

66233-3

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No. 66233-3-I

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

JOHN BOILEAU,

Respondent,

vs.

SANG RYONG YOO (aka Sam Yoo), Appellant,
CITY OF SEATTLE, Respondent,
ANNA MARIE SECRETO, MARK R. GREGG AND
JANE DOE GREGG, AMANDA McGARTY and JOHN DOE
McGARTY, Defendants.

BRIEF OF RESPONDENT CITY OF SEATTLE

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A. PROCEDURAL FRAMEWORK

The judgment in this case was based upon a jury verdict in favor of Boileau against Yoo, and in favor of the McGartys against Boileau. The jury found the McGartys “not negligent.” CP 73. The judgment noted that the City “was dismissed ... at the close of presentation of evidence.” CP 73.¹

In his appeal, Yoo identifies Boileau as “plaintiff/respondent,” the City as “defendant/respondent,” and the McGartys as “defendant.” But Yoo asks for a new trial “as to .. Boileau’s claims against ... Yoo, the City, and Ms. McGarty.” Brief of Appellant, p. 17.

Boileau had amended his complaint to add the McGartys and the City as defendants after Yoo stated during discovery that his view of the stop sign controlling the intersection had been obstructed by tree limbs. CP 2-3, 32-33.

B. COUNTER-STATEMENT OF THE CASE

The case involves an accident between vehicles driven by Boileau and Yoo on June 14, 2006. The facts are set forth in the City’s Motions in Limine and Boileau’s response to those motions. CP 2-3; 32-33, 43-46.

¹ The City was dismissed under CR 50(a).

The City's Motion in Limine #1 sought to bar exhibits showing conditions at the accident intersection in 2002 and 2007 – four years before and one year after the Boileau/Yoo accident. CP 1-2.

The inference that plaintiff wants the jury to draw is that because the City knew that [certain] conditions existed in 2002 (and 2007 after the accident), it should have reasonably anticipated (or had actual knowledge of) the condition would exist on June 14, 2006. But no nexus exists between the proposed exhibits and the proposition sought to be proved against the City.

CP 3-4.

Motion in Limine #2 sought to bar testimony “concerning enforcement activity in 2002 and 2007, and [to bar] opinions from lay witnesses about accidents and changes at the intersection.” CP 31-32.

The inference that plaintiff wants the jury to draw from this testimony, insofar as the City is concerned, is that because the City knew a condition existed in 2002 and 2007, it should have reasonably anticipated (or alternatively already knew) that the condition would exist on June 14, 2006. But no logical nexus exists between the testimony and the proposition to be proved against the City.

Similarly, plaintiff proposes to use the complaint by Ms. Finseth in 2007 to show the City should have anticipated the condition of the intersection on June 14, 2006. But no nexus exists between Ms. Finseth's complaint in 2007, and the proposition sought to be proved. Complaints received after the crash cannot prove notice before the crash.

CP 33.

Yoo's contention about the stop sign being obscured by tree limbs was very vague. Yoo admitted that he did not slow before entering the intersection. Yoo testified that when he drove slowly past the accident scene a few days later, he could see the sign. RP Sept. 20, 2010, pp. 6-9, 18-19.

Q. Do you recall how close the tree branches were to the stop sign itself?

A. No.

Q. Do you recall how far away from the stop sign you were when you first were able to observe that the stop sign was there?

A. I mean, I couldn't tell you an exact figure, but ten, fifteen feet away, maybe.

Q. Did you make these observations from an automobile?

A. Yes.

Q. The same automobile that was involved in the collision?

A. No, that was totaled. So I mean, we had two cars; so I took the other one, I think, to –

RP Sept. 20, 2010, p. 10.

Q. You didn't get out of the car on your revisit?

A. No.

Q. So it could've been twenty feet.

A. It could've been.

Q. Could've been 25 feet.

A. Probably not that much. I mean, it was – it's all approximate; but, you know, it was – I would say it was reasonable conjecture that came from me, it's probably, you know, (inaudible) –

Q. Well, it is conjecture.

A. Yes.

Q. So what do you mean by "reasonable conjecture."

- A. I mean, you know, I – I cannot be sure how close I was, exactly; so by then, it could've been hundred feet away from it, or two, you know?
- Q. Could've been thirty feet?
- A. I do not think it was that far.
- Q. You don't think so, but it could've been?
- A. Sure.
- Q. Because you're really just conjecturing, isn't that right?
- A. Yeah, but it was – I would say it's more like, in – more – what's the word? It wasn't just a pure conjecture. You know, it was somewhat calculated, somewhat educated guess, if you will.
- Q. It's in your interest to have a smaller distance, isn't it?
- A. By theory, yes.

RP Sept. 20, 2010, pp. 24-25.

Yoo admitted that he didn't slow down because he was in a hurry.

- Q. Yet you knew that you were supposed to slow down for an intersection. Isn't that right?
- A. Yes.
- Q. And you didn't slow down on this occasion for the intersection.
- A. No.
- Q. And that decision of yours had nothing to do with whether you saw the stop sign or not; isn't that correct?
- A. That's correct.
- Q. Do you know what the speed limit was there on Fremont?
- A. It was a small residential area, so I believe it was 25.
- Q. You were going faster than 25.
- A. I might've.
- Q. You didn't look at the speedometer.
- A. No.
- Q. But you were in a hurry.
- A. I was – guess so.
- Q. Wasn't that the reason that you turned off Aurora?
- A. Yes.

RP Sept. 20, 2010, pp. 26-27.

The police officer who investigated the accident testified that Yoo told her "... he was in a hurry and ... never saw the stop sign." She testified that Yoo said nothing about his view of the stop sign being obstructed. RP Sept. 27, 2010, p. 6. The officer testified that the stop sign would *in fact* have been clearly visible by an approaching southbound driver. *Id.* at 9-10.

The trial court found a lack of legally sufficient evidence upon which to base a verdict against the City. For a jury to find against the City "would require inadmissible speculation and conjecture." CP 79.

There is simply, even taking all of the reasonable inferences in the light most favorable to the plaintiff, no reasonable basis upon which a reasonable jury ... could find that the City is liable for the accident in any part that occurred in June of 2006.

RP Sept. 29, 2010, pp. 7-9. Yoo made no argument opposing the City's CR 50(a) motion. Only Boileau opposed it. RP Sept. 29, 2010, pp. 4-7.

Yoo now argues that the trial court erred by entering the orders in limine. *See* CP 57-60; RP Sept. 15, 2010, pp. 20-37. Yoo's motion for reconsideration of the orders in limine was denied at the same time plaintiff's offer of proof was rejected. RP Sept. 20, 2010, pp. 4-14. Yoo's motion for reconsideration challenged the orders in limine only insofar as

accidents and occurrences *before* the Boileau/Yoo accident were concerned. CP 61-63.

Boileau's offer of proof concerned a complaint to the City about the intersection made about a year after the Boileau/Yoo accident by Andrew Finseth, one of the McGartys' neighbors. Finseth had resided on the southeast corner of the intersection since August 2003. He stated he never paid attention to the "potential outgrowth of the tree in question" until June 2007. Finseth stated that accidents happened at the intersection "approximately once every month during ... June, July, August, and September from 2005 through 2007," and that all these accidents involved "vehicles traveling southbound on Fremont Avenue North...." During this time, Finseth stated that he had observed "the tree becoming more and more overgrown." But Finseth did not complain to the City until 2007, when he himself drove southbound through the intersection and noticed that "drivers cannot see the stop sign." Finseth concluded "that the collisions [he had observed had] occurred because of tree limbs blocking the drivers' view of the stop sign." Offer of Proof, Sept. 20, 2010, pp. 4-7.

The trial court rejected the offer of proof because the "case law ... requires evidence of prior accidents to have occurred under substantially similar circumstances [RP, Sept. 20, 2010, p. 8]," and because the witness "... first complain[ed] to the City about it in 2007 ... [*id.*]" The trial court

denied Yoo's motion for reconsideration of the orders in limine for the same reason.

There's absolutely no evidence ... that the vision of the drivers was obstructed and that was the cause of the accident[s] in 2005, 2006, or 2007.... If I were to admit this evidence, it would allow the jury to speculate whole heartedly as to the circumstances of any of these prior accidents.... [T]here is simply no basis upon which this Court should allow this jury to hear about those accidents and allow them to deduct ... that, in fact, this obstruction had existed during all of those years and that the City was somehow responsible for it.

...

For the same reasons, and based upon the cases – in fact they are even cited in the motion for reconsideration – I'm going to deny the motion for reconsideration for the same reasons I just outlined....

There were accidents. They occurred at this intersection. That is simply not sufficient for this Court to allow evidence of those accidents to be put before this jury to draw the conclusions that counsel wish them to be able to draw.

RP Sept. 20, 2010, pp. 8-10. The written orders in limine were signed on September 15, 2010, and the offer of proof was rejected on September 20, 2010. CP 57-60. The court noted that the motion for reconsideration was based on the "same cases" that had been cited by the City to support the motions in limine. Those cases included *Turner v. City of Tacoma*, 72 Wn.2d 1029, 435 P.2d 927 (1967) and *Blood v. Allied Stores Corp.*, 62 Wn.2d 187, 381 P.2d 742 (1963). RP Sept. 20, 2010, pp. 9-10.

The City pointed out in Motion in Limine #2 that municipalities were "... not liable for unsafe conditions ... they did not create and had no reasonable opportunity to correct.... The tree was not the City's tree, and its foliage would have appeared only shortly before the crash. See *Niebarger v. Seattle*, 53 Wn.2d 228 (1958); WPI 140.02." CP 33. The City also pointed out that *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978) was not in point. *Boeing* involved an underpass, while the case at bar involved tree foliage, whose characteristics change from season to season. CP 54.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion by its rulings on the evidence?
2. Is defendant/appellant Yoo entitled to a new trial with respect to plaintiff/respondent Boileau, defendants McGarty, and defendant/respondent City of Seattle?

D. ARGUMENT AND CONCLUSION

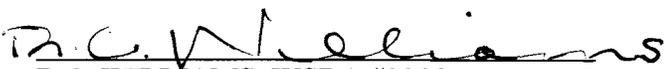
The record shows that the trial court did not abuse its discretion by excluding evidence of prior accidents and enforcement activity by the City. Yoo cites only one case that was not considered by the trial court. *Evans v. Miller*, 8 Wn. App. 364, 507 P.2d 887 (1973) is distinguishable. The prior accident in *Evans* was substantially similar in nature.

Yoo is not entitled to a new trial. Yoo fails to demonstrate that the trial court abused its discretion by excluding evidence. Further, Yoo did not oppose the order dismissing the City under CR 50(a). Only Boileau opposed it, and Boileau was not on the same side of the case as Yoo. *See* RAP 2.5(a); *see also* CP 68-71; RP Sept. 29, 2010, pp. 1-9. Plaintiff/respondent Boileau did not appeal. Yoo has no grounds for overturning Boileau's judgment against him.

The judgment should be affirmed.

RESPECTFULLY SUBMITTED this 6 day of June, 2011.

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PROOF OF SERVICE

DONNA M. ROBINSON certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On June 6, 2011, I requested ABC Legal Messengers to serve, by June 7, 2011, a copy of this document upon the following counsel:

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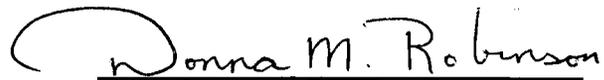
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I further state that I requested ABC Messengers to deliver by June 7, 2011, for filing, the original and one copy of this document to the Court of Appeals, Division I.

DATED this 6th day of June, 2011.


DONNA M. ROBINSON