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NO. 65838-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JAMES ANTHONY "TONY" ZAHAN AND CARLA COLWELL,

Plaintiffs/Appellants

v.

TERESA CHENG AND JOHN DOE CHENG,

Defendants/Respondents

**BRIEF OF DEFENDANTS/RESPONDENTS TERESA CHENG AND
JOHN DOE CHENG**

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I. SUMMARY OF THE CASE

While driving his Dodge Ram pickup, plaintiff/appellant James Zahran¹ was involved in a three-car chain-reaction auto accident on February 21, 2006. The Zahran vehicle was the front vehicle in the chain, a Toyota Camry driven by defendant/respondent Teresa Cheng was the middle vehicle, and the last vehicle in the chain was a Safeway-owned tractor-trailer driven by Safeway employee Marvin Thompson.

The Zahrans sued both Ms. Cheng and Safeway², asserting alternatively that there was either one collision caused by the Safeway semi, or one collision caused by Cheng followed by a second collision caused by the Safeway semi. Teresa Cheng testified that her car impacted Mr. Zahran's pickup only once: that she stopped safely behind Mr. Zahran's pickup with room to spare, and that the Safeway semi then struck the rear of her car and propelled her car into the rear of Mr. Zahran's pickup. Mr. Thompson agreed with Ms. Cheng's version of events, telling his employer Safeway that the Cheng vehicle had stopped clear of the Zahran vehicle, but was then propelled into the Zahran vehicle as a result

¹ In this brief, the Chengs utilize the spelling of plaintiffs' last name used by plaintiffs in their opening brief. For ease of reference, when referring jointly to Mr. Zahran and his wife, plaintiff Carla Colwell, the Chengs utilize the phrase "the Zahrans".

² The Chengs understand that the Zahrans subsequently settled with Safeway. Safeway is not a party to this appeal.

of being rear-ended by the Safeway semi. Mr. Zahran admits that although he thought there were two impacts, he simply is not sure whether there was more than one impact: what he thought was a second impact might simply have been him slamming on his brakes following a single impact.

The Chengs moved for summary judgment, arguing that the only admissible evidence established that there was one impact between the Cheng car and the Zahran pickup, and that this single impact was caused by the Safeway semi. Ms. Cheng's testimony established that there was only one impact between her car and Mr. Zahran's pickup, and that it was caused by the Safeway semi. Mr. Zahran's testimony that he could not say for certain that there were two impacts left Ms. Cheng's testimony un rebutted.³ As a result, the witness testimony established that there was one impact caused solely by Mr. Thompson/Safeway.

Plaintiffs Zahran responded to the Chengs' summary judgment motion by arguing that because there might have been a second impact between the Cheng vehicle and the Zahran vehicle, a question of material fact existed as to whether there was a second impact. In other words,

³ The Safeway driver, Mr. Thompson, died after the accident of causes unrelated to the accident, so the recorded statement he gave to his employer shortly after the accident contains the only detailed recitation of his version of how the accident occurred. See CP 57. Mr. Thompson's recorded statement is consistent with what he told the responding officer regarding how the accident occurred. See CP 22-23.

plaintiffs' sole argument against summary judgment was that the jury should be allowed to speculate that what Mr. Zahran believed might have been him slamming on his brakes was actually a second impact. The trial court correctly rejected the Zahrans' argument that the jury should be permitted to engage in such speculation, and granted the Chengs' summary judgment motion. In doing so the trial court ruled, as a matter of law, that there was no admissible evidence that Ms. Cheng negligently caused or contributed to the accident. Given Ms. Cheng's unrebutted testimony that there was only one impact between her vehicle and Mr. Zahran's pickup, no material question of fact exists, so summary judgment was appropriate and the trial court should be affirmed.

II. COUNTERSTATEMENT OF THE CASE

A. Accident

The three-car auto accident from which this lawsuit arises occurred on February 21, 2006, on northbound I-405 in Renton, Washington. Plaintiff/appellant James Zahran was travelling northbound in the center lane in his 2004 Dodge Ram pickup truck, followed by defendant/respondent Teresa Cheng in a 2002 Toyota Camry. CP 22-24. Ms. Cheng's Camry was, in turn, followed by a Safeway-owned tractor-trailer driven by Safeway employee Marvin Thompson. CP 22-24 and 122.

According to Mr. Zahran, he came to a stop in heavy traffic, saw the Safeway semi approaching in his rearview mirror, and knew that the Safeway semi was not going to stop in time. CP 27. Mr. Zahran did not see Ms. Cheng's small car between his pickup and the Safeway semi, because the back end of his pickup was higher than the front end, impeding his view of things immediately behind him. CP 28-30.

What Mr. Zahran could not see was that Ms. Cheng's Camry had come to a complete stop behind his pickup, with about a car length of space in between the two vehicles. CP 32-33. Ms. Cheng's car was then hit by the Safeway semi and pushed into Mr. Zahran's pickup. See CP 32-33. When Mr. Zahran got out of his pickup following the accident, he was "amazed" to see Ms. Cheng's car behind his pickup because he had not realized until that moment that there was a car between his pickup and the semi. CP 30.

In a recorded statement taken by Safeway shortly after the accident, Mr. Thompson confirmed that there was only one impact between the Cheng car and the Zahran pickup, and that he (Mr. Thompson) caused that one impact. In the recorded statement, Mr. Thompson stated unequivocally that Ms. Cheng's car was stopped behind Mr. Zahran's pickup, and that Ms. Cheng's car did not strike the pickup until after the Safeway semi collided with Ms. Cheng's car:

A: Okay, It sounds like you believe that the car ahead of you was stopped before you impacted it?

MT: Well I know it was stopped before I impacted it yes but how long it was stopped I have no idea.

A. Were you able to clearly see whether that vehicle had impacted the truck prior to you impacting that car?

MT: Yes I know it had not.

A. And you I think you said that you weren't sure how long that vehicle was stopped?

MT: Right.

A: The one right in front of you.

MT: That's correct. A matter of a second, maybe two. I didn't know. Not very long.

A: Pretty quick.

MT: Yes.

A: All right so when you impacted that vehicle uh did you push it into the truck?

MT: I impacted that vehicle and then it went ahead and hit the truck yes. I did not physically push it into the truck with my truck no.

A: Kind of like a bump?

MT: Yes I hit it and then it rolled ahead and hit the truck.

CP 44-45. Mr. Thompson likewise told the responding officer that he had caused the accident. CP 23. Mr. Thompson was cited as a result of

this accident, and plaintiffs' complaint alleged that Mr. Thompson did not contest the citation. CP 9, 22, and 123.

Despite this evidence, the Zahrans named Ms. Cheng as a defendant in this action, apparently because Mr. Zahran believed there might have been two impacts. However, in a written discovery response he admitted that he was "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." CP 69. During the course of his deposition, Mr. Zahran reiterated that he was not sure whether Ms. Cheng's Camry had struck the Zahran pickup twice, and acknowledged that perhaps there had not been a second impact. He explained that what he had thought to be a second impact might actually have been a single impact from Ms. Cheng's Camry being pushed into his pickup by the Safeway semi, followed by his own slamming on the brakes of his pickup to avoid hitting the car in front of his pickup:

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 that 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 accidents?

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.

CP 27.

Mr. Zahran never saw Ms. Cheng's Camry hit his pickup, and in fact never saw Ms. Cheng's car at all before the accident. See CP 27, 30. Mr. Zahran's own testimony established that he had no factual evidence that Ms. Cheng struck his pickup prior to the Safeway semi striking Ms. Cheng's car. Rather, Mr. Zahran "felt" that there were two impacts, but admitted that he had no evidence to support that "feeling", and further admitted that that "feeling" might be wrong. CP 27-30. A "feeling" that there might have been two impacts does not create a material issue of fact, especially when there is no evidence that Ms. Cheng's Camry struck Mr. Zahran's pickup before the Safeway semi struck the Camry, and Mr. Zahran himself admits that what he initially thought to be a second impact could just as likely have been him slamming on his brakes.

B. Procedural History

On April 12, 2010, the Chengs moved for summary judgment, arguing that there was no evidence that Ms. Cheng had proximately caused the accident. CP 13-20. The Chengs noted that the uncontroverted

evidence in the record established that the Cheng car had come to a complete stop prior to the collision, with approximately a car length of space between the Cheng car and the Zahran pickup, and that the only collision between the Cheng car and Zahran pickup occurred when the Safeway semi pushed the Cheng car into the Zahran pickup. CP 18-20.

The Zahrans opposed the Chengs' motion by submitting evidence which did not create a question of material fact. Mr. Zahran submitted a declaration in which he did not state that the Cheng car had impacted his pickup twice. CP 66-67. Rather, his declaration stated, in effect, that he assumed the Cheng car had impacted his pickup twice. Because there was damage to both the front end and back end of the Cheng vehicle, and because Mr. Zahran

felt what seemed like two impacts, I understood that Teresa Cheng's vehicle struck my vehicle first and then was pushed into my vehicle a second time when her vehicle was struck by the Safeway truck.

CP 67 (emphasis added). In other words, Mr. Zahran's declaration did not even attempt to take back his earlier deposition testimony that he was unsure whether a second impact had occurred.

Mr. Zahran's declaration also included a statement that following the accident he had told healthcare providers that there were two impacts, CP 67, but the Zahrans provided the trial court with no basis upon which

the court could even potentially consider these inadmissible hearsay statements. Moreover, given Mr. Zahran's clear deposition testimony in 2010 that he does not know whether there was more than one impact, what he might have told medical providers years earlier about how the accident occurred was irrelevant. See, e.g., *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999).

As part of their summary judgment opposition, the Zahrans also submitted their written discovery response describing how the accident occurred. See CP 69. However, like Mr. Zahran's deposition testimony, the interrogatory response indicated that Mr. Zahran was uncertain whether the Cheng car had impacted his pickup twice. CP 69.⁴

In reply, the Chengs noted that what Mr. Zahran may have told his healthcare providers was irrelevant, because Mr. Zahran had testified quite clearly that he did not know whether there had been two impacts. CP 105-106. Hearsay issues aside, Mr. Zahran having repeated to medical providers his speculation that there were two impacts did not transform that speculation into admissible evidence that there were, in fact, two impacts. CP 106

⁴ The Zahrans' brief also references a CR 56(f) motion, see Appellants' Opening Brief at p. 6, but it does not appear that the Zahrans ever filed a CR 56(f) motion.

Because the Zahrans submitted no admissible evidence that the Cheng car impacted the Zahran pickup more than once, or that Ms. Cheng did anything to cause or contribute to the accident, the trial court granted the Chengs' summary judgment motion. CP 117. The trial court's order specified that Safeway could not argue to the jury that Ms. Cheng was a non-party at fault for the accident. CP 117.⁵ The Zahrans have appealed the trial court's order granting the Chengs' summary judgment motion. CP 119.

III. ISSUE PRESENTED

The summary judgment should be affirmed because the evidence in the record established that the Cheng car impacted the Zahran pickup only once, and further established that this single impact was caused solely by Safeway driver Marvin Thompson.

IV. LEGAL ARGUMENT

A. Summary Judgment Standard

When reviewing an order for summary judgment, the Court of Appeals engages in the same inquiry as the trial court, and will affirm the summary judgment if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Wilson Court Ltd.*

⁵ Safeway also filed an opposition to the Chengs' summary judgment motion, making essentially the same arguments as the Zahrans. As noted above, Safeway is not a party to this appeal.

Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 698, 952 P.2d 590 (1998); *see also* CR 56(c). A material fact is one that affects the outcome of the litigation. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004) (quotation omitted). Any factual dispute which does not affect the outcome of a party's summary judgment motion is immaterial as the Court considers a summary judgment motion:

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-32 (9th Cir.1987). In *Celotex*, the United States Supreme Court explained this result: "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 477 U.S. at 322-23, 106 S.Ct. at 2552-53.

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (footnote omitted). Under this standard, if a "plaintiff fails to make a showing sufficient to establish an essential element of his case, the trial court should grant the summary judgment motion because

there can be no genuine issue of material fact in that situation; a complete failure of proof concerning an essential element of the plaintiff's case renders all other facts immaterial." *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 779-780, 133 P.3d 944 (2006). Although reasonable inferences from the admissible evidence in the record should be drawn in the non-moving party's favor, "reasonable inferences cannot be based upon conjecture." See *Little*, 132 Wn. App. at 781.

In the present case, no question of material fact exists, and the Chengs were entitled to judgment as a matter of law. Ms. Cheng testified that her car impacted Mr. Zahran's pickup only once, after the Safeway semi struck the Cheng car, and Mr. Zahran testified that there might have been two impacts. Washington law is clear that a jury verdict cannot be based on speculation, and a jury would had to have speculated here to find that there were two impacts. Because the Zahrans failed to submit any admissible evidence that the Cheng car struck the Zahran pickup twice, leaving Ms. Cheng's testimony to the contrary unrefuted, the trial court correctly granted the Chengs' motion for summary judgment.

B. The Summary Judgment Should Be Affirmed Because the Admissible Evidence in the Record Established that Ms. Cheng's Car Struck the Zahran Pickup Only Once, And Further Established that This Single Impact Was Caused Solely by Safeway's Driver

To succeed on a negligence claim, the plaintiff must prove: (1) the existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) proximate cause. See, e.g., *Little*, 132 Wn. App. at 780. Plaintiffs Zahran submitted no admissible evidence that Ms. Cheng breached any duty to Mr. Zahran. The Zahrans likewise submitted no admissible evidence that Ms. Cheng caused or contributed to this accident. Due to the absence of any admissible evidence of either breach or causation, the Zahrans' negligence claim against the Chengs necessarily failed as a matter of law.

Contrary to the Zahrans' assertions, the uncontroverted facts establish that the Safeway semi driven by Mr. Thompson struck Ms. Cheng's car and pushed it into Mr. Zahran's pickup, and this was the only impact between Ms. Cheng's car and Mr. Zahran's pickup. Mr. Thompson himself confirmed that Ms. Cheng was stopped behind Mr. Zahran's pickup and had not hit the pickup prior to the Safeway semi running into Ms. Cheng's car. The testimony of Mr. Zahran did not controvert the testimony of Ms. Cheng, or the recorded statement given by

Mr. Thompson⁶. While Mr. Zahran had the sensation of feeling two impacts, he acknowledged that what he had thought was a second impact was just as likely a jolt from him slamming on his brakes after his pickup was hit from behind.

Therefore, contrary to plaintiffs' assertions in their opening brief (at p. 2), there was not "widely divergent testimony" regarding how this accident occurred. Rather, Ms. Cheng and Mr. Thompson both agreed that Mr. Thompson was the sole cause of the accident, and Mr. Zahran stated that he was unsure whether Mr. Thompson was the sole cause of the accident. Ms. Cheng testified that there was one impact, and Mr. Zahran testified that he did not know whether there was more than one impact. The fact that Mr. Zahran admitted that he did not know whether there were two impacts left Ms. Cheng's testimony uncontroverted, and required that the trial court grant the Chengs' summary judgment motion.

⁶ Although the Zahrans complain about the Chengs' reliance on Mr. Thompson's recorded statement, see Appellants' Opening Brief at p. 9, they did not move to strike the recorded statement. As a result, they are precluded from arguing on appeal that the trial court should not have considered the recorded statement. See *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928 (1987). Moreover, even if this Court believes that the trial court should not have considered the recorded statement, any error was harmless because Mr. Thompson's testimony was cumulative – he merely gave the same version of events as Ms. Cheng. See *State v. Flores*, 164 Wn.2d 1, 18-19, 186 P.3d 1038 (2008). If the trial court had declined to consider the transcript of Mr. Thompson's recorded statement, the outcome would necessarily still have been the same given Mr. Zahran's uncertainty as to whether there was a second impact and Ms. Cheng's certainty that there was only one impact.

“While generally a question of fact is properly left to the trier of fact, when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” *Trane Co. v. Brown-Johnston, Inc.*, 48 Wash.App. 511, 513-14, 739 P.2d 737 (1987). A review of the evidence submitted by the parties as part of the summary judgment proceedings establishes that a reasonable mind could conclude only that there was one impact, and that this single impact was caused solely by the Safeway semi.

Given the evidence submitted by the parties in conjunction with the summary judgment hearing, a jury would have to speculate in order to find for Mr. Zahran here. Mr. Zahran’s testimony was equivocal as to whether there were two impacts, or whether he felt one impact and then slammed on his brakes. A verdict cannot be founded on mere theory or speculation, nor is a jury permitted to conjecture how an accident occurred. See, e.g., *Marshall*, 94 Wn. App. at 379-380. Mr. Zahran’s assumption or “feeling” that there must have been two impacts with his vehicle is not evidence that there were, in fact, two impacts.

Also contrary to the Zahrans’ assertions, there is no credibility dispute here that would have precluded summary judgment. See Appellants’ Brief, pp. 6-7. This is not a situation where Ms. Cheng testified that her car struck the Zahran pickup only once, and Mr. Zahran

testified that the Cheng car did strike the Zahran pickup more than once. Rather, as noted above, Ms. Cheng says that there was one impact, and Mr. Zahran says he does not know whether there was more than one impact. The fact that Mr. Zahran did not know whether there were two impacts left Ms. Cheng's testimony uncontroverted, and required the trial court to grant the Chengs' summary judgment motion. In order for the Zahrans to have defeated the Chengs' summary judgment motion, Mr. Zahran would had to have testified unequivocally that the Cheng vehicle did impact the Zahran vehicle twice. This he did not do. The mere fact that he acknowledged that there might have been only one impact eliminated the Zahrans' ability to oppose the Chengs' summary judgment motion.

Likewise, the cases cited by plaintiffs in asserting that "[s]ummary judgment should not be granted when the credibility of a material witness is at issue" are easily distinguishable and inapplicable. *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986), involved a plaintiff who submitted a declaration on summary judgment which directly contradicted her earlier statements to an investigator. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963), similarly involved a party who filed an amended answer which directly contradicted his earlier answer as to whether he had been in the course of his employment

at the time of an auto accident. In contrast, Ms. Cheng has at all times consistently stated that she collided with the Zahran pickup only once, and that this single impact with the Zahran pickup was the result of the Safeway semi striking the rear of the Cheng car and propelling it forward.

None of the admissible evidence in the record supports the Zahrans' bare allegation that the Cheng car impacted the Zahran pickup more than once. Mr. Zahran never saw Ms. Cheng's car until after the accident, and he simply assumed once he saw the Cheng car that the car had hit his pickup before the Safeway semi hit the car. Assumption is not fact. Speculation is not fact. The only actual evidence in this case establishes that Ms. Cheng was stopped safely behind the Zahran pickup, and was then pushed into the Zahran pickup by the Safeway semi. The Safeway driver confirmed Ms. Cheng's version of events. The trial court correctly concluded that there was no material dispute of fact that would have precluded summary judgment being granted to the Chengs.

V. CONCLUSION

No issues of material fact exist. Mr. Zahran's testimony established that he does not know whether there was a second impact between his pickup and Ms. Cheng's car. As a result, Ms. Cheng's testimony that there was definitely only one impact between her car and Mr. Zahran's pickup, and that this single impact was the result of her car

being pushed into Mr. Zahran's pickup by the Safeway semi, was uncontroverted. No one has testified that Ms. Cheng's car hit Mr. Zahran's pickup twice. In fact, the Zahrans submitted no admissible evidence of any kind that Ms. Cheng's car struck Mr. Zahran's pickup twice. The Zahrans submitting admissible evidence that Ms. Cheng's car definitely struck Mr. Zahran's pickup twice would have been necessary for the Zahrans to create a material question of fact.

Because the Zahrans submitted no admissible evidence contradicting Ms. Cheng's testimony that her car impacted Mr. Zahran's pickup only once, the trial court correctly decided as a matter of law that there was no evidence that Ms. Cheng caused or contributed to this accident. As a result, the Chengs were entitled to summary judgment dismissal of the claims against them. The trial court correctly granted the Chengs' summary judgment motion, and should be affirmed in all respects.

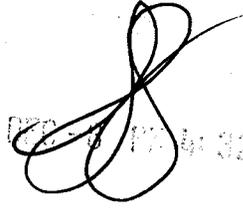
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