

CANADA / JUDGMENT

Greenfield v. Tran

2024 BCSC 309

COURT

Supreme Court of British Columbia

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2024 BCSC 309 Greenfield v. Tran

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Greenfield v. Tran,

2024 BCSC 309

Date: 20240223

Docket: M191911

Registry: Vancouver

Between:

Benjamin Greenfield

Plaintiff

And

Mai Thi Tran and Maika Nguyen

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

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Place and Date of Trial/Hearing:

Port Coquitlam, B.C.

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Vancouver, B.C

September 14 and October 10, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 23, 2024

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- [1] This action concerns a motor vehicle accident that happened six years ago. The issues of liability and damages have been severed; this trial addressed liability only.
- [2] The accident involved a sideswipe impact at high speed along a highway. Both the plaintiff and defendant driver testified, as did two witnesses to the Accident. The Court also received expert evidence about the Accident.

I. FACTS

- [3] Four people who experienced or witnessed the Accident testified. Their evidence differed on several points. That there is a difference--even a dramatic difference--about some details of the movements of the parties' vehicles just before the Accident is not surprising given the well-known frailties of human memory. All of the witnesses testified about events that took place more than six years ago. It is undisputed that people's memories may be compromised by the passage of time, the impact of the event on them personally, and what they have learned from other sources about the Accident after their experience.
- [4] While there are some differences amongst the experts' opinions, they agree on many things, including their inability to opine on which vehicle most likely attempted a lane change just before the accident. Before turning to that evidence, I will review what is not in dispute.

A. Undisputed Facts

- [5] The accident occurred on January 1, 2018, at about 1:45 p.m. in the westbound lanes of Highway 1 between the Sumas/Mission exit and the McCallum Road exit in Abbotsford (the "Accident").
- [6] The plaintiff was driving a 2003 GMC pick-up truck (the "Truck"). The defendant Maika Nguyen (the "Defendant") was driving a 2007 Honda Civic, owned by her mother (the "Honda"), who is the other defendant in this action. There were no passengers in either vehicle.
- [7] The weather was sunny, and the highway was clear although there was some snow and possibly ice on the shoulders and in the ditches adjacent to the highway. Just before the collision, both vehicles were travelling westbound.

- [8] Just before the collision, the Defendant was in the leftmost lane, or the fast lane, and the plaintiff was in the lane immediately adjacent to that, on the right (the middle lane). In the vicinity of the Accident, there was a third lane to the parties' right as a result of vehicles merging onto the highway from a ramp.
- [9] While the parties gave different versions of what preceded the collision, there is no dispute about the following:
- a) The main incident in the Accident was a sideswipe collision caused by an attempted lane change.
 - b) The collision between the two vehicles damaged the left front corner of the Truck.
 - c) The Honda was damaged on the front edge of the front door on the passenger side of the vehicle. There was also evidence of physical contact starting at the back of the right (passenger side) front wheel well, and on the right-side rear-view mirror, which was folded inwards. There was minor scraping on both the left and right rear quarter panels.
 - d) After the impact, the Truck traversed northwards (to the right) across the highway, went into the ditch and hit the embankment. When it came to rest, it was perpendicular to the highway. The impact with the embankment caused damage across the Truck's front bumper and grille.
 - e) After the collision with the Truck, the Honda ended up on the south shoulder (next to the fast lane) facing westward.
 - f) The evidence differs as to the exact movements of the two vehicles between the collision and their coming to rest.
 - g) Two witnesses to the Accident testified. Claire Livingston was driving an SUV, and her husband Warner Uhl was in the passenger seat (I may refer to them collectively as the "Witnesses"). They, too, were travelling westbound on Highway 1 and were in the lane directly behind the Honda. They witnessed the Accident, and then pulled over onto the shoulder behind the Defendant.
 - h) Ms. Livingston called 911 and stayed in her vehicle.
 - i) Mr. Uhl has first aid training, and he left his vehicle to check on the plaintiff until emergency services arrived. He was then escorted back across the highway, and he spoke briefly with the Defendant.
 - j) After being assured by emergency personnel in attendance that they were no longer needed, Ms. Livingston and Mr. Uhl left the scene, continuing their journey to Vancouver.
 - k) The Defendant drove back home after she was told her vehicle was safe to drive.
 - l) The plaintiff was placed on a spine board and taken by ambulance to the hospital.

B. Testimony of the Parties and the Witnesses

[10] I provide a brief summary of the parties' and Witnesses' recollections about the Accident.

1. The Plaintiff's Version

[11] The plaintiff was at his son's house in Chilliwack and driving home on the day of the Accident. At the time, he worked for a plastic recycling company and had a class 3 license. He estimated that he spent about 60 to 70 percent of his work week driving a 10-ton truck for his job, mostly on highways.

[12] Unfortunately, he was severely injured in the Accident, requiring spinal surgery and rehabilitation. In total, he spent about five weeks in hospital or at a rehabilitation centre after the Accident. He still has pain in his lower back, and numbness in his left leg.

[13] He testified the following about the Accident and the moments before it:

- a) He was driving at about 100 km/hour. He was careful about his speed because he drives for his job.
 - b) Before the collision, he recalls seeing a car ahead of him in his own lane and another ahead of him in the lane to his left. Both cars slowed down, and the car in the left lane fell behind the car in his lane.
 - c) He wanted to change lanes into the fast lane. He looked over his left shoulder, engaged his turn signal, checked his rear-view mirror, and was doing a second shoulder check as he was about to change lanes.
 - d) All of a sudden, he saw a dark car in his sideview mirror (there is no dispute this was the Honda). He avoided the lane change, and focussed on remaining in his lane. During cross-examination, he agreed that he had planned to move into the left lane, but denied that the Truck ever left the lane it was travelling in.
 - e) During cross-examination, he denied that he attempted a second lane change just before the Accident.
 - f) He testified that after his aborted lane change, he saw the Honda speed and come into his lane and he felt the impact.
 - g) He claimed that he held his wheel firmly, but was pushed to the side by the impact with the Honda, causing the Truck to go off the highway into the ditch, hitting the embankment.
- [14] After his Truck came to a stop, he was in immediate and severe pain. He recalled someone speaking to him before the paramedics attended. He spoke to a paramedic, but he does not recall that conversation.

2. The Defendant's Version

- [15] The Defendant was on her way from Abbotsford, where she lived with her parents, to Vancouver with a plan to go tobogganing with her boyfriend on Cypress Mountain. They were to meet up at her boyfriend's house in Vancouver. He was visiting his family's home in Mission and driving separately to Vancouver.
- [16] She was driving in the fast lane. She said it was her habit to drive in the fast lane because of the prevalence on that stretch of highway of big trucks, which tend to drive in the slow lane, and she preferred to avoid being in the same lane as the big trucks. She testified that she drove at about 100 km/hour because that was the speed limit.
- [17] She testified the following regarding the Accident and the moments immediately preceding it:
- a) She first recalled seeing the Truck in her rear-view mirror quite a distance behind her.
 - b) She was generally aware that there were other cars behind her, including possibly in her lane.
 - c) She next noticed the Truck to her right going "pretty fast" and that it "started going towards her lane".
 - d) She believed the best course of action was to "get out of the Truck's way", by accelerating because she knew that there were no vehicles in front of her, but there were possibly some behind her. However, she could not recall specifically looking in her rear-view mirror and could not say at what distance the cars behind her were travelling.
 - e) She testified that before she was able to accelerate, or just as she started to accelerate, the Truck hit her car on the passenger side door, near the front.
 - f) She recalls her car spinning, and that it was difficult to know exactly in which direction the car was facing. She focussed on regaining control of her vehicle to take it safely to the left shoulder and stop.
- [18] After stopping on the shoulder, she remained in her vehicle for a while, absorbing what happened. She phoned her boyfriend to tell him she had been in an accident. She then exited her vehicle. She noticed a car had stopped behind her, and she spoke to the person in that car (this must have been Ms. Livingston). Ms. Livingston asked if the Defendant was all right. The Defendant answered "yes", and then asked if Ms. Livingston saw what happened.
- [19] The Defendant also spoke briefly with Mr. Uhl, who asked if she was all right. She spoke to emergency services personnel who attended the Accident, and was advised her car was safe to drive home.

3. The Witnesses' Testimony

[20] Ms. Livingston and Mr. Uhl were driving to Vancouver from Sun Peaks ski resort on the day of the Accident. Ms. Livingston was driving. They both remember seeing the Honda in the fast lane.

a. Claire Livingston

[21] Her testimony about what she witnessed included the following:

- a) Traffic was moving normally, and nothing unusual was happening in the moments before the Accident.
- b) Her attention was drawn to the cars in front of her. She noticed the Truck started to move into the fast lane and toward the Honda, although she did not recall if the Truck ever completely left its lane. In response, the Honda immediately started to move left, either going towards or onto the shoulder. This was referred to, during the trial, as the "First Interaction".
- c) The Truck moved back toward the middle of the slow lane, and the Honda went back into its lane.
- d) She recalled thinking at that moment that an accident had been avoided. However, she next saw the Truck move back towards the left and called out to her husband.
- e) She testified that the Truck then began to fishtail, and she believed it "did a 360". She also described that the Truck lost control, was spinning, and ended up on the far side (right side) of the highway.
- f) Her recollection was that the Honda remained going forward, seemingly in control, and went off to the left side, pulling onto the shoulder and stopping. She does not recall the Honda moving to the right into the fast lane at any point.

[22] She testified that she did not see the two vehicles collide at any point, although she found out some time later that they had.

[23] After the Accident, Ms. Livingston pulled over onto the shoulder and called 911. She said the Defendant came to the car and asked if she saw what happened. Ms. Livingston did not leave her vehicle.

b. Warner Uhl

[24] Mr. Uhl testified as follows:

- a) Traffic was moving normally, and he noticed nothing unusual until just before the Accident.
- b) With regard to the First Interaction:
 - i. he saw the Truck start to move into the left lane without a signal. It was adjacent to the Honda.

- ii. The Honda moved over to the left, avoiding a collision.
 - iii. He recalls seeing a small space between the two vehicles during the First Interaction.
 - c) The Truck swerved back into the middle lane, and Mr. Uhl thought that was the end of the incident.
 - d) All of a sudden, the Truck swerved back into the left lane, and it hit the Honda.
 - e) He saw the Truck start to "spin". It then travelled across two lanes of the highway ending up in the ditch, perpendicular to the highway.
- [25] After Ms. Livingston pulled onto the shoulder and stopped, Mr. Uhl went to check on the Truck driver because he has an industrial first aid certificate.
- [26] He said the plaintiff was in obvious pain. Mr. Uhl told the plaintiff not to move until the ambulance arrived. Once the ambulance came to attend to the plaintiff, Mr. Uhl left. Someone escorted him across the highway, and he spoke with the Defendant. He told her he saw the Accident and gave her his phone number.
- [27] Responding to something the ambulance driver told him, Mr. Uhl said he did not believe the Honda rammed into the Truck.
- [28] In cross-examination, Mr. Uhl confirmed:
- a) The Honda went onto the left shoulder during the First Interaction.
 - b) During the First Interaction, Ms. Livingston was driving about six to eight car lengths behind the Honda.
 - c) He never saw the Honda enter the middle lane.

C. Expert Evidence

- [29] Reports from three experts were put into evidence, and two of the authors testified. I find all expert evidence to be helpful, and the two experts that testified were reliable and credible.
1. Craig Good
- [30] The plaintiff called Craig Good, who is a traffic reconstruction engineer. He was qualified to give opinion evidence on the causes and effects of accidents. He prepared three reports dated June 24, 2022, August 12, 2022, and September 12, 2022. Mr. Good testified at trial.
- [31] In addition to non-controversial assumptions and facts, Mr. Good noted in his first report that a layer of ice accumulated on the tree branches and bushes next to the highway in the photographs he reviewed. He researched weather data, which indicated that on January 1, 2018, between 1:00 p.m. and 2:00 p.m., it was approximately -1 degree Celsius in the vicinity of the Accident. There had been freezing rain on December 29 and 30, 2017.
- [32] Mr. Good's conclusions in his first report were:

- a) The primary impact between the Honda and the Truck was a sideswipe impact. Both vehicles were travelling approximately parallel and moved together laterally at impact.
 - b) The rearward distortion of the right front door of the Honda indicated that the Defendant's vehicle was moving faster than the plaintiff's at impact.
 - c) The sideswipe impact would have been clear and obvious to both vehicles' occupants.
 - d) It could not be determined from the physical or engineering evidence which vehicle departed from its respective lane to cause the primary sideswipe impact.
 - e) The force of this impact caused the Honda to start spinning. There was a secondary impact to the right side of the Honda after the primary sideswipe. The Honda had a third impact on its left side after it began spinning. The tire marks demonstrate that the Honda spun at least 360 degrees clockwise.
 - f) There were tire marks on the highway that showed a portion of the Honda's trajectory sometime after the primary impact. Those indicated the "Honda moved from encroaching on the middle lane to its point of rest", but that it was unknown what the vehicle's movement was before those visible tire marks.
 - g) After leaving the highway from the impact with the Honda, the Truck struck a tree or tree branches and then hit the embankment in the ditch, coming to rest. It is not known what the Truck's movements were before that crash and after the primary sideswipe impact.
- [33] Mr. Good's second report was prepared after he reviewed Bradley Heinrichs' report (Mr. Heinrichs is an expert witness called by the defendants). That was the first time he was made aware of the existence of and given access to the data recorded electronically from the Truck (the "EDR Data"). Having reviewed the EDR Data, he agreed with Mr. Heinrichs' interpretation of it, but he did not change any of his opinions.
- [34] Mr. Good's third report was a supplemental report that identified the tires installed on the Truck were larger than what the manufacturer specified. This meant the speed registered on the speedometer and the EDR Data would be slower than the actual speed of the vehicle. Accordingly, he applied an upwards adjustment to the recorded speed of the Truck of four percent. This was not controversial and was accepted by the other two experts.
2. Craig Luker
- [35] Mr. Luker was also qualified to give evidence as a reconstruction engineer with a particular focus on perception response times. Perception response time ("PRT") refers to the delay between noticing a hazard and a driver taking action to respond to it. He was retained by the plaintiff and prepared a report dated June 12, 2023. He testified at trial.
- [36] In a mid-trial ruling, I dismissed the defendants' application to redact portions of Mr. Luker's report. However, I confirmed that ruling did not purport to comment on whether I would rely on the impugned portions, or what weight would be attached to them.

[37] The plaintiff relies on Mr. Luker's evidence in support of his alternative position that if the Defendant was not 100% liable, she should be found to bear the majority of fault for the Accident. The plaintiff points out that the defendants did not adduce expert evidence to address this point.

[38] Mr. Luker was asked two questions:

- a) Evaluate the Defendant's opportunities for collision avoidance before the vehicles' collision.
- b) In the context that the Defendant decided to accelerate past the Truck at the point she believed it was drifting into her lane, evaluate her collision avoidance potential and comment on her decision to accelerate.

[39] His conclusions were:

- a) If it was the plaintiff who changed lanes, the Defendant could have avoided the collision by:
 - i. braking, by applying at least 0.27g and 0.31g force when the Truck began its leftward movement. This conclusion was supported by his reliance on the EDR Data to calculate the distance travelled by the Truck in the scenario described by the Defendant that the Truck was "drifting" into her lane. He relied on studies setting out the PRT of drivers in difference scenarios. He also used a computer simulation to explore the braking required by the Defendant;
 - ii. moving to the left onto the shoulder; or
 - iii. moving towards the left within the fast lane.
- b) If the Honda is the vehicle that changed lanes, the Defendant could have avoided the collision by aborting her lane change and waiting until she had fully passed the Truck before changing lanes to the right.
- c) If the Defendant had been able to accelerate just before impact, that would imply the Truck's lane change may have been slower than earlier predicted, making the collision more avoidable for her because her PRT would be greater.
- d) Accelerating to get past a vehicle that is beside or ahead is a higher risk option than trying to avoid it by braking.

[40] The last two opinions are explained as follows at p. 12 of his report.

If [the Defendant] accelerated to get passed the [Truck], it implies that the [Truck's] lateral motion may have been slower than the 3.02 seconds I described above. Vehicles are more capable for slowing than accelerating. When already travelling at highway speeds [the] Honda likely could not accelerate at more than 0.15 g, but based on tests I published using a passenger vehicle with anti-lock braking systems (ABS) like this Honda, I measured average decelerations of 0.83 to 0.92 g [citation omitted]. [I]f she actually had time to increase her speed by accelerating, it suggests that she had more time and distance to accomplish that. If that was the case, then the collision

would be more avoidable for her than what I described [in the previous section].

Regardless, [sic] of how long she had to respond to the [Truck], it is a higher risk option to attempt accelerating to get past a vehicle that is beside or ahead, rather than braking. That is because of the capability difference described above. Also, any slowing reduces the vehicle's impact speed and kinetic energy in the event collision is not avoided, whereas accelerating would increase those quantities. An impact at lower speed and lower energy would be safer and preferable.

3. Bradley Heinrichs

[41] The defendants adduced expert reports from Mr. Heinrichs. He prepared three reports dated June 22, 2022, August 12, 2022, and August 15, 2022. The plaintiff did not require Mr. Heinrichs to be produced for cross-examination.

[42] In his first report, Mr. Heinrichs noted that the main difference between the parties' description of the Accident was which vehicle changed lanes before impact. The vehicle damage is consistent with both versions.

[43] He opined:

- a) The left front corner of the Truck collided with the right side of the Honda.
- b) The Honda was travelling faster than the Truck at impact.
- c) Either the Truck changed lanes as the Honda overtook it, or the Honda was overtaking and changed lanes into the Truck.

[44] In his first report, he also concluded that while both version of events were possible, it was more likely that the Truck was changing lanes at impact than the Honda. However, after receiving more and better photographs of the scene of the Accident, he changed that opinion.

[45] For his first report, he had one photograph showing a tire mark on the highway curving off the highway to the south, but the additional photographs portrayed not only the Honda's rest position but additional tire remarks. Specifically, the resting position of the Honda was inconsistent with the trajectories he opined in his first report. The additional tire marks visible in the photographs he had not previously seen indicated that the "path [of the Honda] was more influenced by driver action", and he could no longer conclude by the path of the Honda which vehicle had changed lanes.

[46] Thus, he ultimately concluded that both the plaintiff's and the defendants' version of which vehicle changed lanes causing the Accident are consistent with the vehicle damage. He added that it is possible both vehicles were changing lanes at impact.

II. LEGAL PRINCIPLES

[47] The parties agreed on the applicable legal principles.

A. Credibility and Reliability

- [48] A key issue is the credibility and reliability of the parties' and Witnesses' testimony. An often-cited authority with regard to the appropriate approach to take in assessing credibility and reliability is *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [49] It is important to keep in mind the difference between reliability and credibility. Credibility refers to the veracity of the witness' testimony whereas reliability concerns the testimony's accuracy, which is based on a witness' ability to observe, recall, and recount events. A witness who is not credible cannot give reliable evidence on the same point. However, a witness who is credible may give unreliable evidence due to various factors.
- [50] It is also important to note that a trier of fact can accept none, part, or all of witnesses evidence, and can attach different amounts of weight to different portions of their testimony: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

B. Causation

- [51] The standard of proof in this case is the balance of probabilities. Courts should take a common sense or robust and pragmatic approach with regard to causation rather than a scientific approach: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 330-331, 1990 CanLII 70; *Sandhar v. Ghuman*, 2023 BCSC 779 at para. 93.
- [52] The plaintiff relies on *Singleton v. Morris*, 2010 BCCA 48, which refers to *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, 1998 CanLII 814. *Fontaine* confirms that the general approach of negligence cases is after weighing the circumstantial and direct evidence, the court determines whether the plaintiff has established a *prima facie* case of negligence (as quoted in *Singleton* at paras. 32-33).
- [53] Once a plaintiff establishes a *prima facie* case of negligence, the onus shifts to the defendant to rebut that presumption of negligence: *Gauthier & Co. Ltd. v. Canada*, [1945] S.C.R. 143 at 149-150, 1945 CanLII 40; *Fontaine* at para. 27. In order to defeat a *prima facie* case, the defendant must provide a non-negligent explanation, which must be reasonable and not merely speculative: *Fontaine* at para. 24.

C. Legislation

- [54] The following sections of the Motor Vehicle Act, R.S.B.C. 1998, c. 318, were referred to by the parties, and are relevant.
- [55] Section 144(1) of the Act prohibits careless driving:
- 144 (1) A person must not drive a motor vehicle on a highway
- (a) without due care and attention,
 - (b) without reasonable consideration for other persons using the highway, or
 - (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
- [56] In addition, the plaintiff referred to s. 146 (2)-(3) which creates an obligation to operate a vehicle on a highway at a speed no greater than that which is posted.
- [57] Section 151(a) requires a driver not to change lanes when a broken line exists unless the driver "has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle".

III. ANALYSIS

- [58] The testimony of the parties and the Witnesses differed as to which vehicle left its lane immediately before the impact. This brings to the forefront both the credibility and reliability of the testimony of the parties, Ms. Livingston, and Mr. Uhl.

A. Credibility and Reliability of the Parties' and Witnesses' Testimony

- [59] The plaintiff submits his version of the Accident should be preferred, and that his account raises a prima facie case of negligence against the defendants. The plaintiff submits the credibility and reliability of the Defendant's testimony was seriously eroded. He also submits little weight should be placed on the testimonies of Ms. Livingston and Mr. Uhl because of their diminished reliability.
- [60] The Defendant submits the Court should prefer her evidence and the evidence of the two Witnesses that the plaintiff's imprudent lane change caused the Accident. She says the consistency amongst them on that point overwhelms the plaintiff's version of events.
1. The Witnesses' Testimony
- [61] As noted, the Defendant relies on Ms. Livingston's and Mr. Uhl's testimony that the Truck changed lanes to cause the Accident, not only because it is consistent with her account of the Accident, but also because they are independent witnesses.
- [62] The testimony of independent witnesses can be highly valuable because of their assumed lack of interest in the outcome. There is no suggestion in this case that Ms. Livingston or Mr. Uhl had anything to gain or lose by the outcome of this case. I agree their testimony as neutral observers has the possibility of carrying greater weight. However, the following factors about their testimony tempers that weight to a significant degree.
- [63] Ms. Livingston testified that she did not believe the vehicles actually collided until she found out that had occurred some time after the Accident. She maintained during her testimony that she was not in a position to actually see the collision because of how far back her vehicle was from the Honda, and that the point of impact was the Honda's front, right corner. At the same time, she insisted that it was the Truck that improperly changed lanes and hit the Honda, causing the Accident.
- [64] Her testimony on these two points is difficult to reconcile, and she was challenged about that during cross-examination. I find that her insistence that it was not possible for her to see the point of collision while also claiming she could see which vehicle changed lanes weakens her reliability. That insistence amounted to her being defensive about her evidence, which negatively impacts the weight I place on her testimony.
- [65] More concerning is that both Ms. Livingston and Mr. Uhl were firm in testifying that the Honda kept driving relatively straight after impact eventually pulling over to the left shoulder. Ms. Livingston went so far as to say she was impressed that the Defendant had "maintained control" of her vehicle after both the First Interaction, and after what turned about to be the collision.

- [66] Those descriptions are a direct contradiction of the Defendant's own testimony that the Honda spun around after impact, and at times, it was difficult for her to know in which direction the vehicle was travelling. Their descriptions are also inconsistent with damage to the Honda located at the rear of the vehicle on both the left and right sides. Furthermore, their testimony is contradicted by all the experts, who opined that the tire marks are consistent with the Honda spinning around after impact.
- [67] Also problematic was Ms. Livingston's and Mr. Uhl's descriptions of the Truck's movements after impact. Both used the word "fishtailing" to describe its movements. However, in her direct evidence Ms. Livingston twice used the term "360" to describe the Truck's movement after impact. She also described it at one point as "spinning". Mr. Uhl also described that the Truck "spun" after impact.
- [68] There is no objective evidence as to the Truck's exact movements between impact and it coming to rest, so it is possible that it did fishtail or swerve. However, I find it highly improbable that the Truck spun around completely given that it ended up being perpendicular to the highway when it came to a stop. That suggests it did not complete a revolution, or that it would have had to have spun more than 360 degrees. I find it highly unlikely that the Witnesses would fail to notice both vehicles spinning around if that had happened.
- [69] While there was no objective evidence that the Truck completely spun around, the Defendant and all three experts agree that the Honda did so. This raises the possibility that in their minds, both Ms. Livingston and Mr. Uhl mistakenly mixed up the Honda's actual movements after impact with their memories of the Truck's movements.
- [70] The Defendant argues even if their memory about the Truck's movements was inaccurate, that should not diminish the weight attached to their evidence. The Defendant argues that use of the words spinning or spun is consistent with the Truck fishtailing and that neither necessarily describe a vehicle doing a complete revolution. I am not entirely certain that was the case, and the Witnesses were not asked to confirm that understanding. In any event, it still does not explain Ms. Livingston's use of the term "360".
- [71] For all those reasons, I find Ms. Livingston's and Mr. Uhl's testimony as to the vehicles' movements after impact was inaccurate, and I place no weight on it. Specifically, I reject their evidence that the Honda remained travelling straight after impact before it came to rest because it is directly contradicted by the physical evidence of damage to the Honda, the expert evidence, and the Defendant's testimony. This diminishes their reliability.
- [72] It is relevant that both witnesses made the same mistake because it raises the possibility that their testimony reflects not just their personal observations and memories of what happened, but what they have come to believe based on discussing the incident with each other. In fact, both agreed that they talked about the vehicles' movements just before the Accident. Ms. Livingston confirmed that the night before her testimony she reviewed a statement she made, and Mr. Uhl read aloud to her the statement he gave to ICBC. This is

consistent with a concern that their testimony was not the product of their individual recollections.

- [73] I also note that both Ms. Livingston and Mr. Uhl speculated as to how the Truck ended up in the ditch, expressing the view that the plaintiff over-corrected by steering right or that he "lost control" after colliding with the Honda. This contrasts with their descriptions of the Defendant "maintaining" control of her vehicle. The plaintiff objected to the admissibility of their evidence about the plaintiff over-correcting because it was improper opinion evidence. I agree that I cannot rely on that evidence to assist in determining what caused the Accident because it is speculative and not based on direct observations of the plaintiff's steering.
- [74] However, the fact that the Witnesses formed those conclusions about the plaintiff's behaviour may be relevant to their reliability. It is possible that they drew that conclusion at least to some degree from their erroneous recollection that the Honda travelled relatively straight after impact until pulling over onto the shoulder. The concern is whether drawing those conclusions affected their recollections about whether either vehicle crossed into the opposing party's lane just prior to impact.
- [75] I hasten to add that I do not find either witness was being dishonest, or was attempting to mislead the Court. There is nothing wrong with spouses talking to each other about an Accident they both witnessed. Indeed, it would be odd if they did not do so given it was a high-speed collision on a highway. However, those facts may affect the weight that should be placed on their testimony.
- [76] I find it more probable than not that both Ms. Livingston's and Mr. Uhl's testimony was significantly impacted by their discussing with each other not only what they saw, but also their inferences and the conclusions they drew about the drivers' actions. This further impacts their reliability. For all those reasons, I reject their evidence that the Truck "did a 360" or spun after impact.
- [77] Given my findings about their evidence and their reliability, the question then becomes how much weight I should attach to their testimony that after the First Interaction, the Truck crossed into the other lane and hit the Honda. There is the possibility that their recollections about that were also affected by their erroneous recollection about the Honda's movements.
- [78] At the same time, the evidence was consistent and unchallenged that both Ms. Livingston and Mr. Uhl immediately expressed the view that they believed the Truck hit the Honda to cause the Accident. The Defendant and Ms. Livingston both recall having a conversation after they stopped their vehicles on the shoulder, and their evidence was consistent that Ms. Livingston expressed the view the Truck caused the Accident. Mr. Uhl's testimony that he expressed the same view to the paramedic on the scene was not challenged.

- [79] This might temper at least to some degree the possibility that their recollection of the Truck's movements just before impact is wholly unreliable. However, I also take into account that Ms. Livingston testified that once she saw the First Interaction, she slowed her vehicle, meaning the distance between her vehicle and the parties' vehicles must have increased. This would affect their line of sight and ability to observe details about their movements. I also note her admission that she did not see the actual impact between the vehicles.
- [80] Both human memory and human perception may be affected by the shock of witnessing an accident on a highway in winter when vehicles are travelling around 100 km/hour. Given that and all other factors discussed above, I find it difficult to accept that the Witnesses' observations of the precise movement of the parties' vehicles relative to the dividing line between lanes before impact would be more reliable than their recollection as to whether the Honda spun around after the collision.
- [81] Given all the concerns I have identified about the reliability of their evidence, I find it more probable than not that in forming the belief as to who "caused" the Accident, both Witnesses' memories and, possibly, their initial perceptions were affected by the fact that the plaintiff made an attempt at a lane change just before the Accident.
- [82] For those reasons, I place no weight on their testimony about which vehicle made a lane change to cause the impact.

2. The Parties' Versions of Events

- [83] The plaintiff's position is that the Defendant should be held 100% liable for the Accident. He emphasized that his testimony has remained constant since the day of the Accident that the Honda hit his Truck.
- [84] He submits his credibility and reliability are enhanced by the fact that the late-delivered EDR Data confirmed that his speed just prior to the Accident was 101 km/hour; he has always maintained that he was not speeding. I agree that objective evidence does enhance his reliability.
- [85] He also contends that his version of the Accident should be preferred because of the frailties in the testimonies of the Defendant, Ms. Livingston, and Mr. Uhl. For the reasons explained in the previous section, I agree no weight can be placed on the Witnesses' evidence that the Truck improperly changed lanes to cause the Accident.
- [86] This leaves the parties' testimony about the Accident. The plaintiff submits the Defendant's testimony of what happened before impact was confused and, at times, inconsistent with other evidence, rendering her recollection unreliable.

- [87] The plaintiff and the Witnesses both described the plaintiff attempting and then aborting a lane change shortly before impact. However, the Defendant's evidence during her direct testimony was to deny there having been an interaction before the Accident. During cross-examination she said she "could not recall" the First Interaction. That her evidence differs from the plaintiff's and the Witnesses' on this point is relevant to her reliability.
- [88] The plaintiff testified that after his aborted lane change, he focussed on remaining in his lane, but the Honda had sped up, and he saw it come into his lane causing the impact. He was not shaken on this evidence during cross-examination.
- [89] The Defendant's evidence about the moments before the Accident had inconsistencies. She testified that she first noticed the Truck in her rear-view mirror "quite far behind" in the lane to her right. When she next noticed it, she provided the following evidence:
- a) The Truck was "coming next to her", was driving very fast, "came out of nowhere", and being driven erratically.
 - b) At the same time, she described that the Truck started to "slowly go into her lane".
 - c) She said she was scared because the Truck "drifted into her lane", yet despite that fear, she said she maintained her speed and does not recall moving to the left in response to the Truck's movement.
 - d) However, she also testified that she was "trying to keep away" by driving closer to the left side of her lane. She clarified that she assumed that was how she was driving because that was her habit.
 - e) She testified that in response to the Truck's movements, she did not brake, and she wanted to accelerate to get out of the truck's way.
 - f) She confirmed at the time she thought braking was a bad idea because of a concern about vehicles behind her, but she could not say and did not remember how many vehicles were behind her, nor how close they were to her vehicle. She believed that she was "aware" of vehicles behind her. However, she denied any vehicles were following her at an unsafe distance.
 - g) She testified that she tried to honk her horn, but was unsure if she actually did so largely because she also believed that she wanted to maintain control of the vehicle by keeping both hands on the steering wheel. This was somewhat inconsistent with her evidence at her examination for discovery that she believes she did try to hit her horn.

- [90] To explain possible inconsistencies between her trial testimony and evidence given at her examination for discovery, she said at the discovery she was "thinking logically" and trying to "makes sense of the accident from [counsel's] point of view", even if that was not what she actually remembered. She also said she remembers 100 percent how the Accident happened, but cannot recall at every point the movement of her vehicle after impact. This negatively affects the reliability of her trial testimony.
- [91] Another factor decreasing the Defendant's reliability is her insistence that she maintained a speed of about 100 km/hour until just prior to her acceleration in response to the Truck's movements. The expert evidence is consistent that at impact, the Honda was travelling at least 10km/hour faster than the Truck, putting its speed at 115 km/hour or faster. Given that she was unsure if she had actually accelerated, I find it improbable that she was only travelling at 100 km/hour in the moments before the Accident.
- [92] I agree with the plaintiff that the Defendant's testimony about the moments before impact suffered from a lack of precision, internal inconsistencies, and incompatibilities with other evidence. For those reasons, I find her evidence to have significantly diminished reliability.
- [93] However, that does not automatically mean I accept the plaintiff's version of events. The Defendant submits a number of factors damaged the plaintiff's testimony such that I should not accept his evidence about how the Accident happened, including:
- a) his apparent disinterest in contacting the police or the independent witnesses regarding his version of the Accident;
 - b) what the Defendant submits was the plaintiff's confused evidence regarding whether he knew others blamed him for the Accident, and;
 - c) his criminal record, and his testimony about it.
- [94] With regard to the first two factors, the plaintiff submits those do not diminish the reliability of his testimony about what happened. He was asked during cross-examination why he apparently took little action to contest the Defendant's version of events, for instance, by contacting the police or the Witnesses. The plaintiff testified that he was focussed on his recovery.
- [95] The Defendant also submits the plaintiff had difficulty answering when he became aware of the statements made by the Witnesses that blamed him for the Accident. The Defendant suggests the plaintiff was being evasive because he knew those statements did not support his version of the Accident.
- [96] I do not find either argument persuasive. The plaintiff suffered serious injuries from the Accident, and was hospitalized or in a rehabilitation facility for five weeks, and he still experiences pain from his injuries. I accept that is both reasonable and plausible that he would focus on his rehabilitation and recovery. I also find this may account for his difficulty in remembering when he became aware of the Witnesses' statements.

- [97] Moreover, overall, I do not find the plaintiff's testimony to be evasive on other matters. Accordingly, I do not find those factors have a significant impact on his credibility or reliability.
- [98] The Defendant suggested the plaintiff provided no evidence as to why the Defendant would "speed into his lane trying to pass him" rather than staying in the fast lane. However, the Defendant herself admitted she wanted to accelerate to get past the Truck, so that point is not compelling.
- [99] The plaintiff and the Witnesses both testified the plaintiff aborted an attempted lane change just before the collision. The plaintiff denied swerving shortly thereafter into the fast lane, but the Witnesses said that is what he did. However, they offered no evidence or explanation for why he would do that. They agreed they found that movement surprising.
- [100] In closing submissions, the Defendant offered a possible explanation. The Defendant argues the plaintiff's criminal record and his being required to take an anger management course are consistent with a person with a propensity to take rash action, such as "swerving" into the Honda after an aborted lane change.
- [101] The plaintiff denied being angry at other drivers just before impact, and the Defendant's position is that his evidence is not plausible. The plaintiff explained he wanted to change lanes because the car ahead of him in his lane, and in the lane to his left, had slowed down. The plaintiff maintains he kept his speed at about 100 km/hour, meaning the other two vehicles were driving under the speed limit.
- [102] The Defendant's position is that driving under the speed limit is the type of discourteous driving behaviour that can anger others on the road. Given that situation, the Defendant asserts the plaintiff's denial that he was not angered by those actions is puzzling.
- [103] I do not agree. The plaintiff denied being angry, and I do not find his testimony on that point weakened by cross-examination. Nor do I find the fact of his criminal conviction to question his testimony. While a person's criminal record may impact their overall credibility, it is not clear to me that ought to be significant in this case. His criminal record does not relate to driving offences, and it was not a recent conviction.
- [104] Also, the Defendant's line of reasoning was explicitly based on the evidence from the Witnesses that the Truck inexplicably swerved into the Honda after the aborted lane change. However, the Defendant did not describe or recall the First Interaction. Accordingly, the factual underpinning of the Defendant's argument is inconsistent with her own testimony, which diminishes its persuasiveness.

B. The Expert Evidence

- [105] As noted, the opinions in the experts' final reports differs little. Significantly, the plaintiff's expert (Mr. Good) and the Defendant's expert (Mr. Heinrichs) agree on the following:

- a) The Defendant was driving faster than the Truck just before impact;
- b) The Defendant was driving at least 115 km/hour, and may have been driving faster;
- c) Their analysis of the tire marks is consistent with the Honda spinning after the impact, in a way noticeable to anyone travelling behind it.

[106] No expert could offer an opinion as to which vehicle changed lanes to cause the Accident, although Mr. Heinrichs said it is possible both vehicles attempted a lane change at the same time.

[107] The plaintiff submits Mr. Good's evidence is more supportive of his version that the Honda must have crossed into the Truck's lane. In his June 24, 2022 report, Mr. Good opined that the tire marks show that the Honda "moved from encroaching on the middle lane to its point of rest". The plaintiff argues that one can infer the Honda crossed into the Truck's lane.

[108] I do not agree. During cross-examination, Mr. Good agreed that the tire mark does not help determine if the Honda coming out of the Truck's lane occurred before or after impact. In other words, he confirmed the tire mark "coming out" of the Truck's lane does not help determine which vehicle caused the collision by crossing over the lane divider.

[109] The plaintiff also relies on Mr. Luker's opinion that the Defendant's decision to accelerate was riskier than slowing her vehicle by taking her foot off the accelerator or braking. Mr. Luker's opinion was directed to what action the Defendant could take to avoid the collision, assuming the Truck changed lanes immediately before impact.

[110] During cross-examination, Mr. Luker was challenged as to whether choosing to accelerate was always a riskier reaction. I find he provided reasonable answers, and his core opinion was not shaken: accelerating to avoid a hazard carries with it a higher risk of having a collision than braking. I find that opinion is grounded in science, as explained by Mr. Luker. It is easier and quicker to avoid colliding with a close hazard by braking a vehicle already moving at high speed, than it would be to try and speed ahead of the same obstacle.

[111] I accept Mr. Luker's opinion.

C. Conclusions

[112] The expert evidence was clear that the collision was caused by one or both vehicles making an illegal lane change, but no expert could opine on which vehicle made a lane change. Both parties denied changing lanes immediately before impact.

[113] I have explained above why I have found the reliability of the Defendant's and the Witnesses' testimony to be significantly diminished. I did not come to the same conclusion about the plaintiff's testimony. For those reasons, and taking into account the undisputed expert evidence, I find:

- a) The plaintiff intended to change lanes, but aborted when he saw the Honda in his side view mirror.
 - b) Regardless of whether either vehicle crossed over a dividing line at that point, the Truck did move towards the left, and the Honda moved leftwards in response.
 - c) These movements preceded the Accident, and constituted a separate event from the collision itself.
 - d) At this point or shortly thereafter, the Defendant chose not to brake but instead to accelerate in any attempt to get ahead of or pass the Truck.
- [114] The plaintiff's position is that his aborted lane change ought to have put the Defendant on notice to take more care. In that circumstance, he submits that her choice to try to speed past the Truck by accelerating rather than braking to slow her speed amounts to negligence. His position is that the more prudent course in the circumstances was to brake.
- [115] He submits his position is supported by case law, including *Salaam v. Abramovic*, 2010 BCCA 212 at para. 29; *Doyle v. Hubick*, 2022 BCSC 309 at paras. 116-120; and *Varga v. Kondola*, 2016 BCSC 2406 at paras. 118-124. The plaintiff also emphasized applying the brakes is not an extraordinary driving step: *Doyle* at paras. 118-119.
- [116] Given my finding that the Truck attempted but aborted a lane change when the Honda was very close to it in the next lane, I agree the Defendant should have perceived those actions to be a potential hazard. I add that even though she does not recall the First Interaction, her testimony was consistent that she actually did perceive a hazard. She testified that she perceived the Truck was driving "erratically", that it "sped up beside her", and that it was going "very fast". She said he started to drift into her lane and that she was scared.
- [117] I find at that point, the Defendant was on notice of a potential hazard and required to pay extra attention, give the vehicle a wide berth, and be prepared to stop if necessary. I am not satisfied on a balance of probabilities that braking at that point would have required the Defendant to take extraordinary action.
- [118] I also find her explanation that she was worried about braking because of cars behind her is not reasonable because she agreed no car was following behind her at an unsafe distance. This accords with the Witnesses' testimony that they were directly behind the Honda, but at some distance.
- [119] While I find her actions were imprudent, that on its own does not necessarily mean that she caused the Accident. However, combined with my conclusions about the reliability of the parties' and the Witnesses' trial testimony, I prefer the plaintiff's testimony about what caused the Accident, including preferring it over the Defendant's testimony.

[120] Accordingly, I find on a balance of probabilities that the Defendant crossed the lanes' dividing line causing the collision between the Honda and the Truck as described by the plaintiff. I also find that since the Honda was travelling faster than the Truck at impact, the Truck was pushed to the right and ended up in the ditch.

[121] Given those conclusions, I find the Defendant is 100% responsible for the Accident. Accordingly, I need not consider apportionment of liability.

IV. CONCLUSIONS

[122] For all those reasons, I find the Defendant 100% liable for the Accident.

[123] The plaintiff is entitled to his costs of the action. If there are facts relevant to an award of costs of which I am unaware, the parties may seek a brief hearing before me to address that issue so long as that request is made no later than 30 days from the date of this judgment.

"Sharma J."

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