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No. 63689-8

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

TARA A. GARCIA, individually and as personal representative of the
estate of FRANK J. GARCIA, Appellant,

v.

DIANA J. CUSHING and "JOHN DOE" CUSHING,
wife and husband, Defendant,

and

THE STATE OF WASHINGTON DEPARTMENT OF
TRANSPORTATION, THE STATE OF WASHINGTON, Respondent,

And

The CITY OF SHORELINE, Respondent.

APPELLANT'S REPLY BRIEF

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I. WSDOT's Counterstatement of the Issues

A. The intersection in question was not reasonably safe for travel on the day of Mr. Garcia's fatal collision, October 26, 2002.

Contrary to Respondent WSDOT's argument, Appellant does not argue WSDOT had a duty to make a safe intersection safer. Rather, Appellant argues WSDOT did not satisfy its duty to design, construct and maintain the intersection so that it was safe for ordinary travel. Appellant's expert, Tim Miller, opined that regardless that WSDOT had undertaken and completed the other safety improvements the intersection actually increased pedestrian danger without some type of lighting display. CP 402-403.

WSDOT now argues it had no duty to install a stop light at this intersection because of the small amount of pedestrian and motor vehicle traffic crossing Aurora at this location, and cites CP 157-158 in support of this contrary argument to that made to the trial court. WSDOT should be judicially estopped from making this argument on appeal. *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001)

In its analysis of Washington law, the court in *Johnson* noted:

Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position in a subsequent

action. "The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time." *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982)).

Johnson, 107 Wn. App at 906.

The court in *Johnson* then reviewed Washington law as it evolved in the application of the doctrine of judicial estoppel, noting:

In *Markley v. Markley*, 31 Wn.2d 605, 198 P.2d 486 (1948), the Supreme Court reviewed the discussion of judicial estoppel contained in 19 AM. JUR., and appeared to adopt the treatise's statement of the elements for judicial estoppel: "(1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change." *Markley*, 31 Wn.2d at 614-15 (quoting 19 AM. JUR. 709, Estoppel § 73).

Johnson, 107 Wn. App. at 906.

WSDOT argued to the trial court the duty to install a signal light was Shoreline's not WSDOT's, which is what CP 157-158 supports. WSDOT's argument now made on appeal is contrary to the position taken by WSDOT in support of its Motion for Summary Judgment. WSDOT should be estopped from changing its position on appeal.

WSDOT infers from its argument that this pedestrian safety improvement project had nothing to do with the recognized and known dangers that existed with respect to pedestrians and vehicles in this section of Shoreline. To the contrary, this entire pedestrian safety project was implemented because of the Haro report which recognized known dangers to pedestrians at several intersections in Shoreline and SR 99 that included the intersection in question. CP 149-150.

Furthermore, Plaintiff does not argue the State should be required to protect other drivers against the extraordinary acts of negligent drivers. There was nothing extraordinary about Diana Cushing's inattention. Inattention of motorists to pedestrians in this specific area of SR 99 was well known to Respondents WSDOT and The City of Shoreline.

As was argued by Garcia to the trial court, *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990), is distinguishable from this case. VRP I, P. 43, L. 6-25. The Plaintiff in *Jenson* was injured before construction began. The Court of Appeals in *Jenson* ruled there was no unreasonable delay as a matter of law where the department followed the Legislature's budgetary process. In this case, funding was available since the spring of 1999 (CP 151), and construction was substantially complete by June 11, 2002.

Finally, at a minimum there is a material dispute of facts on the issue of whether the overhead “roving eyes” displays could have been operable sooner. Although the state argues the parts necessary to make the displays operable were only obtained and installed after Frank Garcia’s death, nowhere did the state argue they could not have been obtained and installed sooner. Even the actual work orders raise a material question of fact regarding this issue.

B. The trial court only found that a proximate cause of the collision was the negligence of Diana Cushing.

The trial court did not find the sole proximate cause of the collision to be the negligence of Diana Cushing or Frank Garcia. Rather the trial court simply found that Diana Cushing’s negligence was a proximate cause. CP 477-480, CP 565- 567. The trial court did not address Frank Garcia’s negligence in either Motion for Summary Judgment.

Frank Garcia’s negligence, if any, is irrelevant to the issue whether WSDOT’s actions/inactions were a proximate cause of the collision.

C. The trial court only found that Plaintiff could not satisfy the legal prong of proximate cause.

The trial court did not find that the jury would need to speculate in order to find WSDOT(‘s negligence) a proximate cause of the collision. The trial court only found WSDOT’s actions/inactions were discretionary

functions. The trial court even recognized there were enough facts for the “but for” prong of proximate cause to be decided by the jury, but ruled Plaintiff did not satisfy the legal prong of proximate cause. CP 477-480.

There are two elements to proximate cause: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 778-79, 698 P.2d 77 (1985). Cause in fact refers to the “but for” consequences of an act—the physical connection between an act and an injury. [Citations omitted]. *Id.* Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant’s acts should extend. *Id.* It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. *Id.*

With respect to legal causation:

that rests on policy considerations as to how far the consequences of defendant’s acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on “mixed considerations of logic, common sense, justice, policy and precedent.

Hartley v State, 103 Wn.2d at 779.

Policy considerations and common sense dictate whether the connection of the county and state with the collision is too remote or insubstantial. *Id.* at 784. In the instant action, only an unmarked crosswalk existed at the N. 170th and Aurora intersection prior to the

improvements undertaken before the fatal collision. By constructing the improvements, WSDOT and Shoreline were channeling pedestrians into specific pedestrian crossing areas. WSDOT undertook the improvements and reasonable minds could agree that it breached its duty of ordinary care.

By specifically choosing new technology rather than uniformity in the design features that affected the traffic to be controlled, WSDOT clearly was accepting a risk. WSDOT was also accepting a risk by choosing high technology devices that would foreseeably be problematic and initially faulty in operation.

WSDOT was ignoring MUTCD basics, that uniformity in the design features is especially important for safe and efficient traffic operations. Furthermore, WSDOT created a confusing and hazardous condition when they elected to turn the systems off during the 2 weeks before Frank Garcia's fatality when WSDOT was troubleshooting the system.

A reasonable inference to be drawn from the facts is that motorists probably started getting used to seeing the devices in operation and began learning that it meant a pedestrian was somewhere near the crosswalk. However, when the same motorists passed through that intersection in those two weeks when the signals were off and not bagged, it is a

reasonable inference they associated no signal with no pedestrian. Under the facts of this case, logic, common sense, justice, policy and precedent support a finding of legal causation rather than against.

Furthermore, WSDOT argues it would be speculative whether Diana Cushing would have noticed a working overhead roving eyes display, citing to Ms. Cushing's acknowledgement that she wasn't paying attention. However, the facts show the reason the "roving eyes" technology was chosen for this portion of SR 99 was to get the attention of inattentive motorists whose eyes were focused elsewhere. At a minimum, Diana Cushing's passenger was attentive and would have noticed a working overhead light display.

Both WSDOT and the City of Shoreline make misleading arguments with respect to the yielding behavior of motorists to pedestrians after the installation of the "roving eyes" displays. The percentage of motorists who yielded in northbound traffic at N. 170th increased from 33 percent to 56 percent after the "roving eyes" were installed. They didn't test its effect on southbound traffic. VRP I, P. 25, L. 5-16.

II. There is sufficient evidence in the record that the City of Shoreline breached the duty to design, construct and maintain the intersection so that it was safe for ordinary travel.

The City of Shoreline acknowledged it did not do anything before Mr. Garcia was killed with respect to the design, construction and

maintenance of the intersection. It is undisputed that the City of Shoreline let WSDOT “take the reins” in this pedestrian safety project. It is undisputed that the City of Shoreline did not question WSDOT’s wanting to use the roving eye technology. It is also undisputed that the City of Shoreline never requested that a traditional traffic signal be installed prior to Mr. Garcia’s death. These facts, in and of themselves, are evidence that the City of Shoreline was negligent and breached the duty it owed of ordinary care to make its roadways reasonably safe for travel.

Contrary to The City of Shoreline’s argument, Plaintiff’s expert, Mr. Miller did not use “extraordinarily unusual language to describe his opinions”. Rather, Mr. Miller used the exact language that traffic engineers use. Even Mr. Leth, WSDOT’s traffic engineer, acknowledged “(i)nstallation of signal lights is a matter of engineering discretion to be exercised when specific criteria are met”. CP 157 (emphasis added)

Given this was a Motion for Summary Judgment in which all reasonable inferences should have been drawn in the light most favorable to Plaintiff, at a minimum, Mr. Miller’s opinions were sufficient to support a finding there was evidence to support the City of Shoreline was negligent and breached its duty of ordinary care to make its roadways reasonably safe for travel.

Finally, there was sufficient evidence in the record that the funding was available prior to Mr. Garcia's death and installation of traditional traffic control signals, drawing the reasonable inferences in the light most favorable to Plaintiff, would not have been anywhere as time consuming as installing the experimental technology.

III. Conclusion

All facts and all reasonable inferences were not drawn in the light most favorable to petitioner, as non-movant. There was sufficient evidence that both WSDOT and The City of Shoreline breached their duties of ordinary care to make its roadways reasonably safe for travel. The Orders Granting Summary Judgment for both WSDOT and The City of Shoreline should be reversed and this case should be remanded back to the trial court for further proceedings.

Respectfully submitted, this 29th day of March, 2010.

A handwritten signature in black ink, appearing to read "John R. Walicki", written over a horizontal line.

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Attorney for Appellant.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of Washington State that on the 29th day of March, 2010, I caused a true and correct copy of the attached Appellant's Reply Brief to be served on the following in the manner indicated below:

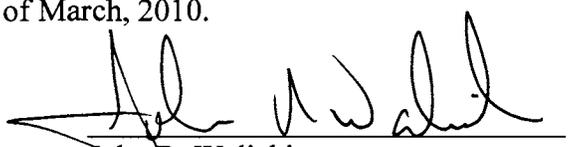
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