

HONORABLE EDWARD F. SHEA

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

THOMAS A. WAITE,
Plaintiff,

No. CV-05-399-EFS

vs.

THE CHURCH OF JESUS CHRIST OF
LATTER DAY SAINTS d/b/a/
CORPORATION OF THE PRESIDING
BISHOP OF THE CHURCH OF JESUS
CHRIST OF LATTER DAY SAINTS, a
Utah Corporation, d/b/a
CORPORATION OF THE PRESIDENT
OF THE CHURCH OF JESUS CHRIST
OF LATTER DAY SAINTS, a Utah
corporation; DONALD C. FOSSUM;
and STEVEN D. BRODHEAD,

DEFENDANT BRODHEAD'S
REPLY TO CHURCH
DEFENDANT'S AND FOSSUM'S
MEMORANDUM IN SUPPORT OF
SUMMARY JUDGMENT OF
DISMISSAL

Defendant.

I. INTRODUCTION

Defendant Steven Brodhead replies to the Church defendants and Fossum's Memorandum in Support of Summary Judgment (Document 121) only to state that his actions, egregious as they were, should not be construed as a matter of Washington law to negate duties Mr. Fossum owed to his passenger. Those duties

DEFENDANT BRODHEAD'S REPLY TO
CHURCH DEFENDANT'S AND FOSSUM'S
MEMORANDUM IN SUPPORT OF SUMMARY
JUDGMENT OF DISMISSAL - 1

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1 should be judged on their own without a preclusive ruling of the Court based upon
2 the actions of another driver at the intersection.

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4 This defendant is unaware of evidence by which plaintiff asserts that
5 defendant Fossum should have heard Steven Brodhead's vehicle before entering
6 the intersection or that there was any part of Mr. Brodhead's driving that should
7 have "cued" or alerted Mr. Fossum to the potential for danger (before entering the
8 intersection). Instead, this defendant simply understands that plaintiff asserts that
9 Mr. Fossum should have looked left just before entering the intersection in order to
10 discern if any dangers existed and if he had done so, he would have perceived Mr.
11 Brodhead's vehicle.
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14 Therefore, by this defendant's understanding, plaintiff's claims of neglect
15 against Mr. Fossum are not dependent upon the acts of Mr. Brodhead.
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17 Defendant Brodhead does not advance any argument regarding whether or
18 not Mr. Fossum breached his duties.
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20 II. FACTS

21 Defendant Steven Brodhead has admitted driving in excess of 70 mph on a
22 long residential street in the Spokane Valley, slamming his brakes hundreds of feet
23 in advance of a stop sign on that street, but being unable to stop before entering the
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1 intersection because of deficient brakes. (Please see Church defendant's and
2 Fossum's LR 56 Statement of Facts Document 120, page 2, Fact 7 and 8.)

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4 It is equally true that defendant Steven Brodhead has never attempted to
5 avoid responsibility or escape the truth. He has admitted fault in this matter and
6 that he caused injuries. He did plead guilty to assault in the third degree and
7 reckless driving for which he paid a fine and spent a few days in jail (Document
8 120, page 3, Fact No. 10). He has also been very forthright about his actions that
9 day during testimony in this case by readily admitting his speed, his long skid, his
10 unsuccessful attempt to stop and his remorse.
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13 **III. AUTHORITIES AND ARGUMENT**

14 **A. Steven Brodhead Convictions.**

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16 Steven Brodhead pled guilty to and was convicted of "assault in the third
17 degree" which by 9A.36.031(1)(f) is defined as:

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19 A person is guilty of assault in the third degree if he or she, under
20 circumstances not amounting to assault in the first or second degree:
21 with criminal negligence, causes bodily harm accompanied by
22 substantial pain that extends for a period sufficient to cause
23 considerable suffering.

24 Steven Brodhead also pled guilty to and was convicted of reckless driving
25 which by RCW 46.61.500(1) is defined as:

26 - Any person who drives any vehicle in willful or wanton disregard for
27 the safety of persons or property as guilty of reckless driving.

1 **B. Washington Law of "Legal Cause."**

2 Defendant Brodhead respectfully submits that Washington case law does not
3 stand for the proposition that a criminal conviction of one party negates an
4 independent and well established duty of another party.
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6 Instead, Washington courts have refused to create new duties when those
7 would have been predicated upon unforeseeable criminal acts. Examples of these
8 rulings are the cases cited by the LDS and Fossum defendants (Document 121).
9

10 Washington courts will not create duties in a vacuum of facts, logic or law.
11 In Medrano v. Schwendeman, 66 Wn. App. 607, 836 P.2d 833 (1992), the court
12 did not create a duty upon those constructing highway shoulders or erecting power
13 poles to foresee those who would drive off the roadway as a result of intoxication
14 or recklessness. Similarly, in Minahan v. W. Wash. Fair Ass'n, 117 Wn. App. 881,
15 73 P.3d 1019 (2003), the court ruled as a matter of law that a party which directed
16 plaintiff to load her vehicle at a certain location could not foresee that an
17 intoxicated driver would strike the plaintiff in that spot. The common ingredient
18 was that, *in the absence of an established duty*, the court would not impose a duty
19 where, as a matter of law, the foreseeability of the actions (that were the predicate
20 of the potential duty) was so "remote" and "insubstantial" that reasonable minds
21 could not differ. Id. at 897-899.
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1 This case is different. There are well established duties and they are
2 imposed on drivers such as Mr. Fossum.

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4 In this case a jury would be instructed that "it is the duty of every person
5 using a public street or highway, whether a pedestrian or a driver of a vehicle, to
6 exercise ordinary care to avoid placing himself or others in danger and to exercise
7 ordinary care to avoid a collision." (WPI 70.01 citing Robison v. Simard, 57
8 Wn.2d 850, 360 P.2d 153 (1961) that drivers must exercise a degree of care that a
9 reasonably prudent person who have exercised under the same or similar
10 circumstances). Further the driver approaching a stop sign has duties imposed by
11 Washington law and shall "yield the right of way to any vehicle in the intersection
12 or approaching on another roadway so closely as to constitute an immediate hazard
13 during the time the driver who had the duty to stop is moving across or within the
14 intersection or junction of roadways. Further, the right-of-way . . . is not absolute,
15 but relative and the duty to exercise ordinary care to avoid collisions at
16 intersections rests upon both drivers." (WPI 70.02.02, RCW 46.61.190).

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21 As a mater of law, Mr. Fossum had duties to his passenger. Those duties are
22 not eradicated by the actions of Steven Brodhead, even when they resulted in
23 criminal convictions.
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IV. CONCLUSION

This defendant respectfully submits that summary judgment should not be predicated upon a ruling at law that the actions of Steven Brodhead, for which he sustained criminal convictions, negate common law and statutory duties imposed on Mr. Fossum. Defendant Brodhead takes no position in this motion, whether or not Mr. Fossum breached those duties.

DATED this 5th day of June, 2007.

PAINE HAMBLÉN LLP

By: s/ Andrew C. Smythe
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2007, a true and correct copy of the foregoing DEFENDANT BRODHEAD'S REPLY TO CHURCH DEFENDANT'S AND FOSSUM'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT OF DISMISSAL was duly served on all parties entitled to service by electronic mail, addressed to the following:

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