Moses v. Colville Valley Concrete

126 Wash.App. 1046 (2005) | Cited 0 times | Court of Appeals of Washington | March 31, 2005

Concurring: John A. Schultheis, Stephen M Brown

UNPUBLISHED OPINION

Theresa Moses appeals a defense verdict for Colville Valley Concrete (CVC) in an action to recover damages for injuries she received in a vehicle accident. She contends the court made improper evidentiary rulings and the jury was improperly instructed. We reverse and remand for new trial.

On September 25, 2001, Ms. Moses was driving north on highway 395 when she noticed a light cloud of dust blowing across the road. Upon entering the cloud, she slowed down and kept on going through the dust. As she traveled through the dust, however, the dust thickened and created a blackout. Behind Ms. Moses was a CVC cement mixer truck driven by Daniel Sweet. Within minutes of entering the dust, Mr. Sweet rear-ended Ms. Moses.

Trooper Michael O'Connor was dispatched to the accident scene. He spoke with Ms. Moses and Mr. Sweet and inspected all the vehicles involved in the accident. As a result of his investigation, the trooper determined Mr. Sweet was traveling 5-10 miles per hour at the time of the collision. Ms. Moses filed suit against CVC, alleging Mr. Sweet was negligent in operating his vehicle. During CVC's opening statement at trial, defense counsel stated:

We'll hear from Trooper O'Connor. He is the first witness in this case. Trooper O'Connor investigated this accident. He completed a police report, as he's required to do by law. He indicated from his investigation that within seconds visibility went from good to zero. Within a couple of seconds. He didn't give a citation to Mr. Sweet, as he's required to by law if he feels it's necessary. And he's also required by law to fill out a police report indicating what he thought the contributing circumstances are. In that police report he stated for Mr. Sweet, none, no contributing circumstances to cause this accident.

Report of Proceedings (RP) at 46.

Ms. Moses' counsel then asked to approach the bench. But the sidebar conference was unrecorded. After a break in the trial, the court returned to the issue of the trooper's not citing Mr. Sweet. Outside the presence of the jury, the court stated that both the lack of a citation and the issuance of a citation were inadmissible to show negligence. Nonetheless, because no issuance of a citation was mentioned only during CVC's opening statement and not in Trooper O'Connor's testimony, the

court stated it was 'water under the bridge.' RP at 111. Ms. Moses neither requested a curative instruction nor moved for a mistrial. The jury returned a defense verdict. This appeal follows.

Ms. Moses contends the court erred by allowing defense counsel to mention in his opening statement that Trooper O'Connor did not issue a citation to Mr. Sweet. As a preliminary matter, however, we must first address CVC's claim that we need not reach the merits of this issue since Ms. Moses failed to have the sidebar conference recorded, and therefore did not preserve the alleged error for appeal.

An objection that does not specify the particular ground upon which it is based does not preserve the question for appellate review. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). ''The only exception to this rule is that the propriety of the ruling will be examined on appeal if the specific basis for the objection was 'apparent from the context.''' State v. Pittman, 54 Wn. App. 58, 66, 772 P.2d 516 (1989) (quoting 5 Karl B. Tegland, Washington Practice: Evidence sec. 10, at 33 (3d ed. 1989)). Here, Ms. Moses' objection to defense counsel's statement that Trooper O'Connor did not issue a citation to Mr. Sweet is clearly apparent from the context reflected in the record. Although the initial objection was not recorded, the court's subsequent discussion of it was sufficient to preserve the issue for appeal. We therefore review it.

Ms. Moses argues defense counsel's comment in his opening statement regarding the trooper's decision not to cite Mr. Sweet was so prejudicial as to require a new trial. She argues the comment led the jury to believe Mr. Sweet was not responsible for the accident because Trooper O'Connor did not issue a citation. A new trial will not be granted because of the misconduct of counsel absent a request to the trial judge to give a curative instruction, except when the misconduct is so flagrant that no instruction would cure it. McUne v. Fuqua, 42 Wn.2d 65, 78-79, 253 P.2d 632, 257 P.2d 636 (1953).

Here, the central issue was whether Mr. Sweet was negligent in his driving the cement mixer truck. Whether the trooper issued a citation to Mr. Sweet was not relevant to this issue. Given that the citation or noncitation of a driver by the investigating law enforcement officer is inadmissible, Warren v. Hart, 71 Wn.2d 512, 514, 429 P.2d 873 (1967), it was flagrant misconduct for defense counsel to state to the jury Mr. Sweet had not been cited by Trooper O'Connor. Under the circumstances, there was a substantial likelihood defense counsel's statement affected the verdict and no instruction by the court could have cured the prejudicial effect of that statement.

Because this issue is dispositive, we need not address the others raised in this appeal.

Reversed and remanded for new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato, C.J.

WE CONCUR:

Schultheis, J.

Brown, J.