IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Freidooni v. Freidooni,*
2010 BCSC 553

Date: 20100423
Docket: M084529
Registry: Vancouver

Between:

Jennifer Freidooni

Plaintiff

And

Vahid Freidooni and Honda Finance Inc.

Defendants

Before: The Honourable Mr. Justice S.J. Shabbits

Reasons for Judgment

Counsel for the plaintiff:	W. D. Mussio
Counsel for the defendants:	D. De Bai
Place and Date of Chambers Hearing:	Vancouver, B.C. March 4, 2010
Place and Date of Judgment:	Vancouver, B.C. April 23, 2010

[1] The plaintiff was injured in Alberta in a motor vehicle accident that occurred on July 20, 2007. She was a passenger in a vehicle being operated by her husband, the defendant, Vahid Freidooni. She has brought this proceeding for damages, alleging that her husband's negligence was the cause of the collision giving rise to her injuries. I will sometimes refer to Mr. Freidooni as the defendant.

[2] The plaintiff and the defendant agree that the issue of the defendant's liability can and should be resolved at this Rule 18A summary trial.

[3] The evidence includes the affidavit evidence of the plaintiff, a copy of the plaintiff's statement given by her to an insurance adjuster on August 3, 2007, the transcripts and portions of the evidence given by the plaintiff and the defendant at their examinations for discovery, and copies of a number of photographs of the motor vehicle involved in the accident. The accident involved the defendant's vehicle striking a deer on a highway. The defendant was driving the vehicle, and the plaintiff was a front seat passenger. The Freidooni's three children were in the back seats of the vehicle. There were no other witnesses to the collision.

[4] The evidence on the application therefore includes the evidence of the only two adult persons who could give evidence as to what happened – those being the plaintiff and the defendant. Both parties accept the evidence advanced by the other. There are no issues of credibility. Neither party suggests that any further evidence could be elicited at a trial. I have concluded that the issue of liability should be determined at this summary trial.

[5] At the time of the accident, the plaintiff was wearing a lap and shoulder belt. She was intermittently speaking with her children. The pleadings raised an issue of contributory negligence but there is no evidence that she was contributorally negligent.

[6] I am of the opinion that the plaintiff was not contributorally negligent. She is not responsible for her injuries or losses.

[7] The accident occurred when the Freidooni family was en route from Millet, Alberta to Vancouver, British Columbia. They had left Millet at around 5:30 a.m. The accident happened at about 7:30 a.m. on Alberta Highway No. 16. Highway No. 16 has two westbound lanes of travel at the point where the accident occurred. The Freidooni vehicle was in the fast lane when it struck a deer. The speed limit was 110 kilometres per hour. The defendant was driving at 130 kilometres per hour. The vehicle was on cruise control. The defendant was listening to music and drinking coffee when he saw a shadow coming from the right of the vehicle. That was immediately followed with a “big impact”. The defendant testified that he did not see the deer before the impact - he saw only its shadow. He was unable to take any evasive action. He neither applied the brakes, nor attempted to steer away from the deer.

[8] The impact was to the front of the vehicle. The photographs confirm that the point of impact was at the front centre of the vehicle.

[9] Highway No. 16 has a divider between the eastbound and westbound lanes of travel. There are two eastbound lanes on Highway No. 16, as well as the two westbound lanes.

[10] The terrain to the right of the defendant’s vehicle at the scene of the accident was an open field with no trees or shrubs that would preclude an individual from seeing animals next to the travelled portion of Highway No. 16. The area was wide open, without significant vegetation, signs, buildings or fences. The terrain was flat.

[11] There were no vehicles travelling westbound in front of the defendant’s vehicle that limited the defendant’s view.

[12] There was vegetation on the divider area between the westbound and eastbound lanes of Highway No. 16 that could have impeded the defendant’s view of deer in that area.

[13] The plaintiff did not see the deer before the impact. Her evidence is that she was turned speaking with one of her children. Her recollection is that there was no steering or braking by the defendant before impact.

[14] The defendant says that he did not see the deer before impact. He neither slowed down nor applied the brakes of the vehicle before the collision.

[15] Because neither the plaintiff nor the defendant saw the deer before impact, the defendant submits that it cannot be determined with any certainty as to whether the deer entered the westbound lanes of Highway No. 16 from the open area to the north, that being the open field to the defendant's right, or whether it emerged from the vegetation to the defendant's left

[16] The defendant was examined for discovery on September 21, 2009. At discovery, he testified that he saw a shadow coming from his right just before impact. Although he did not see the deer, the defendant said he saw its shadow. The defendant said that the vehicle he was driving was on cruise control at 130 kilometres per hour. The speed limit was 110 kilometres per hour. The defendant said he was "just driving, listening to music."

[17] At discovery the defendant was asked:

> Q Do you have any explanation as to why you didn't see this deer even though there wide open field on the right-hand side?
>
> A Mainly because it was first thing in the morning, and I thought it is a pretty quiet road, so just on the cruise control and I was pretty much straight and going my way.

[18] The case for the plaintiff is based on the submission that the defendant was negligent in not paying attention to the roadway. It was bright and sunny out at the time of the accident. There was nothing to impede the defendant's view. There was no traffic in the immediate area.

[19] The plaintiff submits that the defendant's negligence lies in failing to see what was there to be seen. In *White v. Webster* 2003 BCCA 118, Esson, J.A. delivers oral reasons for the Court of Appeal. He finds that there was serious fault on the

part of the part of the owners of a cow that had escaped onto a highway. He says the operator of a truck that took evasive action to avoid the cow "had little reason to anticipate that a cow, or anything else, would show up in front of his truck." Esson, J.A. said this:

> However, the question whether Mr. White's lack of care for his own safety comes down this. By his own evidence, he did not see the cow until he was so close to it that he decided that he had to take the violent avoiding action which he took, which led to the truck leaving the road. Having regard to those facts, it was, in my view, a virtually unavoidable inference that there was some absence of look out on the part of Mr. White.

[20] In *Blaine v. Hopkins* (1990), B.C.J. No. 2724, Mr. Justice Houghton, of this court, finds that the speed of a vehicle being operated at about 110 kilometres per hour in a 90 kilometre per hour zone constituted negligence, and was a contributing factor to a collision with a moose. He finds that if the motor vehicle driver had reacted when he should have reacted, and if he had been travelling at or near the posted speed limit, he could have avoided the collision.

[21] The defendant submits that it has not been proven that the defendant had time to take effective evasive action "when the situation was recognizable as being dangerous," and refers to *Brewster v. Swain* 2007 BCCA 347. In *Curre v. Fitt,* Mr. Justice A.F. Wilson of this court exonerates a defendant from negligence, in circumstances where the defendant was operating a motor vehicle at 50 kilometres per hour in a 30 kilometre per hour speed zone. Wilson J. concludes that even if the vehicle had been going 30, the accident would still have occurred. The collision was with a child who ran out onto the road in front of a vehicle.

[22] In *Fajardo v. Horianopoulos* 2006 BCSC 147, Madam Justice Ross dismisses an action against a motorist whose vehicle struck a deer. She finds that the collision was not caused by any negligence or want of care on the part of the motor vehicle operator. She finds that he was not driving at an excessive speed "given the conditions" and that he was not negligent in failing to see the moose earlier than he did.

[23] The defendant submits that it has not been shown that the deer did not emerge from cover in the median of the roadway, and that since neither the plaintiff nor the defendant saw the deer before the collision, it cannot be inferred that the defendant could have seen the deer in sufficient time to avoid the impact.

[24] The evidence, however, is unequivocal in that the deer approached the defendant's vehicle from its right. Even if it had initially emerged from the median of the roadway, it must have crossed entirely over the lane in which the defendant was driving before turning and re-entering the defendant's lane of travel. Alternatively, the deer emerged from the open field to the right of the highway. I am of the opinion that in either case, the defendant's failure to see the deer was negligent. The only explanation as to why he did not see the deer is that he was not paying attention to the roadway. The defendant was on cruise control on a wide roadway in perfect conditions with no other traffic about. By his own account, he was drinking coffee and listening to music. In my opinion, the reason why he did not see the deer on the roadway was that he was not paying attention. He was not paying attention because he did not expect anything to be there.

[25] The accident occurred in an area where there is wildlife. The defendant knew that.

[26] In *White v. Webster*, Esson J.A. says that the question comes down to this. He says it was a virtually unavoidable inference that there was some absence of look out on the part of the driver. I am of the same opinion in this case. The defendant was not paying attention. He did not see the deer when he should have seen it. He took no evasive action to avoid the impact when he should have been able to do that.

[27] I find that the defendant was negligent. He is liable for the accident.

[28] The plaintiff is entitled to judgment and costs on Scale B.

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Mr. Justice Shabbits