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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

THOMAS A. WAITE, Plaintiff, vs. THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, a Utah corporation; THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, a Utah corporation; DONALD C. FOSSUM; and STEVEN D. BRODHEAD, Defendants.	Case No.: CV-05-399-EFS CHURCH DEFENDANTS AND FOSSUM'S REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT OF DISMISSAL

I. INTRODUCTION

The Church defendants and Fossum have moved to dismiss this case on the basis that the cause in fact of this accident was Steven Brodhead's criminally reckless conduct. And, because of Brodhead's criminally reckless conduct, which Mr. Fossum had no duty to foresee and prevent, Fossum's actions or inactions as a legal cause of the accident are eliminated.

Under Celotex v. Catrett, 477 U.S. 317 (1986), Mr. Waite has the burden at this stage of the proceedings to set forth a *prima facie* case of negligence by

making a sufficient showing to establish each element of his claim on which he bears the burden of proof at trial.[1] Failure on any element requires dismissal as:

> 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.

Celotex, at 322-323.

Waite's response discusses cause in fact, legal causation and special relationship, but fails to raise any material issues of fact precluding summary judgment.

As to cause in fact, Waite makes two arguments in claiming fault against Donald Fossum. First, Waite asserts that a tree was a visual obstacle at the intersection and, second, that Fossum allegedly had "time" to avoid the accident. These facts, however, do not raise a genuine issue because plaintiff fails to provide any evidence or facts that the tree was a factor in the accident and, as a matter of law, it was not. And, similarly, Waite provides no evidence or facts that Fossum could have avoided the accident and, thereby Waite's argument relies solely and entirely on impermissible speculation.

With regard to legal causation, plaintiff inappropriately relies on a products liability/rescue doctrine case and fails to cite any case that makes a favored driver like Donald Fossum responsible to anticipate and avoid another driver's, like Brodhead, criminally reckless conduct.

Finally, plaintiff's "special relationship" theory evidences a fundamental misunderstanding of the facts required to make that argument and therefore again

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[1] Plaintiff's reliance on Washington summary judgment cases is wrong, as in a diversity case, federal procedural law controls. Snead v. Metropolitan Property and Casualty Ins. Co., 237 F.3d 1080, 1090 (9th Cir. 2001).

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fails to raise a genuine issue precluding summary judgment. Accordingly, the Court should grant this Motion for Summary Judgment.

II. UNDISPUTED FACTS

The Church defendants and Fossum have combined the competing statements of fact into a single pleading. Based on the properly authenticated submissions, the following facts are undisputed:

1. The accident occurred on August 21, 2003, at 8th and Adams which is a four-way stop intersection. Defendants' Reply LR 56.1 Statement of Undisputed Facts No. 1.

2. Just prior to the accident, Steven Brodhead, who had not taken his anti-depression medication, became upset at his girlfriend and had a near accident with another driver, which further upset him and caused him to drive his car at speeds of at least 70 miles per hour prior to taking his foot off the accelerator. Id. No. 2-6.

3. Donald Fossum, who was driving a Church-owned truck and acting within the scope and duty as a missionary, came to a complete stop at 8th and Adams and was the favored driver at that intersection. Id. No. 11, 20, 21, 50.

4. A tree to Donald Fossum's left (west) partially blocked his ability to see. Id. No. 23.

5. Fossum, after coming to a complete stop, looked right, then left, and did not see Brodhead's vehicle. The front seat passenger, James Ross, likewise saw no approaching vehicle because of a big pine tree. Id. No. 24, 31, 32.

6. Depending on where Fossum stopped, a calculation could be done as to how far down the road Fossum could see. Id. No. 23.

7. After a complete stop, there was not specific time Fossum had to wait and look before proceeding. Id. No. 13.

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8. As the favored driver, Fossum could expect Brodhead (or any driver) to reduce speed, yield and allow Fossum to cross the intersection. Id. No. 14.

9. Fossum did not have to assume that Brodhead would go twice the speed limit and have bad brakes. Id. No. 15.

10. Brodhead saw a stop sign at 8th Avenue and Adams, slammed on his brakes and slid into the side of the Church truck driven by Fossum. Id. No. 1, 7.

11. Brodhead's brakes were not working properly. Id. No. 8.

12. Had Brodhead's brakes been working, all of the foregoing could have happened and the accident could have still been avoided. Id. No. 9.

13. Prior to impact Fossum heard a high pitched squeal, heard Ross yell "oh crap," looked to the right at Ross, looked back left when Ross pointed and saw Brodhead's vehicle with smoke. Fossum then accelerated to cross the intersection and was struck. Id. No. 33-39.

14. If Fossum did not see Brodhead he would have no notice that Brodhead was violating the law, and if Fossum had no opportunity to detect or identify a potential hazard, he could not react to it. Id. No. 16.

15. Brodhead pled guilty to criminal charges. Id. No. 10.

16. Brodhead has or will admit negligence in the instant case. Id. No. 17.

17. A special relationship existed between Mr. Waite and the LDS Church. Id. No. 51.

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III. ARGUMENT

A. BRODHEAD WAS THE SOLE CAUSE IN FACT OF THE ACCIDENT.

1. The Presence of a Tree at the Intersection was not the Cause of the Accident.

Mr. Waite claims that Fossum was negligent because the view to his left (west) was partially blocked by a tree. The presence of the tree does not raise a genuine issue as to the cause in fact of the accident for several reasons.

- Fossum undisputedly came to a complete stop at the 4-way stop sign at 8th and Adams. As the favored driver at the intersection he saw no vehicle to whom he should yield, and rightly and reasonably proceeded to cross the intersection.
- Waite proffers no evidence in his response that Fossum should have stopped somewhere else other than at the stop sign.
- Waite's expert admits that depending on where Fossum stopped it could be calculated how far down the road Fossum could see.
- Waite proffers no evidence as to where the tree is actually located, where Brodhead was when Fossum stopped at the stop sign, and what could be seen by Fossum with or without the tree.

Moreover, Waite's "tree" argument is exactly analogous to the power pole, road design, and road maintenance arguments that have been made to, and routinely rejected by Washington courts when dealing with criminal conduct and cause in fact issues in negligence cases. In addition to the Medrano and Hartley

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cases cited in Defendants' opening brief, see, Kristjanson v. Seattle, 25 Wn. App. 324 (1980), Klein v. Seattle, 41 Wn. App. 636 (1985), and Braegelmann v. Snohomish County, 53 Wn. App. 381 (1989). Indeed, in the Braegelmann and Medrano cases, the state conceded negligence for purposes of summary judgment, and the Court still dismissed the action because the cause in fact was criminally reckless conduct.

The same result is mandated here. The tree is not a factor in this case if Brodhead obeyed the law, or at a minimum if he had at least had brakes on his car that worked properly.

2. Fossum's Pre-Impact Conduct Does Not Raise a Material Issue of Fact.

Plaintiff's second cause in fact argument claims that Fossum had sufficient time to see Brodhead and avoid the accident based on facts just prior to impact. See Undisputed Fact No. 13, supra. The fatal flaw, however, with Waite's argument is that he fails to establish that any of the pre-impact facts make any difference in the cause in fact of the accident. As the favored driver, Fossum was entitled by law to assume that Brodhead (or any driver) would obey the law. Therefore, Fossum had, as a matter of law, a "reasonable reaction time" after he first learned that the disfavored driver, Brodhead, would not yield.

> A favored driver is entitled to a reasonable reaction time after it becomes apparent in the exercise of due care that the disfavored driver will not yield the right-of-way. Until he has been allowed that reaction time, he is not chargeable with contributory negligence flowing from omissions or acts regarding his failure to observe or respond to the conduct of the disfavored driver.

Poston v. Mathers, 77 Wn.2d 329, 335 (1969) (Citations omitted.)[2]

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[2] The Poston case is particularly appropriate to the case at bar in that it is the only case cited by either party where both the favored and disfavored driver

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A case subsequent to Poston further expanded the rule:

> The favored driver is entitled to a reasonable reaction time after it becomes apparent in the exercise of due care that the disfavored driver will not yield the right-of-way. This rule applies even though the favored driver did not see the disfavored driver until it were too late to avoid the accident.

Sanchez v. Haddix, 95 Wn.2d 593, 597 (1981)

Waite offers no evidence as to exactly where Brodhead was at any given time, *vis-a-vis* Fossum and therefore offers no facts that Fossum indeed had "time" to recognize, react and avoid the accident as the favored driver. A similar argument was made in Sanchez v. Haddix, supra. The Court there framed the issue as follows:

> Here, the evidence is undisputed that the defendant did not see the Chevrolet until it was too late to avoid the accident. Should he have seen it? And should he have been aware, in time to avoid the accident, that the disfavored driver was not going to yield the right-of-way?, Of course, it depends on the movement of the automobiles prior to the accident.

Sanchez, at p. 597.

After reviewing plaintiff's alternate causation theories, the Court concluded:

> The trouble with the plaintiff's position is that it required the jury to speculate as to what movements the automobile made before the collision, and also as to what action on the part of the defendant could have avoided the accident.

Sanchez, at p. 599.

The same is true in this case. It is undisputed that the law provides Fossum with a reasonable reaction time. As in Sanchez, supra, plaintiff has no facts and no expert opinions, in support of his assertion that Fossum had a reasonable reaction time. Without evidence of reaction time, Fossum, "is not chargeable

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were approaching stop signs. Accordingly, its analysis is the closest to a four-way stop situation.

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with contributory negligence." Accordingly, Mr. Waite's speculation raises no material issue that Fossum could in fact have avoided the accident had he "merely looked left." Waite has failed to carry his burden in this respect.

B. FOSSUM IS NOT THE LEGAL CAUSE OF WAITE'S INJURIES.

1. Plaintiff's Reliance on a Product Liability/Rescue Doctrine Case Raises no Issue of Fact.

Defendants established through three cases in their opening brief that criminally reckless conduct is unforeseeable as a matter of law: Hartley v. State, 103 Wn.2d 768 (1985) (state not legal cause of death for failure to revoke license of drunk driver), Medrano v. Schwendeman, 66 Wn. App. 607 (1992) (county and power company not legal cause of drunk driver running off road and striking power pole), and Minahan v. W. Wash. Fair Ass'n, 117 Wn. App. 881 (2003) (employer not legal cause of drunk driver hitting plaintiff while she was behind a legally parked car on a street).

In response, plaintiff cites McCoy v. American Suzuki Motor Corp, 136 Wn.2d 350 (1998), claiming it is somehow a "better analogy" than Hartley, Medrano and Minahan. Plaintiff's reliance, however, on McCoy is misplaced. McCoy is a products liability/rescue doctrine case in which the Supreme Court held that the purpose of the rescue doctrine was, "informing a tortfeasor it is foreseeable a rescuer will come to the aid of a person imperiled by the tortfeasor's actions." McCoy, at 355. In McCoy, it was the alleged primary negligence of Suzuki in designing a defective car which rolled over, caused injury and invited rescue. No such situation exists here, as the cause in fact of the accident was Brodhead, not Fossum.

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Simply put, Waite offers no facts or law whereby Hartley's fundamental legal causation question (. . . "was the defendant under a duty to protect plaintiff against the event which in fact did occur?" . . .) is answered in his favor.

C. PLAINTIFF'S SPECIAL RELATIONSHIP ARGUMENT RAISES NO ISSUE THAT PRECLUDES SUMMARY JUDGMENT.

1. There Existed no Relationship Between Fossum and Brodhead, whereby Fossum was on Notice of Brodhead's Potential Criminally Reckless Conduct.

Citing Hartley, supra, Waite blithely claims that any time a "special relationship" exists, liability attaches. He then argues that since there is admittedly a special relationship between himself and the Church, liability must surely attach (or at least raise an issue to preclude summary judgment).

Plaintiff misunderstands the dynamic required to claim liability due to a special relationship. As amply discussed in Hartley, for the special relationship doctrine to apply in the case at bar, the special relationship had to exist between the Church and/or Fossum and Brodhead, NOT the Church and Mr. Waite.

In the instant case, there is no evidence of any relationship between Fossum and Brodhead or Brodhead and the Church, much less a special relationship, which put defendants on notice of Brodhead's potentially criminal reckless conduct.

D. DEFENDANT BRODHEAD'S RESPONSE RAISES NO GENUINE ISSUE OF MATERIAL FACT THAT PRECLUDES SUMMARY JUDGMENT.

1. Defendant Brodhead disputes no facts.

Defendant Brodhead has filed a short response to the pending Summary Judgment Motion. In that response he takes no issue with any of the Church defendants and Fossum's LR 56 Statement of Facts. Accordingly, these are deemed admitted as against Mr. Brodhead. LR 56.1(d).

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2. Brodhead makes no argument regarding whether or not Mr. Fossum breached his duties.

Obviously as a driver Mr. Fossum had an obligation to comply with the law and exercise ordinary care to avoid placing himself or others in danger and to exercise ordinary care to avoid a collision. It is not Fossum's position that Brodhead's criminally reckless conduct absolves him of his duties. It is Fossum's position that he undisputedly acted with ordinary care and, as demonstrated above, was not the cause in fact of the accident. Accordingly, with Fossum not being a cause in fact of the accident, he is likewise not a legal cause of the accident because he could not foresee Brodhead's criminally reckless conduct.

IV. CONCLUSION

There is no genuine issue of material fact. Mr. Waite has failed to meet his Celotex burden and defendants are entitled to dismissal.

DATED this 12th day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2007:

1. I electronically filed the foregoing **CHURCH DEFENDANTS AND FOSSUM'S REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT OF DISMISSAL** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

   (for Waite) Richard C. Eymann and Stephen L. Nordstrom;
   (for Brodhead) Andrew C. Smythe

2. I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants at the address listed below: **None.**

3. I hereby certify that I have hand delivered the document to the following participants at the addresses listed below: **None**.

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