proceeding at 30 mph is speculation and conjecture. This accident would not have happened if the Bowers' Subaru was doing 5 mph, 25 mph or 50 mph. Nor would it have happened if Walter Bowers had obeyed the law and refrained from driving on a

suspended license. CP 287. Nor would it have occurred if he left his house 5 minutes before or after the time he left. Nor would it have happened if Mrs. Marzano had been traveling at a speed of 45 or 50 mph. This is the very rationale used by the Court to articulate why speed in and of itself is too arbitrary to assign negligence to a favored driver. *Channel*, 77 Wn. App. at 271-279. Plaintiffs must establish the point of notice. *Channel*, 77 Wn. App. at 271-279; *Mossman* 154 Wn. App. 735 (trial court properly dismissed claim against speeding driver where plaintiff was disfavored driver and did not produce evidence that collision could have been avoided at slower speed); *Claar ex rel. Claar v. Auburn School Dist.* 408, 126 Wn. App. 897 (Div.1, 2005)(claim against driver was properly dismissed on summary judgment where driver had no notice that child was behind school bus, and slower speed would not have prevented collision).

Also see *Theonnes*, 37 Wn. App. at 647-649 for further authority on afore noted point. Therein the court held that an accident reconstructionist's testimony that if the favored driver was proceeding at 30 mph, rather than at 42 mph, in a 35 mph zone, he could have avoided an accident constituted speculation and was

insufficient to avoid summary judgment motion in favor of favored driver. The court stated the following at pages 648-650:

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

Likewise the expert stated that the "ability" of a vehicle to cause damage at impact increases with the speed. But he used that "ability" as a basis for a conclusion that excessive speed in this case did in fact cause more damage than would have been experienced at a speed 5 or 10 miles an hour less. That is speculation unsupported by any evidence.

Similar to the expert in *Theonnes*, the Becinski declarations contain nothing but conclusions based on unsupported assumptions and therefore are insufficient to oppose a summary judgment motion.

e. Inattention by the Favored Driver Is Not a Factor in Determining If Speed Is a Proximate Cause of the Collision.

Appellant incorrectly argues Mrs. Marzano was inattentive at the time of the accident and that this is relevant to determining if

she was negligent. Br. App. 3-4; CP 81. In fact, the only testimony on this issue is from Mrs. Marzano who unequivocally testified that she maintained a proper lookout. CP 239:18. Whether a favored driver fails to maintain a proper lookout is irrelevant to the determination of whether his or her rate of speed caused the accident. *Grobe*, 87 Wn.2d at 221-222; *Windle v. Huson*, 32 Wn. App. 230, 234 (Div.1,1982), *review denied*, 32 Wn. App. 235 (1982). Failure to maintain a proper lookout of a street on which a disfavored driver may be moving is not evidence that a favored driver's speed proximately caused the accident. *Grobe*, 87 Wn.2d at 221-222 (intersection collision with substantial evidence favored driver not maintaining lookout is not a factor or evidence that speed was excessive). Nor does RCW 46.61.400 identify inattention as a permissible factor in determining excess speed. *Grobe*, 87 Wn.2d at 221-222. Nonetheless, there is no evidence or reasonable inference that Mrs. Marzano did not maintain a proper lookout.

Mrs. Marzano testified she was vigilant as she proceeded towards the intersection. CP 239. Furthermore, Mrs. Marzano testified that she doesn't recall if she did or did not see the cross road sign on the day of the accident. CP 238-239. This is

undisputed.

Appellant relies on Mr. Becinski's conclusion that Mrs. Marzano was not attentive because the tire mark shows her first physical reaction is five feet before the point of impact. That conclusion is nothing but speculation. In fact, all the tire mark establishes is that after it became apparent to Mrs. Marzano that Walter Bowers was not going to yield the right of way, she attempted to brake. *Bellantonio v. Warner*, 47 Wn. 2d 550, 553-555 (1955).

Similarly, Becinski speculates Mrs. Marzano "lacked attentiveness" because the CDR data on her vehicle, according to him, showed a constant RPM of 1280. CP186:11-13. Yet he failed to explain or cite any facts or authorities that would support his conclusion that Mrs. Marzano was inattentive based on this information. This information is meaningless and invites nothing but conjecture and speculative conclusion. In fact, if you actually look at the CDR data which Becinski redacted, it shows Ms. Marzano's speed varied during the last five seconds before the impact. CP 261-262, 264. (Supp. Decl. of Hunter). This is the exact opposite of what Mr. Becinski assumed. CP 264.

Furthermore, contrary to Mr. Bowers' argument, the Marzano vehicle was not using cruise control. CP 239. The undisputed testimony of Mrs. Marzano was that she was not using, and did not know how to use, cruise control. CP 239. Mr. Becinski either disregarded or did not consider this undisputed testimony. Furthermore, he also did not consider or rule out other explanations for the CDR reading, such as Mrs. Marzano maintaining a constant speed on the accelerator, coasting or removing her foot from the accelerator as she proceeded on the downgrade for 152nd as you approach the intersection.

Furthermore, contrary to Mr. Bowers' assertions, reference by Mrs. Marzano that there is no traffic control for vehicles proceeding in her direction of travel refers to no traffic signals or stop signs which would require her to yield the right of way or change her status as the favored driver at the intersection. CP 25. The same is true with reference to traffic control by Mrs. Marzano's accident reconstructionist John Hunter. CP 59.

There is no factual foundation or basis to support Mr. Becinski's conclusory statements that Mrs. Marzano was inattentive. Appellant's argument in this regard was nothing other

than unsupported, conclusory and argumentative assertions.

Even if you assume the same, it is inconsequential because Appellant failed to introduce any competent evidence establishing the point of notice for Mrs. Marzano.

2. **Appellant Failed to Submit Competent Evidence of a Reasonable Perception Reaction Time for the Favored Driver.**
 - a. **Mrs. Marzano Had the Right to Assume Walter Bowers Would Obey the Law and Therefore Is Not Required to Anticipate or Expect He Will Not Yield the Right of Way.**

The undisputed facts established Mrs. Marzano had the right of way through this intersection. They also established Walter Bowers' direction of travel through the intersection was controlled by a stop sign and therefore he was the disfavored driver. The primary duty to avoid a motor vehicle accident falls upon the disfavored driver. *Sanchez v. Haddix*, 95 Wn.2d 593, 597 (1981).

The law in the State of Washington provides that every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption. WPI 70.06. There is absolutely no legal authority cited by Mr.

Bowers which imposes a duty upon Mrs. Marzano to anticipate a disfavored driver will fail to yield the right of way. In fact, the favored driver may assume the disfavored driver will yield the right of way. *Whitchurch*, 63 Wn. App. at 275-276. This assumption continues until the favored driver becomes aware, or in the exercise of reasonable care should have become aware, that the right of way will not be yielded. *Maxwell v. Piper*, 92 Wn. App. 471 (Div. 2, 1998); *Jones v. Widing*, 7 Wn. App. 390, 392 (Div. 2, 1972); *Massengale v. Svangren*, 41 Wn.2d 758 (1953). Nor is a favored driver required to anticipate a disfavored driver's negligent conduct. *Kilde v. Sorwak*, 1 Wn. App. 742, 746 (Div. 3, 1970).

From the point where the favored driver should realize the disfavored driver is not going to yield, the favored driver's conduct is compared with a reasonable person's hypothetical conduct to determine whether the accident would not have happened, but for the favored driver's negligence. *Whitchurch*, 63 Wn. App. at 276. Mrs. Marzano had a right to assume Walter Bowers would obey the law and was under no obligation to react or anticipate otherwise until such time as it became apparent that he was not going to yield the right of way (point of notice). It is only then that she must react

and the law provides that she is entitled to a reasonable opportunity to react. As previously discussed, Appellant failed to introduce evidence as to the apparent point of notice for Mrs. Marzano.

b. As a Matter of Law, Appellant's Use of a .67 of a Second Expected Perception Reaction Time Is Unreasonable.

Even if Appellant had provided competent evidence establishing point of notice, the reaction time used by Becinski (.67) is not reasonable. A favored driver is allotted a reasonable reaction time to take evasive action after it becomes apparent in the exercise of ordinary care that the disfavored driver will not yield the right of way. Even if the favored driver does not see the disfavored driver until it is too late to avoid the accident does not mean he is not allowed a reasonable reaction time before he can be charged with negligence. *Grobe*, 87 Wn.2d at 226-227; *Olpinski*, 73 Wn.2d at 949. Appellant's expert acknowledges his perception reaction time of .67 of a second is based on an expected versus an unexpected hazard. CP 186:18-19.

Mr. Becinski's conclusory assumption that Mrs. Marzano is entitled to no more than .67 of a second in perception reaction time

is without foundation and unreasonable as a matter of law since it is derived from a faulty premise. Becinski's first declaration asserts that Mrs. Marzano should have been "prepared for someone running the stop sign". CP 186:18. Based on this conclusory statement, and nothing else, he asserts her reaction time would be .67 of a second (2/3 of one second). CP 186:21-22. Becinski's opinion is premised on the conclusory assumption that Walter Bowers' failure to yield the right of way was an expected hazard. In other words, Becinski assumes a disfavored driver will always fail to yield the right of way to the favored driver at an intersection and therefore the favored driver must expect this hazard. However, a favored driver is not required to anticipate the disfavored driver's negligent conduct. *Kilde*, 1 Wn. App. at 746. Becinski offered absolutely no foundation for asserting a .67 of a second perception/reaction time is reasonable and appropriate under the circumstances or that it is accepted within the relevant scientific community. Nor is there any legal basis for Appellant's premise that the cross road sign required Mrs. Marzano to expect that a disfavored driver would fail to yield the right of way to her. There is simply no evidence of an expected hazard. Because there is no

legal or factual foundation which supports concluding that a .67 of a second perception reaction time is reasonable, Becinski's opinions based thereon should be excluded. ER 702 and *State v. Black*, 46 Wn. App. 259, 262-265 (Div. 3, 1986), *aff'd*, 109 Wn.2d. 336 (1987).

As a matter of law there can be no dispute that the occurrence at issue here is an **unexpected hazard** and therefore Mrs. Marzano is entitled to a reasonable perception reaction time. Quite simply, disfavored vehicles do not regularly fail to yield the right of way. In fact, just the opposite is true; disfavored drivers usually yield the right of way. When the Subaru enters into the favored driver's path of travel then it becomes an unexpected hazard which entitles the favored driver to a reasonable perception reaction time. Mr. Hunter's perception reaction time of 1.5 seconds is undisputed. CP 59-60. Appellant did not submit a perception reaction time for an unexpected hazard.

One should not lose sight of the fact that this is a dynamic, rather than static event. You cannot freeze a moment in time and conclude this establishes fault. As the *Kilde* court pointed out and held, it is insufficient to establish the favored driver's negligence by

“means of split second computations of time and distance.” *Kilde*, 1 Wn. App. at 746-748. Yet that is exactly what Mr. Becinski did. Appellant never provided the trial court with any evidence showing Mrs. Marzano’s location at the point of notice and whether she could have avoided the accident.

3. Appellant Failed to Submit Competent Evidence That the Speed of the Marzano Vehicle Was a Proximate Cause of the Collision.

Actionable negligence requires that the breach of a duty be the proximate cause of the claimed injury. *Hartley v. State*, 103 Wn.2d 768, 777 (1985). As the court stated in *Wilkie v. Chehalis County Logging Co.*, 55 Wash. 324, 104 Pac. 616 (1909):

Liability does not rest in the negligent act, but upon proof that the act of negligence was the proximate cause of the injury. Appellant cites many authorities showing that improper use of a highway is a nuisance, but it does not follow that an individual can recover damages in an action of this kind because of its maintenance, unless it be shown by competent evidence, attaining a higher degree than conjecture evidence, that he had suffered an injury because of it. (emphasis added)

See also *Miller*, 109 Wn. App. at 145 (to survive summary judgment, the Appellant’s showing of proximate cause must be based on more than mere conjecture or speculation). Instead, they

must produce evidence from which the cause in fact may be inferred. 16 *Wash. Practice*, sec. 4.2, at 102.

The issue of proximate cause can be decided by summary judgment. *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 384 (Div. 3, 1989), *review denied*, 112 Wn.2d 1020 (1989)(proximate cause may be question of law . . . if the facts are undisputed, the inferences are plain and inescapable, and reasonable minds could not differ). Causation is speculative if "there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372 (Div. 2, 1999) quoting *Gardner v. Seymour*, 27 Wn.2d 802, 809 (1947); *Grobe*, 87 Wn.2d 217(1976).

4. Appellant's Reliance on *Holmes and Hough* is Misplaced.

Mr. Bowers cites the case of *Holmes v. Wallace*, 84 Wn. App. 156 (1996) at page 29 of his brief for the proposition that disputes between expert opinions should be resolved by the trier of fact. This proposition really has no bearing in the case at bar

because the trial court correctly held that the opinions expressed by Mr. Becinski were based on speculation and conjecture and did not provide evidence on the critical issue of point of notice as previously discussed. RP: 39-40, 44-46, 64.

As a result there was no dispute between experts.

On pages 30-31 of his brief, Mr. Bowers cites the case of *Hough v. Ballard*, 108 Wn. App. 272 (Div.2, 2001) for the proposition that the court has recognized a failure to reduce speed when approaching an intersection as grounds for reversing a summary judgment for a favored driver. *Hough* does not support that proposition. In fact, the *Hough* court found there was actually a dispute of fact as to which driver was the favored driver and who had the right of way due to inoperative traffic signals at the *uncontrolled* intersection which precluded summary judgment. *Hough*, 108 Wn. App. at 279-283. Contrary to this, the case at bar involves a controlled intersection in which the Bower's vehicle as the disfavored driver was required to yield the right of way to Mrs. Marzano, the favored driver. These facts are undisputed. Furthermore, as previously discussed, in the present case

Appellant never met the threshold of establishing a point of notice for the favored driver which is a precursor to consideration of the issue of speed. In addition, in *Hough* it was the special hazard created by the inoperative traffic signals and the darkened intersection and Mr. Hough's knowledge of these which prompted the court's discussion of speed and RCW 46.61.400; *Hough*, 108 Wn. App. at 284-85. It is clear Mr. Becinski's opinions regarding speed were not based on any foundation and constitute conjecture.

On page 19 of his brief, Appellant asserts Respondent "argued that proof of point of notice using a point in time before the accident, rather than a measure of distance before the accident, was legally deficient and the trial court seemed to base its ruling on this rationale." It is not clear exactly what Appellant is referring to by this statement or upon what basis he concludes Judge Felnagle employed this rationale. Nonetheless, this misstates the nature of Respondent's position and the trial court's ruling. Rather, the Marzanos' argued the assumptions used by Mr. Bowers' expert regarding what Subaru action initiated his analysis, and the perception reaction time for the favored driver and speed were nothing other than speculation and conjecture which did not

establish Mrs. Marzano's point of notice. The trial court's ruling was based on Mr. Bowers' failure to establish the point of notice. RP: 39,64-65. Mr. Bowers never established Mrs. Marzano's point of notice and therefore her speed was not a proximate cause.

5. Appellant's Failure To Show Mrs. Marzano's Point of Notice Precludes Any Claim For Enhanced Injury Since The Favored Driver Is Not Negligent.

The "essential elements of an action for negligence which a plaintiff must prove are: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) a proximate cause between the breach and the injury." *Christen v. Lee*, 113 Wn.2d 479, 488 (1989); *Jill Doty-Fielding v. Town of South Prairie* 143 Wn. App. 559 (Div. 2, 2008).

The threshold determination of whether the defendant owes a duty to the plaintiff is a question of law. *Pedroza v. Bryant*, 101 Wn.2d 677 (1984); *Coleman v. Hoffman*, 115 Wn. App. 853 (Div. 2, 2003). The Appellant's cause of action fails if no duty is established. *Stenger v. State*, 104 Wn. App. 393 (Div. 2, 2001). Argumentative assertions, speculation, ultimate facts, conclusions of law or conclusory statements are insufficient to raise a question of fact in response to a summary judgment motion. *Coleman*, 115

Wn. App. at 857-858.

Besides establishing a duty and a breach of a duty, plaintiff must prove a defendant's acts were a proximate cause of plaintiff's injury. *Riojas v. Grant County Public Utility District*, 117 Wn. App. 694, 697 (Div. 3, 2003). The existence of a duty does not automatically satisfy the requirement of legal causation in a negligence case. *Hertog v. City of Seattle*, 138 Wn.2d 265 (1980). Generally, for a defendant's act to be a proximate cause of an injury, it must produce the injury. *Riojas*, 117 Wn. App. at 697. When the connection between a defendant's conduct and the plaintiff's injury is too speculative and indirect, the cause in fact requirement is not met. *Taggart v. State*, 118 Wn.2d 195, 227 (1992).

Actionable negligence requires that the breach of a duty be the proximate cause of the claimed injury. *Hartley*, 103 Wn.2d at 777.

If excessive speed is not a proximate cause of the collision, liability cannot be based thereon. *Grobe*, 87 Wn.2d at 220-221. Legal responsibility for an injury does not attach to negligent conduct unless the conduct proximately caused the injury. *Marshall*

v. Bally's Pacwest, Inc., 94 Wn. App. 372, 377-378(1999). Even if it is alleged a party's excessive speed may have enhanced the injuries sustained in an accident, such cannot be considered unless the speed was a proximate cause of the accident itself. *Grobe*, 87 Wn.2d at 226. Expert testimony that excessive speed in a case did in fact cause more damage than would have been experienced at a speed of five or ten miles an hour less, is nothing other than speculation unsupported by any evidence. *Theonnes*, 37 Wn. App at 649.

In order to even get to the issue of enhanced injury, Mr. Bowers must establish that excessive speed by Mrs. Marzano was a proximate cause of this accident. Without this, further inquiry in this regard is unwarranted. If excessive speed is not a proximate cause of the collision, liability cannot be based thereon. *Grobe*, 87 Wn.2d at 220-221. In *Grobe*, the Court, at pages 223-224, stated the following about the conjectural nature of attempting to predict the amount of damage and injury resulting from the speed of impact:

In *Cameron v. Goree*, 182 Or. 581, 189 P.2d 596 (1948), the court called attention to the conjectural nature of *conclusions as to negligent or excessive speed based upon testimony as*

to impact between two cars, each in motion when the crash occurred. Although the case did not involve facts identical to those in the instant case, the principles stated support the view that conclusions as to excessive speed here would be based on impermissible conjecture. The court said:
We think that it is permissible for us to infer that if a car proceeding along Palmquist Road at a lawful rate of speed hit another car broadside, much damage would be done Although there is no evidence upon the subject, we believe that it is obvious that a car traveling at a speed of 30 to 35 miles an hour would inflict great damage upon colliding with the side of another car. Undoubtedly, the fenders and body of the victim would be crushed. The extent of the damage would be dependent upon circumstances, such as (a) the respective weight of the cars, (b) the condition of their tires, (c) the condition of the surface of the pavement, and (d) the speed of the car which received the blow.

The damage wrought in some collisions appears to be freak or capricious. In some instances, the occupants of the cars emerge unscathed although the cars are total wrecks; in others the damage to the cars is minor but that to the occupants is appalling. In all instances, however, the law of physics operates indiscriminately and what appears to be novel damage in a particular case would be readily understandable if all of the circumstances were brought to light.

. . . If it were true that all cars traveling at prudent speeds inflict no damage, and that only those proceeding at unlawful rates crush objects which they strike, then the results of this collision would prove negligence. But there is no such rule, and, so far as we know, a car traveling at a careful rate of speed, upon colliding with one which entered an intersection unlawfully, would cause all of the damage which the respondent's witnesses described.

The burden of proof rested upon the respondent to prove that the appellant's speed was negligent. That burden could not be discharged by the submission of evidence showing

no more than a conjecture or possibility favorable to the respondent. It is our belief that the damage inflicted by the impact fails to establish negligence upon the appellant's part.

Mr. Bowers, at page 45-46 of his brief, cites *Doherty v. Municipality of Metro. Seattle*, 83 Wn. App. 464 (1996) in support of a proposition that he does not have to show the point of notice requirement of *Channel* in order to maintain an enhanced injury claim based on speed. *Doherty* does not stand for this proposition and is inapplicable. Rather, the court in *Doherty* reversed a summary judgment ruling in favor of Metro because there was a material dispute of fact regarding proximate cause based on evidence that the bus driver breached his duty to yield to the favored driver, Mrs. Doherty, by turning left in front of her, potentially causing a head on collision. *Doherty*, 83 Wn. App. at 469-471.

In the case at bar, Mr. Bowers failed to introduce competent evidence establishing Mrs. Marzano's point of notice but rather relied on speculation and conjecture. Without evidence of point of notice, Mr. Bowers is unable to establish the element of proximate cause and therefore summary judgment was appropriate. *Channel*, 77 Wn. App. at 278-279; *Mossman*, 154 Wn. App. at 742 ;

Whitchurch, 63 Wn. App. at 276-277.

a. Appellant Failed to Establish Qualifications and a Foundation for Colin Daly to Express Opinions Regarding Enhanced Injury.

Mr. Bowers submitted a Declaration from Colin Daly for the purpose of expressing an opinion that if Mrs. Marzano was traveling at lesser speeds Mr. Bowers would have sustained different injuries. According to his declaration and C.V., Mr. Daly is a biomechanical engineer. CP 152, 164. Mr. Daly is not qualified to express medical opinions regarding the level of injury which would be sustained by a person dependent on speed of a vehicle coming into contact with another moving vehicle. Mr. Daly is not a physician and he does not demonstrate medical qualifications which would enable him to express opinions regarding the nature and extent of head and brain injury. Therefore, he is not qualified to give any medical opinion regarding brain injuries. ER 702. Furthermore, his opinion as to what injuries or damages may have occurred as a result of various levels of impact is purely speculative and has no bearing as to issues of proximate cause and fault.

This very issue was addressed by this Division in *Doherty*, 83 Wn. App. at 467-69. Therein, the Court held that a

biomechanical engineer was not qualified to render medical opinions regarding the severity of injuries that would have been sustained by a favored driver dependent upon the amount of force in a collision with a bus which failed to yield the right of way to her.

In support of its holding the court stated at pp. 468-69:

Metro contends that Dr. Carley Ward's affidavit was properly stricken because Doherty failed to qualify Dr. Ward to render expert medical opinions about the amount of force necessary to cause death or disabling injuries. We observe that the affidavit does not explain how her background in engineering qualified her to give an opinion in the anatomical, physiological, or medical sciences. A trial court's determination of an expert's qualifications will be upheld absent an abuse of discretion. See *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 413, 553 P.2d 107 (1976). We therefore uphold the order striking Dr. Ward's affidavit.

A witness may not testify as an expert on a matter if the matter is not within the witness' expertise. *Queen City Farms v. Central Nat'l Ins. Company of Omaha*, 126 Wn.2d 50, 103-104 (1994); *State v. Farr-Lenzini*, 93 Wn. App.453, 461 (Div. 2,1999).

When an expert's opinion is based on theoretical speculation and strays beyond his or her area of expertise, it is properly excluded. *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App 722 (Div. 3,1998).

Furthermore, expert testimony should be excluded if the issue at hand lies outside the witness' area of expertise. *State v. Farr-*

Lenzini, 93 Wn. App.453 (Div. 2, 1999). Therefore, they are not qualified to express their opinions pursuant to ER 702 and the afore noted authorities. It is an abuse of discretion for a court to admit conclusory or speculative expert opinion testimony that lacks a proper foundation. *Holmes*, 84 Wn. App. at 165-66.

Judge Felnagle never needed to address the concept of enhanced injury or the admissibility of Colin Daly's opinions because Mr. Bowers failed to establish Mrs. Marzano's point of notice. If he had it would be clear, based on the afore noted authority, that Mr. Daly's declaration and C.V. failed to qualify him to express the opinions he proffered. In support of his holding, Judge Felnagle stated the following:

"It is absolutely critical to establish the point of notice, and I don't think what Becinski does is the right methodology to do that..."

"Using the methodology Becinski employs, it doesn't tell us where Mrs. Marzano would have had notice that Bowers was going to disregard the signage and was going to enter the intersection. And I think that is fatal under the case law, and under logic, too. I just don't see how you can say that it affected causation without knowing where it was that she had some fair notice of the fact that he was going to enter that intersection, so I am prepared to grant summary judgment."

RP: 39-40. This constituted proper grounds for the trial court

to grant summary judgment in favor of Mr. and Mrs. Marzano.

IV. CONCLUSION

Judge Felnagle correctly identified and summarized the deficiency in Mr. Bowers' opposition to the summary judgment motion and his motion for reconsideration when he stated the following:

What I had trouble with before and still have trouble with, and maybe you can focus on, is this (sic) the point of notice speculative without foundation, without adequate evidence, which is what I found last time. Or is there sufficient inference, evidence, direct evidence, or inference to get to the jury on establishing a point of notice.

...

Is there sufficient evidence and /or inference to establish the point of notice. That seems to be the critical point for me.

RP: 44-46 (Motion for Reconsideration).

Judge Felnagle concluded Mr. Bowers did not submit competent evidence other than speculation and conjecture regarding Mrs. Marzano's point of notice. As Judge Felnagle stated: "But I am of the same mind as I was before. I think this is in the realm of speculation, that it is not sufficiently established to justify going to trial on this issue." RP 64 (Motion for Reconsideration). Judge Felnagle concluded Mr. Bowers did not "tell us where Mrs. Marzano would have notice that Bowers was

going to disregard signage and was going to enter the intersection.”

RP 39.

Appellant’s effort to establish fault on the part of Mrs. Marzano is built on conjectural and unsupported assumptions. First, that a slow moving vehicle approaching a stop sign located in advance of an intersection constitutes clear notice to a favored driver that the disfavored vehicle will not yield the right of way; and second, that a favored driver should expect a disfavored driver at a controlled intersection to refuse to yield the right of way justifying use of a .67 of a second perception reaction time. Neither of these assumptions are supported by the evidence, reason, or even common sense. Every aspect of Appellant’s theory of liability against Mrs. Marzano is built on speculation and assumption. The foundation for each does not exist either factually or legally. Therefore, Mr. and Mrs. Marzano respectfully request Judge Felnagle’s rulings regarding the Motion for Summary Judgment and

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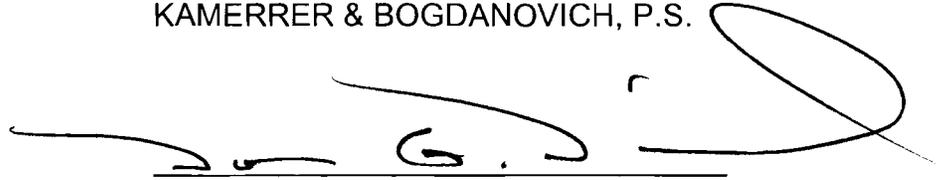
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Motion for Reconsideration be affirmed.

Respectfully submitted this 26th day of May, 2011.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

A handwritten signature in black ink, appearing to read "Don G. Daniel", is written over a horizontal line. The signature is stylized and includes a large loop on the right side.

Don G. Daniel, WSBA #12508
Attorney for Respondents Marzano

Motion for Reconsideration be affirmed.

Respectfully submitted this 26th day of May, 2011.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

Don G. Daniel, WSBA #12508
Attorney for Respondents Marzano

No. 41362-1-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

COLIN BOWERS,,

Appellant,

vs.

PAMELA M. and JERRY
MARZANO,

Respondents.

NO. 41362-1-II

CERTIFICATE OF FILING AND
SERVICE

On May 27, 2011, I filed the foregoing with the Clerk of the Court
and served Mr. George Luhrs via service by Legal Messenger.

1. Respondent's Brief and
2. Certificate of Filing and Service.

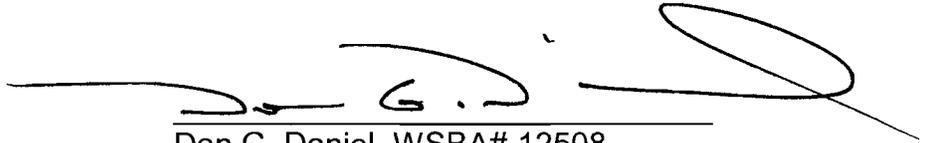
Service upon Appellant's attorney:

George Luhrs
Attorney at Law
701 - 5th Avenue, Ste 4600
Seattle, WA 98104-7068
Luhrs@ncfweb.net

11/11/27 PM 4:50
BY [Signature]

Respectfully submitted this 27th day of May, 2011.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

A handwritten signature in black ink, appearing to read "Don G. Daniel", written over a horizontal line.

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