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NO. 65838-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JAMES ANTHONY "TONY" ZAHAN AND CARLA COLWELL

Appellants,

v.

SAFEWAY, INC., TERESA CHENG AND JOHN DOE CHENG

Respondents

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES D. CAYCE

2010 NOV 24 11:16

AMENDED BRIEF OF APPELLANT

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I. INTRODUCTION

The question before this Court is straightforward: should a genuine issue of material facts about which reasonable minds could disagree be resolved by a judge, on a dispositive motion or by jury? Because reasonable minds could have found differently on the particular genuine issues of material fact here, and no issue of law was before the lower court, summary judgment was not appropriate or justified.

On or about February 21, 2006, around 9:20 am, Plaintiff James Zahran¹ was driving his 2004 Dodge Ram Pickup Northbound on I-405, in King County, Washington. On or about the same date and time a 2002 Toyota Camry driven by Teresa Cheng was traveling directly behind Plaintiff James Zahran's vehicle in the same lane of travel. On or about the same date and time a 2000 International Semi driven by Marvin Thompson, within the course and scope of his employment with Defendant Safeway, was traveling directly behind Teresa Cheng's vehicle in the same lane of travel. Plaintiff James Zahran legally stopped his vehicle in a reasonable and safe manner. Suddenly, he was struck from behind by the 2002 Toyota Camry driven by Defendant Teresa Cheng. Defendant Teresa Cheng's vehicle was also struck from behind by Defendant Safeway's vehicle. The sequence

¹ Plaintiff's name is actually spelled ZAHHRAN; however, this was never corrected in the pleading caption in the court below. Therefore, the caption of the appeal is consistent with the name of the case below, however, the spelling of the plaintiff's name throughout this brief is the correct spelling of the plaintiff/appellant's last name.

of these collisions was and still is at issue and was also the subject of Defendant Cheng's Motion for Summary Judgment. CP 14

In the face of widely divergent testimony, the judge in the lower court strayed from well established precedent, placed himself squarely in the role of fact finder and concluded that it was more appropriate for him to decide what happened than a jury. CP 113-115

II. ASSIGNMENTS OF ERROR

The Superior Court erred by awarding summary judgment to Respondents on Mr. Zahran's claim of negligence against defendant, where he was injured by the Respondent colliding her car into the rear of Mr. Zahran's truck due to their negligence, by failing to keep a safe distance and failing to take affirmative action to avoid the collision. CP 113-115

III. STATEMENT OF THE CASE

On or about February 21, 2006, around 9:20 am, Plaintiff James Zahran was driving his 2004 Dodge Ram Pickup Northbound on I-405, in King County, Washington. On or about the same date and time a 2002 Toyota Camry driven by Teresa Cheng was traveling directly behind Plaintiff James Zahran's vehicle in the same lane of travel. On or about the same date and time a 2000 International Semi driven by Marvin Thompson, within the course and scope of his employment with Defendant Safeway, was traveling directly behind Teresa Cheng's

vehicle in the same lane of travel. Plaintiff James Zahran stopped his vehicle to for traffic it was soon struck from behind by the 2002 Toyota Camry driven by Defendant Teresa Cheng. Defendant Teresa Cheng's vehicle was also struck from behind by Defendant Safeway's vehicle. CP 8-9 The sequence of these collisions is at issue for purposes of Defendant Cheng's Motion for Summary Judgment. CP 14

On February 22, 2010, when describing the February 21, 2006 Motor Vehicle Accident, Plaintiff James Zahran reported that his vehicle was rear-ended by a sedan which was then rear-ended by a large Safeway truck. See the Declaration of James Zahran. CP 55-56

In his Answers to Defendant Safeway's Interrogatories, Plaintiff James Zahran described the February 21, 2006 Motor Vehicle Accident as follows:

I was northbound on I-405 in my 2005 Dodge pickup truck. Shortly after I stopped my vehicle for traffic it was struck from behind. Immediately prior to what I call the initial impact I noticed in my rear view mirror that traffic was coming up quickly on my vehicle and I braced myself and pressed down hard on the brake to keep my vehicle from moving forward into the car in front of me. Prior to the initial impact I do not recall if I saw the Toyota Camry, but I do remember seeing a large semi-type truck. After the initial impact, I am not sure if my foot came off the brake pedal or the vehicle was just forced forward, but my vehicle moved forward a short distance. From the initial impact to the point my vehicle stopped it felt to me as if my vehicle was struck twice. There were three cars involved in the motor vehicle accident. The Toyota Camry that was directly behind my vehicle and the large semi-type truck that was directly behind the Toyota Camry. I am unable to say whether the Toyota Camry struck my vehicle first or if the Toyota Camry collided with my vehicle as a result of being struck by the semi-type Safeway truck first and then pushed into

my vehicle. *See* the Declaration of James Zahran.

When questioned by Defense counsel for Defendant Safeway at his deposition, Plaintiff James Zahran responded as follows:

A. Yes, sir. As I say, I was going up 405 towards Bellevue. The car that was -- the vehicles were stopped in front of me, and I was slowing down, and I looked in my rear-view mirror. All I could see was a truck coming. I don't remember seeing the car between the truck and me, between a big truck and my car, and I knew that he wasn't going to stop in time. I put my foot on the brake, okay, but before I could really get locked up, bam. It seems to me that I got hit twice, and the reason I say that is because I went forward, and then the car jerked again. It could have been because I slammed the brakes back on again because my car was going forward. I got hit. I rocked back. I went forward. And maybe I hit the brake again, and that's what I thought was the second accident. I don't know, but it just -- when I got out and looked at the cars, I just thought she hit me first. I just thought that, you know.

Q. Now, you felt two separate impacts?

A. Well, yeah, it seemed to me that I did, but it could have been me hitting the brake of the car because when I got hit, I took my foot off the brake, and I went forward, and I slammed it on again. So it could have been me doing it. I don't know.

See Deposition of James Anthony Zahran at p. 27, lines 1-23.

Q. Okay. But at the time when you told your doctors at the hospital, you told them that you had been hit twice, first by the car and then by the truck hitting the car and hitting you again?

A. It's very possible I could have said that because when I got out of the car, I saw the two cars sitting there, and one was jammed underneath my truck. You know, the truck was jammed

into the back of her, and I guess I just took it.

See Deposition of James Anthony Zahran at p. 28, lines 10-17.

Unfortunately, prior to this lawsuit, any discovery, sworn statements, certified statements, or questioning by the Plaintiffs, the driver of Defendant Safeway's vehicle, Marvin Thompson, died following this accident from non-accident related causes, leaving Plaintiff James Zahran and Defendant Teresa Cheng as the only known first hand witnesses to the February 21, 2006 Motor Vehicle Accident. CP 56-57

IV. ARGUMENT

A. **Summary Judgment Is Not Affirmed Where Genuine Issues Of Material Fact Remain.**

This Court reviews a summary judgment *de novo*, making the same inquiry the trial court did: Summary judgment should not be granted unless the pleadings and evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Firth v. Lu*, 146 Wn.2d 608, 614, 49 P.3d 117 (2002). The burden of proof is on the Respondents as the moving party, and any doubt as to the existence of a genuine issue of material fact is resolved against summary judgment. *Atherton Condo. Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). All facts are considered in the light most favorable to the non-moving party and all reasonable inferences are drawn in their favor. *Id.* Judgment should issue only if reasonable persons could

reach but one conclusion from the evidence. *Turgren v King County*, 104 Wn. 2d 293, 312, 705 P.2d 258 (1985). In particular, “issues of negligence and proximate cause are generally not susceptible to summary judgment.” *Owen v. Burlington No. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

If this Court reaches the Superior Court’s denial of the plaintiff’s CR 56(f) request for time to complete discovery, that denial is reviewed for abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). The standard is whether discretion was exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion. *Id.* In making this determination, this Court views all facts in the light most favorable to the party making the request and draws all reasonable inferences in their favor. *Tellevik v. Real Prop. Known As 31641 West Rutherford St.*, 120 Wn.2d 68, 91, 838 P.2d 111 (1992).

Summary Judgment should not be granted when the credibility of a material witness is at issue. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963); *429 *Powell v. Viking Ins. Co.*, 44 Wn.App. 495, 503, 722 P.2d 1343 (1986). Summary judgment also may not be appropriate when material facts are particularly within the knowledge of the moving party. *Felsman v. Kessler*, 2 Wn.App. 493, 496-97, 468 P.2d 691, review denied, 78 Wn.2d 994 (1970); *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn.App. 424, 788 P.2d 1096

Wn.App.,1990.

Supporting affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence. CR56(e). CP 79-103

B. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER DEFENDANT TERESSA CHENG BREACHED THAT DUTY

The Superior Court, in granting summary judgment on negligence, implicitly held either that there was no evidence that the respondent had breached her duty and caused Mr. Zahran's injury. Respondents take the position that regardless of what actually happened, because the plaintiff vaguely expressed a possibility that something else may have caused the first physical reaction that felt like a vehicle colliding with his truck, she could not have been negligent. This conclusion flies in the face of well-established principles of Washington law.

Here, as outlined above and discussed below, factual questions exist as to whether or not the Defendant Teresa Cheng stopped her vehicle and was pushed into the back of Plaintiff James Zahran's vehicle or whether Defendant Teresa Cheng's vehicle struck Plaintiff James Zahran's vehicle first and then was pushed into his vehicle a second time. The existence of these genuine issues of material fact precludes summary judgment as a matter of law on these issues under CR 56(c).

The uncontroverted facts of this case show that Defendant Teresa Cheng's vehicle collided with the rear of Plaintiff James Zahran's vehicle. While the evidence further supports the conclusion that Defendant Teresa Cheng's was rear-ended in the same accident, there is no uncontroverted, objective evidence as to the sequence of these collisions.

As set forth above, Plaintiff James Zahran felt as if his vehicle was struck twice. When he exited his vehicle at the accident scene and looked at Defendant Teresa Cheng's vehicle sandwiched between his vehicle and Defendant Safeway's truck, he concluded that Teresa Cheng's vehicle collided with his vehicle first and was then struck by the Safeway truck. This is a reasonable inference based upon the physical evidence and what Plaintiff James Zahran reported to his medical care providers.

Defendant Teresa Cheng's mere denial of striking Plaintiff's vehicle first does not eliminate the question of fact as to whether she collided with Plaintiff's vehicle first and has any liability in contributing to the February 21, 2006 Motor Vehicle Accident. This is particularly true when Defendant Teresa Cheng is a material witness who possesses particular knowledge exclusive to her liability in the underlying accident. Defendant Teresa Cheng is vested and potentially biased in her statement because she is party to this lawsuit. Under these circumstances, it is only through the Trier of fact's assessment of Defendant

Teresa Cheng's credibility in describing the accident should a conclusion regarding liability be permitted.

The driver of the Safeway truck is deceased and the only documentation offered by Defendant Teresa Cheng purportedly from the deceased driver is an unverified and unsworn statement. Absent a proper evidentiary foundation for admissibility, which has yet to be properly established, at best this statement is hearsay that cannot be cross examined by Plaintiffs and is not proper evidence for Defendants' Summary Judgment Motion.

Summary judgment on negligence is not proper where material issues of fact remain as to whether the defendant breached its duty. *Owen*, 153 Wn.2d at 788. In particular, the jury, not the court, must determine whether the plaintiff's injury was reasonably foreseeable, unless the circumstances of the injury are "so highly extraordinary or improbable" as to be "wholly beyond the range of expectability." *Seeberger v. Burlington Northern R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)); accord *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 833, 166 P.3d 1263 (2007).

These facts raise at least a genuine issue as to Respondents' breach of duty, which precludes summary judgment.

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VI. CONCLUSION

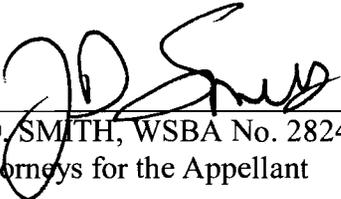
Because Respondent had a duty to Mr. Zahran under applicable Washington law, and because a reasonable jury could have found that Respondent breached that duty, summary judgment was improperly granted, so the decision of the trial court should be reversed and this case remanded for further discovery and trial.

DATED this 22nd day of November, 2010.

RESPECTFULLY submitted,

WARD SMITH PLLC

By: _____


J.D. SMITH, WSBA No. 28246
Attorneys for the Appellant

CERTIFICATE OF SERVICE

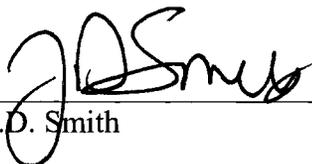
I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the foregoing:

AMENDED APPELLATE BRIEF

TO:

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Dated at Seattle, Washington, this 22nd day of November, 2010



J.D. Smith

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