IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TABITHA M. TUBBS, a single woman Appellant, v. ESTATE OF STEVEN L. VAIL, individually and dba NORTHWEST VEE DUB; and LARRY E. VAIL and DARLENE E. VAIL, as Co-Administrators of the Estate of Steven L. Vail, Respondents, BRAD ABELMAN and JANE DOE ABLEMAN, husband and wife and the marital community composed thereof, Defendants.	)	No. 67201-1-I DIVISION ONE UNPUBLISHED OPINION FILED: February 19, 2013

Appelwick, J. — Tubbs sued the estate of the driver for injuries sustained when the motorcycle on which she was a passenger crashed into a guardrail. The trial court

granted summary judgment in favor of the Estate based on lack of proximate cause. We reverse.

FACTS

This lawsuit arises from a single motorcycle crash on September 28, 2008. Steven Vail was driving a borrowed motorcycle north on I-5 with his girlfriend, Tabitha Tubbs, riding as passenger behind him. He lost control of the motorcycle and collided with a guardrail. Vail died at the scene. Tubbs was seriously injured. She brought suit against Vail's estate claiming that his negligence proximately caused the crash and her resulting injuries.

Vail borrowed the motorcycle from his friend Brad Abelman to ride in the Oyster Run, an annual motorcycle rally in Anacortes. Vail and Abelman worked on the motorcycle together the day before the Oyster Run. Abelman warned Vail not to take the motorcycle up to freeway speeds, because it has low gears and starts "winding out pretty good" around 65 miles per hour. Abelman also told Vail that sediment sometimes collects in the carburetor and fuel tank, which can make the motorcycle run rough.

The following day around 5 p.m., Vail and Tubbs were traveling north on I-5, returning from the Oyster Run. The weather was dry, sunny, and around 70 degrees. Traffic was light and Vail was driving between 55 and 60 miles per hour. Tubbs rode behind Vail in the motorcycle's passenger seat, with her arms around Vail. They stopped at a rest stop near the Whatcom County line and then continued north less than five miles before the crash.

Witnesses observed the motorcycle veer from the right lane onto the shoulder

and collide with the guardrail. One witness saw Vail move onto the shoulder, back into the right lane, then swerve into the guardrail. Another witness testified that he did not remember seeing Vail brake before the crash. Two witnesses saw the motorcycle wobbling before colliding with the guardrail. One described the crash, "I noticed the motorcycle start to wobble [and] the motorcycle veered to the right [and] hit the guard rail sending both passengers off the motorcycle." Another witness testified that Vail "appeared to loose [sic] control" of the motorcycle.

Tubbs has limited recollection of the accident. She testified that she suddenly felt "[s]omething was wrong with the bike"—it "wasn't riding right" and "[e]verything was shaking." She leaned forward to look into Vail's eyes. He nodded his head yes and told her he loved her. Vail put his left hand on Tubbs's left leg, holding the handlebars with only his right hand. Tubbs does not remember whether he put his hand on her leg before or after they hit the guardrail. Nor can she remember whether Vail braked or decelerated before the crash. She explained that the time from when she noticed something wrong with the bike and the crash was "[m]icroseconds."

Vail died at the scene of the crash. Tubbs suffered extensive, life-threatening injuries, including near amputation of her leg, a broken arm, multiple surgeries, painful skin grafts, migraines, numbness, and other serious injuries. She initially spent 30 days in the hospital after the crash.

Tubbs filed suit in Whatcom County Superior Court against Vail's estate (Estate), Larry and Darlene Vail as co-administrators of the Estate, Vail's business, and Brad Abelman as owner of the motorcycle. Tubbs claimed that Vail's and Abelman's negligence caused the accident and her resulting injuries. Brad Abelman later testified

that he knew of no defects with the motorcycle, though was never qualified as an expert witness. Tubbs ordered a mechanical inspection of the motorcycle, but the report was not considered by the court.

The Estate and Abelman filed separate motions for summary judgment. At oral argument for the Estate's motion, the trial court expressed concern that a jury's finding of proximate cause would be based on conjecture and speculation. The trial court granted the Estate's motion. Tubbs appeals that order. The trial court later granted Abelman's motion, because there was no apparent defect with the motorcycle that caused the crash. Tubbs did not appeal from that order.

DISCUSSION

Tubbs argues that the trial court erred in granting the Estate's motion for summary judgment. Tubbs contends that there are genuine issues of material fact as to whether Vail's negligence caused the motorcycle crash, so summary judgment is improper. We review an order granting summary judgment de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). We review all facts, and reasonable inferences drawn from the facts, in the light most favorable to the nonmoving party. CTVC of Haw., Co. v. Shinawatra, 82 Wn. App. 699, 708, 919 P.2d 1243, 932 P.2d 664 (1996).

In a negligence claim, the plaintiff must establish (1) that the defendant owes the plaintiff a duty to conform to a certain standard of conduct; (2) a breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury.

Cameron v. Murray, 151 Wn. App. 646, 651, 214 P.3d 150 (2009). Drivers owe passengers a duty of ordinary care in operation of a motor vehicle. Roberts v. Johnson, 91 Wn.2d 182, 187, 588 P.2d 201 (1978). The Estate concedes that Vail owed Tubbs a duty of ordinary care, because she was his invited passenger.

The parties' argument centers on breach and causation—whether Vail breached his duty of ordinary care and whether any breach of that duty caused the motorcycle crash. Issues of negligence and causation are generally not subject to summary adjudication. LaPlante v. State, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). But, summary judgment may be granted if, from all the evidence, reasonable persons could reach but one conclusion. Morris v. McNicol, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974). However, the nonmoving party may not rely on mere speculation or argumentative assertions that unresolved factual issues remain. Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 377, 972 P.2d 475 (1999). A cause of action may be said to be speculative when, from a consideration of all of the facts, it is as likely that it happened from one cause as another. Rasmussen v. Bendotti, 107 Wn. App. 947, 959, 29 P.3d 56 (2001).

The Estate relies heavily on Gardner v. Seymour to establish this point. 27 Wn.2d 802, 180 P.2d 564 (1947). In that case, an employee fell down a freight elevator shaft and died. Id. at 803-04. There were no witnesses to the accident. Id. at 805. Without any direct evidence, the court found the plaintiff's explanation (employer's unsafe workplace) as plausible as the defendant's explanation (employee's own negligence manipulating the elevator cables). Id. at 806. As a result, any jury verdict would be based on conjecture. Id. at 812. The court explained that a party

cannot prevail by only showing that an accident could have happened in particular way. Id. at 810. Rather, the party must show that "it could not reasonably have happened in any other way." Id. (quoting Whitehouse v. Bryant Lumber & Shingle Mill Co., 50 Wash. 563, 565-66, 97 P. 751 (1908)).

Likewise, in Marshall the plaintiff was injured while exercising on a treadmill at her gym. 94 Wn. App. at 375. She alleged that the treadmill stopped abruptly, then restarted at a fast pace, throwing her off. Id. The last thing the plaintiff remembered was resetting the machine after it stopped—she did not remember how quickly the treadmill reached full speed again. Id. The treadmill was operational for another four years after the accident. Id. at 376. The court concluded that the plaintiff failed to establish that a machine defect proximately caused her injuries. Id. at 379-80. Without any memory of the accident, she simply offered one of many plausible theories for her injuries. Id. at 379. Any jury verdict would be impermissibly based on speculation. Id.; see also Moore v. Hagge, 158 Wn. App. 137, 148, 241 P.3d 787 (2010), review denied, 171 Wn.2d 1004, 249 P.3d 181 (2011).

Tubbs's case is distinguishable from Gardner and Marshall. In those cases, it was equally plausible that the plaintiff's own mistake caused the accident rather than any defect of the equipment or premises. In contrast, the Estate has not put forth any equally plausible explanations for the motorcycle accident other than Vail's negligence. There is no evidence that weather or road conditions contributed to the accident. The Estate does not dispute that Tubbs, as the passenger, did not do anything to cause the accident. And, the parties acknowledged at oral argument that there was no defect with the motorcycle. That leaves Vail's negligence as the only alleged cause of the

accident. A jury would not be forced to speculate between possible causes of the accident.

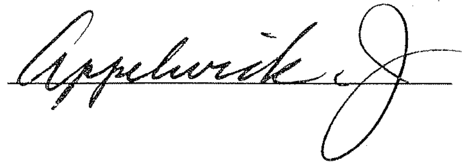
Moreover, violating a rule of the road, though not negligence per se, may be considered by the trier of fact as evidence of negligence. RCW 5.40.050; see also Pudmaroff v. Allen, 138 Wn.2d 55, 68, 977 P.2d 574 (1999). RCW 5.40.050 permits a defendant shown to have violated the literal requirements of a statute to present evidence of excuse or justification and leaves it to the trier of fact to determine whether the violation should be treated as evidence of negligence. Pudmaroff, 138 Wn.2d at 68. Thus, even if evidence of an excuse or justification were before the trial court, a question of fact would preclude summary judgment.

Tubbs has put forth a number of ways in which Vail violated the rules of the road. For instance, RCW 46.61.140(1) requires a vehicle to "be driven as nearly as practicable entirely within a single lane." One witness observed Vail travel from the right lane onto the shoulder then back into the right lane before veering right and colliding with the guardrail. Similarly, RCW 46.61.665 makes it unlawful for a driver to embrace a passenger if it "prevents the free and unhampered operation of such vehicle." Tubbs testified that Vail put his hand on her leg and turned to face her right before the accident. RCW 46.61.400(1) requires that vehicles not be driven "at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." Abelman warned Vail not to take the motorcycle up to freeway speeds, because of the low gear ratio and because sediment sometimes collected in the carburetor and gas tank. Additionally, one witness testified that he did not notice Vail braking before the crash. Abelman, though never qualified

as an expert, also testified that the proper response to a wobble is to slow down or brake.

There are multiple ways in which Vail may have been negligent. This is not a question of speculation, as it was in Gardner and Marshall, between the defendant as the source of negligence and some other source. Rather, the question is whether the facts in evidence, taken in the light most favorable to Tubbs as the nonmoving party, would allow a jury to find negligence. We cannot say from these facts that the only conclusion a jury could reach is that Vail was not negligent.

We reverse and remand.



WE CONCUR: