

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARLA KRESS and JERRY KRESS,)
husband and wife, and the marital)
community composed thereof,)

No. 66352-6-I

Appellants/Cross-Respondents,)

DIVISION ONE

v.)

UNPUBLISHED OPINION

THE STATE OF WASHINGTON,)

Respondent/Cross-Appellant,)

TRI-STATE CONSTRUCTION, INC.,)
a Washington Corporation; and)

TRI-STATE CONSTRUCTION)
COMPANY HOLDINGS, L.L.C., a)
Washington Corporation, and)

RICHARD MOBLEY and JANE DOE)
MOBLEY, husband and wife, and the)
marital community composed thereof,)

FILED: September 17, 2012

Respondents.)

Grosse, J. — In negligence cases, proximate cause is more often than not a question of fact that is reserved for the jury. While summary judgment is appropriate in cases where the evidence is such that reasonable minds cannot differ, such is not the case here, where expert testimony raises issues of fact whether injuries sustained as a result of a head-on collision in a construction zone were caused by the defendants' failure to provide a reasonably safe roadway. It is for the jury to determine whether these factors were substantial

and caused the accident. We reverse the trial court's summary judgment dismissal.

FACTS

On January 23, 2007, Marla Kress was severely injured as a result of a head-on collision with a car driven by Richard Mobley. Kress was driving west on State Route (SR) 202 when the vehicle she was driving was struck by Mobley's vehicle, which had been headed eastbound when it crossed over into the westbound lane and struck her vehicle. The accident occurred within a construction zone.

At the time of the accident, traffic in both directions was routed along the pre-existing road surface while Tri-State Construction, Inc., the general contractor, built new lanes to the north. Mobley has no memory of the accident, but according to the Washington State Patrol at the time of the accident Mobley was lost and talking on the phone to his friend David Giroux. Mobley had been on his phone for approximately 12 minutes prior to the accident. Mobley was using a hands free device. Mobley informed Giroux he was near 148th. Giroux told Mobley to go home because he was closer to home than where they were going to meet. Giroux heard [Mobley] say, "Oh s**t," and lost phone reception."

Mobley crossed into the westbound lane at the western end of a gap in the double yellow "no passing" centerline. Previously the gap had provided a permissible left turn onto N.E. 55th Place. However, the intersection with N.E. 55th Place had been closed since 2003 and was now blocked by a large,

temporary, construction retaining wall and a concrete Jersey barrier.

Kress sued Mobley, the contractor Tri-State, and the State of Washington for extensive injuries sustained as a result of the accident. Mobley did not deny liability. On November 12, 2010, the trial court granted the State and Tri-State summary judgment concluding that “[t]here is no direct or circumstantial evidence showing that Mr. Mobley was in fact misled or confused by the conditions of the roadway.” The trial judge then invited the parties to submit additional briefing on “whether the failure to lower the speed limit itself can be a proximate cause on its own of the injuries or can only be an enhancement of the injuries.” On December 3, 2010, the trial court ruled against the excessive speed argument, granting the defendants summary judgment because the cause of action was not recognized in Washington. Pursuant to CR 54(b), the court entered final judgment dismissing Tri-State and the State.

Kress appeals contending that both Tri-State and the State (collectively Tri-State) caused the accident by their negligence in failing to repair road defects at the scene of the crash, including the missing reflectors, the gap in the double yellow line, and the obscured fog lines. Kress further contends that the 11-foot high retaining wall installed by Tri-State impaired her view of the highway as it curved and contributed to the severity of her injuries by not giving her an avenue within which to escape.

Tri-State cross-appeals summary judgment dismissal of its affirmative defense of contributory negligence. Tri-State alleges that Kress was

comparatively at fault because of her excessive speed and/or failure to reduce her speed under then-existing road conditions. Tri-State argues that these are issues of material fact and thus it was inappropriate to grant summary judgment.

ANALYSIS

The elements of a negligence claim are (1) a legal duty owed by the defendant to the plaintiff; (2) breach of that duty; and (3) injury to the plaintiff proximately caused by the breach.¹ The State has a duty to exercise ordinary care in keeping its public roadways in a safe condition for ordinary travel.² The “duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon.”³ A governmental entity “owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.”⁴ Governmental entities are required by law to design roads and highways so that they are reasonably safe for drivers and car occupants, even if the driving is imperfect.⁵ Where a hazard cannot be eliminated, the municipality responsible for the road must guard the public from the hazard.⁶ “Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway.”⁷

¹ Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

² Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 786-87, 108 P.3d 1220 (2005).

³ Owen, 153 Wn.2d at 788.

⁴ Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

⁵ Keller, 146 Wn.2d at 245.

⁶ Raybell v. State, 6 Wn. App. 795, 802, 496 P.2d 559 (1972).

⁷ Xiao Ping Chen v City of Seattle, 153 Wn. App. 890, 894, 223 P.3d 1230

Tri-State was the general contractor on the Washington State Department of Transportation construction project. Under the contract, Tri-State had a duty to maintain the roadway within the project in good, clean, and safe condition “at all times.” Tri-State’s duties to the traveling public are set forth in the contract that requires Tri-State to “maintain the existing roads and streets within the project limits, keeping them open and in good, clean, safe condition at all times.”

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court.⁸ Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁹ In determining whether a genuine issue of material fact exists, the court views all evidence and draws all reasonable inferences in the light most favorable to the nonmoving party.¹⁰ “In tort actions, issues of negligence and causation are questions of fact not usually susceptible to summary judgment.”¹¹ Cause in fact is established if the plaintiff’s injury would not have occurred but for the defendant’s alleged breach of duty.¹² As noted in Klossner v. San Juan County, “[p]recise knowledge of how an accident occurred . . . is not required to prove negligence, and all elements, including proximate cause, can

(2009).

⁸ Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp., 171 Wn.2d 88, 98, 249 P.3d 607 (2011); Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000).

⁹ CR 56(c); Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

¹⁰ Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 487, 834 P.2d 6 (1992).

¹¹ Miller v. Likins, 109 Wn. App. 140, 144, 34 P.3d 835 (2001) (citing Ruff v. Cnty. of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)).

¹² Gaines v. Pierce Cnty., 66, Wn. App. 715, 723, 834 P.2d 631 (1992).

be proved by inferences arising from circumstan[ces].”¹³ It is only where the facts are undisputed and the inferences therefrom are plain and not subject to reasonable doubt or a difference of opinion that the issue of proximate cause evolves into a question of law for the court.¹⁴

Tri-State argues that Kress’s case is similar to Johanson v. King County.¹⁵ Johanson held that a plaintiff’s case must be based on more than just speculation and conjecture.¹⁶ But Johanson is distinguishable. In Johanson, the plaintiff was injured in a motor vehicle accident and contended that King County was negligent in failing to remove old road lines which could mislead drivers into thinking that Holman Road was a two-lane, rather than a four-lane road. Johanson contended that the driver “might have been and probably was deceived and misled by the yellow line.”¹⁷ The court found this to be mere conjecture because there was no evidence, or reasonable inference from the evidence, that the driver was deceived. The Johanson court dismissed the claim because the plaintiff failed to present any “testimony, or inference which can reasonably be drawn from [the] testimony, that the location of the [road] line was a proximate cause of the accident.”¹⁸

Likewise, Tri-State’s reliance on Miller v. Likins¹⁹ is equally misplaced. In

¹³ Klossner v. San Juan Cnty., 21 Wn. App. 689, 692, 586 P.2d 899 (1978).

¹⁴ Coates v. Tacoma Sch. Dist. No. 10, 55 Wn.2d 392, 397, 347 P.2d 1093 (1960) (quoting Bracy v. Lund 197 Wash. 188, 84 P.2d 670 (1938); 2 Restatement, Torts 1171, § 434).

¹⁵ Johanson v. King Cnty., 7 Wn.2d 111, 122-123, 109 P.2d 307 (1941).

¹⁶ Johanson, 7 Wn.2d at 122.

¹⁷ Johanson, 7 Wn.2d at 122.

¹⁸ Johanson, 7 Wn.2d at 120.

¹⁹ 109 Wn. App. 140, 34 P.3d 835 (2001).

Miller, the 87-year-old driver hit a 14-year-old boy at a curve in the road where two streets converged. The driver died before he could testify. The boy's mother sued the driver and the city. An expert testified that he did not know where the injury occurred, on the shoulder or in the lane of traffic.²⁰ The trial court struck the expert's testimony and granted the city's summary judgment dismissal because there was no evidence, circumstantial or otherwise, to show that the driver was confused or misled by the conditions of the roadway.²¹

That is not true in the case at bar. Here, there is more than speculation and conjecture. Kress was struck head-on in an area under construction that was poorly lit, was missing a double center line in an area that had historically permitted left turns, and had an obscured fog line and a substantially reduced line of sight.

Importantly, evidence presented by Kress's experts supports findings that Mobley was deceived into thinking there was a left-turn lane on a poorly marked highway. Kress's expert, Larry Tompkins, testified that based on the analysis of the police drawing and scene photographs, he determined the speed of the vehicles as follows: Kress (49 m.p.h.), Mobley (23.5 m.p.h.). He timed himself uttering the expletive Mobley was heard to utter before impact. Tompkins measured sight distances from varying locations. Tompkins calculated the angle of the collision, and the arc of Mobley's trajectory into the opposite lane. From this data, Tompkins determined the speed at impact and also that that speed

²⁰ Miller, 109 Wn. App. at 143.

²¹ Miller, 109 Wn. App. at 147.

was consistent with an effort to make a left turn.

That impact speed, 72 m.p.h., indicated that Mobley was travelling at approximately 24 m.p.h. from which a jury might infer that he was slowing down to negotiate a turn. This speed is supported by Kress who in her deposition testified that she was driving at 50 m.p.h.—or under 55 m.p.h. Additionally, the fog lines that a driver would use as a guide were obscured, covered by dirt from the construction area, leaving an inference that Mobley was misguided into the wrong lane.

Another expert testified that

all of this evidence leads me to form the opinion that, more probably than not, the gap in the double yellow line, obstructed sight distanced caused by the temporary retaining wall, combined with poor maintenance of the fog line, poor lighting at the scene, and an absence of operable reflectors in the centerline were defective and dangerous conditions that, more probably than not, temporarily misled Mr. Mobley into turning into the oncoming lane where his car struck Ms. Kress's car and injured her.

Indeed, the trial judge acknowledged this opinion stating that the plaintiff's expert opined that "more probably than not Mr. Mobley was misled into turning onto the oncoming line."

We conclude, under the circumstances here, when the evidence and reasonable inferences are drawn in Kress's favor, as they must be in a summary judgment motion, material issues of fact remain on the question of whether the unsafe road conditions created an unreasonably dangerous condition.

Accordingly, the trial court erred in granting summary judgment

²² Kress appeals the trial court's summary judgment order denying her claim for enhancement of injuries because of the State's failure to reduce the speed limit.

dismissal.²²

But below and in her reply brief, Kress clearly states that this is not an enhanced injury case. Accordingly, we will not address this matter on appeal.

Contributory Negligence

Tri-State cross-appeals the summary judgment dismissal of its affirmative defense of contributory negligence. Tri-State alleges that Kress was comparatively at fault because of her excessive speed and/or failure to reduce her speed under then-existing road conditions.

Kress averred that she was driving approximately 50 m.p.h. when she entered the construction zone. Kress testified that she knew she was going below the speed limit because of the construction site and that “you need to kind of slow down.” Because of the road conditions at night, Tri-State argues that Kress’s driving speed was too high and thus her negligence in driving at 50 m.p.h. contributed to the accident. RCW 46.61.400²³ and 46.61.445

²³ RCW 46.61.400 provides in part:

(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

(2) Except when a special hazard exists that requires lower speed for compliance with subsection (1) of this section, the limits specified in this section or established as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle on a highway at a speed in excess of such maximum limits.

. . . .

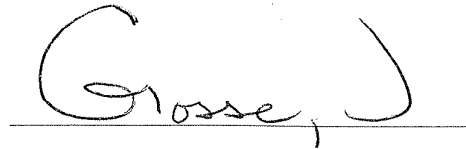
The maximum speed limits set forth in this section may be altered as authorized in RCW 46.61.405, 46.61.410, and 46.61.415.

(3) The driver of every vehicle shall, consistent with the requirements of subsection (1) of this section, drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special

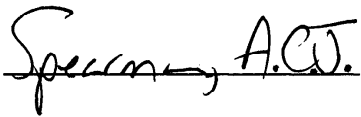
²⁴ require motorists to appropriately reduce speed where road conditions so warrant. This is a factual question for the jury.²⁵

From the evidence, the jury could find that Kress drove through the construction site often and knew that she should proceed at a slower pace. The jury could find that a lower speed limit was not warranted for all times of the day, but that drivers should undertake to exercise caution in the dark. The court erred in dismissing the affirmative defense of contributory negligence.

Reversed and remanded.

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WE CONCUR:

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hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

(Emphasis added.)

²⁴ RCW 46.61.445 provides:

Compliance with speed requirements of this chapter under the circumstances hereinabove set forth shall not relieve the operator of any vehicle from the further exercise of due care and caution as further circumstances shall require.

²⁵ See Hough v. Ballard, 108 Wn. App. 272, 284, 31 P.3d 6 (2001) (driver had duty to drive at prudent speed for known conditions and potential hazards, and though driving 10 miles under the speed limit, the question of whether excessive speed was a proximate cause of the accident is a question of fact for the jury and is not to be resolved by the trial court as a matter of law).

Cox, J.