FILED
4/19/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SOEUN AM, a single individual, and KHEAM CHEAM, a single individual, Appellants/Cross-Respondents, v. THE ESTATE OF DILLON K. O'BRIEN, and the STATE OF WASHINGTON, its subdivisions and agencies, and the WASHINGTON STATE PATROL, Respondents/Cross Appellants.	DIVISION ONE No. 80596-7-I UNPUBLISHED OPINION

DWYER, J. — Soeun Am and Kheam Cheam appeal from the trial court's orders (1) entering final judgment in favor of the State of Washington with regard to several negligence claims, and (2) denying their motion for a new trial. At trial, Am and Cheam claimed that the Washington State Patrol, among other things, negligently failed to cause the activation of a message on highway reader boards to warn oncoming traffic of a wrong-way driver before that driver collided with Am's vehicle. Pursuant to a motion for judgment as a matter of law, the trial court ruled that insufficient evidence was adduced at trial to support a finding that the Washington State Patrol's failure to cause the activation of a warning on highway reader boards was a factual proximate cause of the injuries sustained by Am and Cheam. On appeal, Am and Cheam challenge that ruling. Finding no error, we affirm.

I

On May 17, 2015, at approximately 3:57 a.m., a vehicle driven by Dillon O'Brien was traveling eastbound in the westbound lanes of Interstate 90 and collided with a westbound vehicle driven by Soeun Am. Am's mother, Kheam Cheam, was a passenger in Am's vehicle. At the time of the collision, O'Brien was under the influence of alcohol and marijuana. O'Brien died as a result of the collision. Both Am and Cheam suffered severe injuries in the collision.

Approximately 26 minutes before the collision, at 3:31 a.m., a concerned citizen telephoned 911 and reported an erratic driver who was driving eastbound in the eastbound lanes of I-90 near milepost 38. Upon receiving the report, a Washington State Patrol (WSP) dispatcher broadcasted the report over a WSP radio frequency. At 3:32 a.m., state Trooper Theodore Hahn acknowledged the broadcast by reciting his badge number. At this time, Trooper Hahn was the only trooper on duty in his autonomous patrol area.[1]

When Trooper Hahn received the broadcast, he was located in a state patrol detachment office in Bellevue near milepost 11. Trooper Hahn was working on a work-related incident report. After receiving the broadcast, Trooper Hahn did not depart from the detachment office in order to search for the eastbound driver. He made this decision, the trooper testified, because, based on his training and experience, "trying to chase down an erratic driver is something that's very, very hard to locate." Trooper Hahn reasoned that, by the

[1] According to trial testimony, an "autonomous patrol area" is "the area to which an officer is assigned." The autonomous patrol area to which Trooper Hahn was assigned spanned from milepost 3.33 in Seattle to milepost 54.69 at Hyak near Snoqualmie Pass.

time he would have been able to reach the vehicle's location, "there is a number of places it could either turn around or exit." In the meantime, Trooper Hahn was positioned in a "major metropolitan area" where he was "centrally located to answer calls where the majority of the calls come out at that time of night." In short, the trooper concluded that, given that he was alone on the shift, it was most prudent to remain in Bellevue and complete the report.

Twelve minutes after the first report, at 3:43 a.m., a state patrol dispatcher received a report of a wrong-way driver heading eastbound in the westbound lanes of I-90 near milepost 38. At 3:44 a.m., the dispatcher notified Trooper Hahn of the report. Upon being notified of the existence of a wrong-way driver, Trooper Hahn immediately left the detachment office in order to pursue the wrong-way vehicle.

Also at 3:44 a.m., a state patrol dispatcher received another report, which indicated that the wrong-way driver had now been seen at milepost 46.[2] Next, at 3:46 a.m., another report was received, placing the wrong-way driver at milepost 47. Then, at 3:47 a.m., a report was received that placed the wrong-way driver at milepost 48. And at 3:50 a.m., another report was received that placed the wrong-way driver at milepost 50.

[2] At trial, a state patrol dispatcher testified—with regard to the 3:43 a.m. report that placed the wrong-way driver at milepost 38—that it was "possible that the original location was misunderstood or inaccurate from the caller."

At 3:57 a.m., a state patrol dispatcher received a report of a collision in the westbound lanes of I-90. The collision occurred between mileposts 53 and 54.[3] The state patrol dispatcher received the report from a Kittcom dispatcher.[4]

At 4:14 a.m., 30 minutes after leaving the Bellevue detachment office, Trooper Hahn arrived at the scene of the collision. On his way there, Trooper Hahn drove his patrol vehicle at an average speed of approximately 95 miles per hour.

At 4:34 a.m., a Kittcom dispatcher requested that the Washington State Patrol contact the Department of Transportation (DOT) to request activation of a message on highway reader boards to warn oncoming traffic of the collision.[5] At 4:42 a.m., Trooper Christine White contacted a state patrol dispatcher, Donna Warren, and informed Warren that the DOT had not yet activated a message on the reader boards. A recording of the exchange between Trooper White and dispatcher Warren was presented to the jury at trial:

> Trooper White: Can you have DOT maybe put something up on the reader boards? There's nothing coming

---

[3] A state patrol dispatch report generated by a WSP dispatcher, provided the location of the collision as follows:

> DETAILS: TWO CAR FATALITY COLLISION INVOLVING WRONG WAY VEHICLE. ALL WESTBOUND LANES BLOCKED.
> LOCATION: WESTBOUND I90 JUST WEST OF MILEPOST 54 KITTITAS COUNTY 22 MILES EAST OF NORTH BEND

[4] Kittcom is the 911 dispatch center for Kittitas County emergency communications.

[5] An entry on a state patrol dispatch report provided: "04:34 KITTCOM REQ HAVE DOT PUT UP ON READERBOARDS TO EXIT TO 54." Testimony from a state patrol dispatcher explained the meaning of this entry in the following exchange:

> Q. . . . . So tell us what that entry means from 4:34.
> A. That Kittcom is requesting that we advise DOT to indicate on the reader board that there is a collision, and that traffic needs to exit at 54, or Exit 54.
> Q. Okay, and so according to the [dispatch] log, at least, that request is being made at 4:34 in the morning?
> A. Yes.

up westbound that advises you that the road will be closed.

Warren: They were advised to put up on the reader boards for all traffic to exit westbound.

Trooper White: Yeah they haven't done so. There's nothing up.

Warren: I'll call them back. Four forty two.

A state patrol dispatcher testified that, when Warren stated "four forty two," she was referring to the then-current time. Thus, the exchange between Trooper White and Warren indicates that the DOT had initially received a request to program a warning on highway reader boards sometime before 4:42 a.m.

At 5:20 a.m., an entry on a state patrol dispatch log indicated that the DOT had activated a message on two reader boards—located at mileposts 54 and 61—which provided, "ALL VEHS MUST EXIT."[6] No evidence was adduced at trial demonstrating that a message on the highway reader boards had been activated at any time prior to 5:20 a.m.

On May 17, 2017, Am and Cheam filed a complaint against the estate of Dillon O'Brien and the State of Washington. The complaint alleged, among other things, that employees and agents of the State of Washington owed a duty of care to "warn Plaintiffs of potential hazards on the state-regulated highway." According to the complaint, the State "negligently breached" this duty and, as "a

[6] In particular, an entry on a state patrol dispatch report provided: "05:20 DOT ADV CURRENTLY HAVE SIGNS DIVERTING TRF AT MP61 AND MP54 READS 'ALL VEHS MUST EXIT.'" A state patrol dispatcher testified with regard to the meaning of this entry as follows:

Q. Now, what you still have in front of you there, [defense exhibit] 110, would you continue to look through that and tell me if you can find any entry indicating that DOT has been able to change the reader boards?

A. At 0520.

Q. Do you see any indications before 5:20 that the reader boards had been changed?

A. No.

direct and proximate cause of [the State's] breach of the duty of care," Am and Cheam "suffered, and continue to suffer, from physical and emotional injuries."

The case proceeded to a jury trial. During the trial, Am and Cheam adduced evidence that, pursuant to a Washington State Snoqualmie Pass closure plan, the Washington State Patrol was expected to contact the DOT in order to activate warnings on highway reader boards when "inclement weather" impacted highway conditions.[7]

Am and Cheam also elicited testimony from expert witness Donald Van Blaricom, a retired chief of police. Van Blaricom testified that a 2012 report from the National Highway Transportation Safety Board recommended that, when a wrong-way driver is located on a highway, law enforcement agencies should contact the "Department of Transportation[] to program their reader boards to warn oncoming traffic that they have a wrong-way driver coming in their direction." Van Blaricom additionally testified that the Washington State Patrol had not adopted any training or policy to instruct state troopers on how to utilize highway reader boards in order to warn oncoming traffic of a wrong-way driver.

At the close of the evidence, the State moved for judgment as a matter of law. With regard to the claim that the State was negligent for failing to cause to be activated a message on highway reader boards in order to warn oncoming

---

[7] According to the Snoqualmie Pass closure plan:

DOT and WSP will activate "Variable Message Signs" (VMS), informing and directing motorists about the existing conditions.

- Variable message signs are located both east- and westbound on I-90 from Milepost 34 near North Bend to Milepost 71 at Easton. The sign messages are entered at Hyak DOT and individual messages can be entered on each sign.

Trooper Hahn testified that this plan applies when there is "inclement weather" during "the winter months."

traffic of the wrong-way driver, the State argued that insufficient evidence supported a finding of factual proximate cause:

> [DEFENSE COUNSEL]: In pointing out that on this morning it took an hour for it to happen so it could have made no difference, and there's no evidence as to how long does it take – let's say they make the request as soon as they hear about the wrong-way driver at 3:43. Say they make it right away. It's 14 minutes later when the report of the collision comes in. There is no evidence in the record to suggest that DOT gets a sign changed within 14 minutes.

The trial court partially granted the State's motion for judgment as a matter of law, ruling that insufficient evidence was introduced from which a jury could find that the State's failure to request DOT to activate a warning on the highway reader boards was a factual proximate cause of the injuries sustained by Am and Cheam:

> [T]he Court will find that there is insufficient evidence to allow a jury to make a reasonable inference here that the reader boards were a proximate cause of this -- or the lack of information on the reader boards was a proximate cause to this injury, and so the Court will preclude any argument related to the reader boards being causally related to this accident.

The jury returned a verdict finding that the State was not negligent with respect to any of the claims advanced by Am and Cheam.[8] Am and Cheam subsequently filed a motion for a new trial. In the motion, Am and Cheam claimed that the trial court erred by ruling that insufficient evidence supported a finding that the State's failure to cause to be activated a warning on the highway reader boards was a factual proximate cause of their injuries. Additionally, Am

[8] The jury did, however, find that Dillon O'Brien was negligent and that his negligence was a proximate cause of the injuries sustained by Am and Cheam. The jury assessed damages with respect to Cheam as amounting to $217,071.24. Additionally, the jury assessed damages with respect to Am as amounting to $10,400,000.

and Cheam asserted that the State improperly argued during closing argument that any failure to activate a warning on the reader boards was not a proximate cause of their injuries. The trial court denied the motion for a new trial.

Am and Cheam appeal.

II

Am and Cheam contend that the trial court erred by ruling, as a matter of law, that the State's failure to request DOT to activate a message on highway reader boards in order to warn oncoming traffic of the wrong-way driver was not a factual proximate cause of their injuries. We disagree.

We review a trial court's ruling on a motion for judgment as a matter of law de novo, applying the same legal standard as the trial court. Hawkins v. Diel, 166 Wn. App. 1, 13, 269 P.3d 1049 (2011). Additionally, we may affirm the trial court on any ground established by the pleadings and supported by the record. Linth v. Gay, 190 Wn. App. 331, 336, 360 P.3d 844 (2015). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997). The applicable court rule provides that a motion for judgment as a matter of law may be granted

> [i]f, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or

> third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

CR 50(a)(1).

Proximate cause has two elements: cause in fact and legal causation. "Cause in fact refers to the 'but for' consequences of an act—the physical connection between an act and an injury." Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Ordinarily, cause in fact is a question for the jury to decide. Hartley, 103 Wn.2d at 778. However, the court may decide this question as a matter of law when "the causal connection is so speculative and indirect that reasonable minds could not differ." Doherty v. Mun. of Metro. Seattle, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996). "'The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another.'" Jankelson v. Sisters of Charity of House of Providence in Territory of Wash., 17 Wn.2d 631, 643, 136 P.2d 720 (1943) (quoting Frescoln v. Puget Sound Traction, Light & Power Co., 90 Wash. 59, 63, 155 P. 395 (1916)). Put differently,

> if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947).

Am and Cheam assert that that the "jury could reasonabl[y] have determined that the [Washington State Patrol]'s failure to adopt and implement policies in the first instance to warn motorists of wrong-way drivers was the proximate cause of the collision." Additionally, Am and Cheam contend that "the

jury could have surmised from the evidence that if the [Washington State Patrol] can promptly warn motorists of fast changing weather conditions and pass closures in a very short time frame, they certainly could have quickly posted warnings of the wrong-way driver."

However, under either of these theories, insufficient evidence was adduced at trial to establish that a warning on the highway reader boards could have been activated in time for Am to have noticed the warning and avoided the collision. Notably, the record does not contain any evidence regarding the process utilized by the DOT to program messages on highway reader boards.[9] In the absence of such evidence, we must resort to the evidence adduced at trial regarding how long the DOT actually took to program the reader boards after the collision had already occurred. This is the only evidence of this type in the trial record.

At 4:34 a.m., a Kittcom dispatcher requested that the Washington State Patrol contact the DOT and request DOT to activate a warning message on the I-90 reader boards. At 4:42 a.m., Trooper White contacted Warren, a state patrol dispatcher, and requested Warren to "have DOT maybe put something up on the reader boards." Warren responded that "they were advised to put up on the reader boards for all traffic to exit westbound" and that she would "call them back." Thus, the evidence adduced at trial indicates that the DOT had been

[9] To the contrary, Van Blaricom testified that he did not have an understanding of the procedures utilized by the DOT to program messages on highway reader boards:

> Q. And do you understand . . . how DOT engages the warning signs on these roadway warnings?
>
> A. I don't know how they program them, no.

initially requested to program a message on the I-90 reader boards sometime between 4:34 a.m. and 4:42 a.m.

The evidence in the record indicates that the DOT did not actually activate such a message on the I-90 reader boards until 5:20 a.m. Assuming that the DOT was initially requested to activate the highway reader boards by 4:41 a.m. (which was immediately before Warren informed Trooper White that the DOT had already been requested to activate a message on the reader boards), then 39 minutes elapsed between the request being made and the message on the reader boards being activated.

The evidence in the case is that the Washington State Patrol was not informed of the wrong-way driver in the westbound lanes of I-90 until 14 minutes before the collision was reported.[10] Assuming that Am was driving at a speed of 60 miles per hour, his vehicle would have been located somewhere between mileposts 67 and 68 when the Washington State Patrol was initially informed of the wrong-way driver.[11] Moreover, the evidence adduced at trial indicates that the nearest highway reader boards were located at mileposts 54 and 61.

Therefore, in order for Am to have seen any warning on the I-90 reader board located at milepost 61, the DOT would have had to program and activate a message on that reader board in less than 7 minutes from the time of the

[10] A wrong-way driver was initially reported at 3:43 a.m. The collision was reported at 3:57 a.m. Thus, 14 minutes elapsed between the initial report of a wrong-way driver and the first report of the collision.

[11] According to a state patrol incident report, the collision occurred "JUST WEST OF MILEPOST 54." Assuming that Am was driving at a speed of 60 miles per hour—or one mile per minute—his vehicle would have been located between mileposts 67 and 68 when the Washington State Patrol was initially informed of a wrong-way driver (54 + 14 = 68). Of course, this assumes that the collision was reported immediately after it occurred.

Washington State Patrol initially being informed of a wrong-way driver.[12] Additionally, in order for Am to have noticed any warning on the reader board located at milepost 54, the DOT would have had to program and activate that message in less than 14 minutes from the time of the initial report of a wrong-way driver being received.[13]

Yet there is no evidence in the record demonstrating that a message on the highway reader boards was capable of being programmed and activated in less than either 7 or 14 minutes. Rather, the evidence adduced at trial indicates that, when the DOT was actually requested to activate a warning on the highway reader boards, the DOT took—at the very least—39 minutes to program and activate the message.[14] No evidence was presented from which a jury could conclude that the process could be completed, at that time of the day, in any quantifiably quicker time frame.

Had the jury been permitted to decide the issue of factual proximate cause with regard to the claims advanced by Am and Cheam concerning the

---

[12] Assuming that Am was driving at a speed of 60 miles per hour, it would have taken Am less than 7 minutes to travel from a location in between mileposts 67 and 68 to milepost 61.

[13] Assuming that Am was driving at a speed of 60 miles per hour, it would have taken Am less than 14 minutes to travel from a location in between mileposts 67 and 68 to milepost 54. It is also worth noting that, even if a warning had been activated at milepost 54, it is unclear from the record whether Am would have had a sufficient amount of time to respond to the warning and avoid the collision. Indeed, a state patrol incident report provided that the collision occurred "JUST WEST OF MILEPOST 54." Thus, Am would have had less than one minute to respond to any notice on the reader board located at milepost 54 in order to avoid the collision.

[14] For this reason, even if the Washington State Patrol had requested the DOT to prepare to activate a warning on highway reader boards when the initial report regarding an erratic driver was made, insufficient evidence supported a finding that the DOT would have been capable of activating a warning on the reader boards in time for Am to have noticed the warning. Indeed, the initial report of an erratic driver at milepost 38 was received by a state patrol dispatcher at 3:31 a.m. This was 26 minutes before the collision was reported at 3:57 a.m. Moreover, the initial report of an erratic driver indicated that the driver was heading eastbound in the eastbound lanes of I-90. Thus, any warning on the reader boards concerning an erratic driver would have been posted for eastbound (not westbound) traffic. Such a warning would not have been seen by Am.

Washington State Patrol's failure to ask DOT to activate a warning on the I-90 reader boards, the jury would have been left to speculate as to whether the reader boards were even capable of being activated in the time remaining prior to the collision. The trial court correctly ruled that insufficient evidence was introduced to support a jury finding of factual proximate cause.

Accordingly, the motion was properly granted.

III

In their opening brief, Am and Cheam assert that the State improperly argued during closing argument that any failure to activate a warning on the highway reader boards was not a proximate cause of the injuries sustained by Am and Cheam. However, in their reply brief, Am and Cheam state that they "concede that whether the [State]'s final argument at trial regarding the proximate cause of the variable message sign was proper, it does not constitute reversible error." Accordingly, we consider this assignment of error to be abandoned.

IV

Finally, Am and Cheam contend that the trial court erred by denying their motion for a new trial. The motion for a new trial was based on the same assignments of error that we have already addressed. Because Am and Cheam are not entitled to relief on any of their claims, the trial court's ruling on the motion for a new trial was correct.[15]

[15] Moreover, because of the manner in which we have resolved the issues herein, the judgment on the verdict is affirmed and we need not address any other issues raised by the parties on appeal.

Affirmed.

WE CONCUR: