

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES ANTHONY “TONY” ZAHAN ⁽¹⁾)	NO. 65838-7-I
and CARLA COLWELL, individually)	
and as husband and wife,)	DIVISION ONE
)	
Appellants,)	
)	
v.)	
)	
SAFEWAY INC., a Delaware)	
corporation,)	
Defendant,)	UNPUBLISHED OPINION
)	
TERESA CHENG and JOHN DOE)	FILED: December 19, 2011
CHENG, wife and husband, and their)	
marital community,)	
)	
<u>Respondents.</u>)	

Lau, J. — Driver James Zahran was rear-ended by Teresa Cheng in a three vehicle accident. He appeals the trial court’s summary judgment order dismissing his personal injury negligence claims against Cheng.² Because material issues of fact remain on whether Cheng’s negligence caused or contributed to the accident, we

¹ We use the correct spelling of Zahran’s name in this opinion.

² Safeway, Inc., is not a party to this appeal.

reverse the summary judgment order.

FACTS

Viewed in the light most favorable to Zahran, the facts are as follows: On February 21, 2006, Zahran was driving his Dodge Ram pickup truck northbound on Interstate 405 in Renton. Teresa Cheng was immediately behind Zahran, driving her Toyota Camry. Immediately behind Cheng was a semi truck owned by Safeway and driven by Marvin Thompson.

According to Zahran, he slowed down and stopped for traffic. He saw the Safeway truck approaching in his rearview mirror. Zahran failed to see Cheng's vehicle behind him. It is undisputed that the Safeway truck rear-ended Cheng's vehicle and Cheng's vehicle rear-ended Zahran's pickup truck. The crux of the dispute is whether Cheng struck Zahran once or twice. Zahran sued Safeway and Cheng for negligence.

In April 2010, Cheng moved for summary judgment dismissal, arguing no material issues of fact establish that she proximately caused the accident. Cheng's declaration testimony claimed that she stopped completely "with about a car length to spare" when the Safeway truck collided with the rear of her vehicle, forcing it into Zahran's pickup truck. To corroborate her statement, Cheng submitted Safeway truck driver Thompson's interview transcript provided by Safeway in response to interrogatories. In the interview, Thompson said that Cheng's Camry had stopped "really close behind the pickup in front of it." Thompson repeated this statement later in the interview.

A: Okay so it sounds like you believe that the car ahead of you [Cheng's car] was stopped before you impacted it?

- MT: Well I know it was stopped before I impacted it yes but how long it was stopped I have no idea.
- A: Were you able to clearly see whether that vehicle had impacted the truck prior to you impacting that car?
- MT: Yes I know it had not.
- A: And you I think you said that you weren't sure how long that vehicle was stopped?
- MT: Right.
- A: The one right in front of you.
- MT: That's correct. A matter of a second, maybe two. I didn't know. Not very long.
- A: Pretty quick.
- MT: Yes.
- A: All right so when you impacted that vehicle uh did you push it into the truck?
- MT: I impacted that vehicle and then it went ahead and hit the truck yes. I did not physically push it into the truck with my truck no.
- A: Kind of like a bump?
- MT: Yes I hit it and then it rolled ahead and hit the truck.

Cheng also submitted the Washington State Patrol (WSP) accident report.

Under the "narrative" section, the trooper wrote:

Vehicles 1, 2, 3 are . . . in lane 2 of I405 Vehicles 2 and 3 slow for stop and go traffic. Vehicle #1 fails to slow in time and strikes rear of #2 which then pushes 2 into #3.^[3]

Zahran filed an opposition brief and several exhibits. He submitted his own deposition testimony, in which he stated:

It seems to me that I got hit twice, and the reason I say that is because I went forward, and then the car jerked again. It could have been because I slammed the brakes back on again because my car was going forward. I got hit. I rocked back. I went forward. And maybe I hit the brake again, and that's what I thought was the second accident. I don't know, but it just – when I got out and looked at the cars, I just thought she hit me first. I just thought that, you know.

When asked whether he felt two separate impacts, Zahran stated:

³ The report shows vehicle 1 driven by Thompson, vehicle 2 driven by Cheng, and vehicle 3 driven by Zahran.

Well, yeah, it seemed to me that I did, but it could have been me hitting the brake of the car because when I got hit, I took my foot off the brake, and I went forward, and I slammed it on again. So it could have been me doing it. I don't know.

Zahran's declaration testimony stated, "Since I felt what seemed like two impacts, I understood that Teresa Cheng's vehicle struck my vehicle first and then was pushed into my vehicle a second time when her vehicle was struck by the Safeway truck." His declaration also explained that he sought medical treatment the next day. He told the hospital staff that his "vehicle was rear-ended by a sedan which was then rear-ended by a large Safeway truck, which pushed the sedan into my truck again. The sedan I was referring to was the vehicle driven by Teresa Cheng."

In response to Safeway's interrogatory 12, Zahran described the accident:

From the initial impact to the point my vehicle stopped it felt to me as if my vehicle was struck twice. There were three cars involved in the motor vehicle accident. The Toyota Camry that was directly behind my vehicle and the large semi-type truck that was directly behind the Toyota Camry. I am unable to say whether the Toyota Camry struck my vehicle first or if the Toyota Camry collided with my vehicle as a result of being struck by the semi-type Safeway truck first and then pushed into my vehicle.

Zahran also argued that Thompson's interview statements were "unverified and unsworn" and, thus, inadmissible.

Safeway also opposed Cheng's summary judgment motion, claiming that genuine issues of material fact remained regarding whether Cheng's vehicle hit Zahran's truck first. Safeway submitted Zahran's hospital records and independent medical examination (IME) report.⁴ The hospital records show that Zahran told hospital

⁴ In her reply to Zahran and Safeway's opposition, Cheng did not move to strike the medical evidence. She merely argued, "[Zahran's] speculative history provided to

staff, “[I] was rear-ended by a sedan which was then rear-end[ed] by a large Safeway truck, causing a second impact to [my] vehicle.” The IME report shows Zahran told IME Dr. Daniel Brzusek, “[I] was struck twice: first a car hit [me] and a truck from Safeway hit the car which in turn struck [me] again.” Safeway also submitted deposition excerpts in which Zahran stated, “I didn’t hear brakes screech. I didn’t hear anything I heard the collision, but I was in it when I heard it.” From this, Safeway argued Cheng’s vehicle struck Zahran first since Zahran heard nothing, indicating the Safeway truck struck Cheng’s car first. In its opposition brief, Safeway also moved to strike the WSP accident report and Marvin Thompson’s interview transcript.

On July 6, 2010, the trial court granted Cheng’s motion for summary judgment.

The court’s order⁵ shows it considered:

1. Defendant Cheng’s Motion for Summary Judgment of Dismissal, including the Police Report attached as Exhibit A, portions of the Deposition of Plaintiff Zahran attached as Exhibit B, the Declaration of Teresa Cheng attached as Exhibit C, and portions of the recorded statement of Marvin Thompson attached as Exhibit D;
2. The response of plaintiff in opposition to Defendant’s Motion for Summary Judgment and supporting materials;
3. The response of Defendant Safeway in opposition to Defendant’s Motion for Summary Judgment and supporting materials;
4. The reply of Defendant Cheng and supporting materials;
5. The argument of counsel; and
6. The pleadings and filings in this cause^[6]

the doctors does not create a material issue of fact.”

⁵ CR 56(h) requires the summary judgment order to designate the documents and evidence called to the trial court’s attention.

⁶ Based on the summary judgment order, the trial court considered all submissions from all parties and did not (1) grant Safeway’s motions to strike or (2) rule on Zahran’s complaint about Thompson’s interview. Because, “materials submitted to the trial court in connection with a motion for summary judgment cannot actually be

The court found “no material issues of fact to support a claim that Defendant Cheng negligently caused or contributed to the accident at issue in this case.” Later, the court entered an amended order finding Cheng fault free as a matter of law and precluded any party from arguing otherwise at trial.

ANALYSIS

Zahran argues that genuine issues of material fact exist on whether Cheng breached a duty or caused or contributed to the accident. Cheng contends the trial court properly granted summary judgment because Zahran submitted no admissible evidence that her vehicle hit Zahran’s pickup truck more than once or that she did anything to cause or contribute to the accident.

We review a summary judgment order de novo, performing the same inquiry as the trial court and considering facts and reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Jones, 146 Wn.2d at 300–01.

To defeat summary judgment in a negligence action, the nonmoving party must show that there is a genuine issue of material fact with respect to each element of a

stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal.” Cameron v. Murray, 151 Wn. App. 646, 658, 214 P.3d 150 (2009). No trial court rulings on evidence objections appear in our record. Zahran assigns no error to any evidence considered by the trial court. The admissibility of evidence challenged below is therefore not properly before us.

negligence claim: duty, breach of duty, causation, and injury/damages. Kennedy v. Sea-Land Serv., Inc., 63 Wn. App. 839, 856, 816 P.2d 75 (1991). On motion for summary judgment, the trial court does not weigh the evidence or assess witness credibility and neither does the court on appeal. Barker v. Advanced Silicon Materials, LLC, 131 Wn. App. 616, 624, 128 P.3d 633 (2006). Summary judgment must be “employed with caution lest worthwhile causes perish short of a determination of their true merit.” Smith v. Acme Paving Co., 16 Wn. App. 389, 392, 558 P.2d 811 (1976).

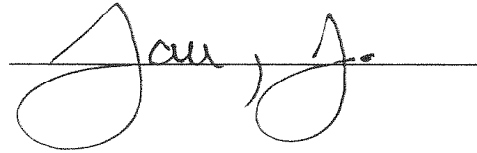
Viewing the evidence and the reasonable inferences most favorably to Zahran, we conclude the record demonstrates material fact issues remain on whether Cheng rear-ended Zahran’s pickup truck before the Safeway truck rear-ended Cheng’s vehicle. As discussed above, the record shows at least two reasonable but competing versions of what caused Cheng’s vehicle to collide with Zahran’s truck. According to Cheng’s testimony, Thompson’s interview transcript, and the WSP report, Thompson rear ended Cheng’s stopped vehicle, causing it to strike Zahran’s truck. In contrast, Zahran contends his numerous statements to others that Cheng’s vehicle rear ended his truck before the Safeway truck rear-ended Cheng’s vehicle and his medical treatment records create material issues of fact precluding summary judgment in Cheng’s favor.⁷

CONCLUSION

⁷ Cheng contends Zahran’s liability evidence constitutes mere speculation. We disagree. The record here establishes more than mere speculation.

Here, because the record shows material disputed facts and competing reasonable inferences on the question of Cheng's negligence, the trial court improperly granted summary judgment in Cheng's favor.

We reverse the summary judgment order and remand for proceedings consistent with this opinion.



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WE CONCUR:

