

Tales from the Criminal Courts

Passenger pulls brake, attorney unaware of agreement.

BY PETER E. FRIEDMAN



Acquittal in Vehicular Homicide Case

Steven Asher was charged with one count of vehicular homicide and one count of vehicular assault

based on an accident in Washougal. The impact of the accident caused the death of his passenger, Joseph Allyn, and caused numerous injuries to Tanya Taylor, the driver of another car. Witnesses at the scene estimated that, prior to the accident, Asher's Pantera sports car was traveling on wet pavement at speeds up to 80 mph in an area with a posted speed limit of 30 mph. They also stated that the vehicle was being operated recklessly prior to the accident — that Mr. Asher had spun his tires and fishtailed, and that rooster tails of water had shot up from his back tires. To make things even worse, Mr. Asher's driving, prior to the accident and the collision itself, was recorded by a video surveillance camera.

The Washington State Patrol estimated Mr. Asher's speed to be between 72 and 89 mph based on their accident reconstruction, and the Vancouver Police Department's reconstruction expert estimated Asher's speed to be 77 mph. They all agreed that the cause of the accident was Mr. Asher's excessive speed and recklessness. Fortunately, Mr. Asher retained WACDL member Steven Thayer as his attorney.

When Mr. Thayer and defense experts examined photographs that had been taken by law enforcement at

the scene of the accident, they showed that the hand brake lever inside the Pantera was on in the fully applied position. This appeared very unusual because the hand brake on a Pantera, unlike almost any other vehicle, is located on the passenger side of the console. This led to a thorough defense investigation into the condi-

tion of the vehicle. In examining the car, defense experts found that the rear brake calipers were locked on the rotors and the cable running from the hand brake lever to the rear brake was fully energized, which was consistent with the application of the hand brake *prior* to loss of control of the vehicle and the accident.

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This seemed to be confirmed by all the eyewitnesses, who stated that the car had rotated counter-clockwise as it crossed the centerline of a curve. The defense experts confirmed that this would happen if the hand brakes were applied while the vehicle was moving. The defense inspected the tires of the

vehicle and found cross striations on the rear tires that were consistent with the application of the hand brake while the vehicle was moving.

The defense vigorously contested the state's witnesses' estimates of the vehicle's speed. They took a similar Pantera sports car to a drag strip and, during simulations, found that Mr.

Asher's maximum speed when witnesses saw him prior to the accident would have been 53 mph. Based on a videotape of that simulation, a number of the state's witnesses revised their estimates of the defendant's speed downwards.

The defense theory of the case was that the passenger had foolishly pulled the hand brake while the vehicle was moving and that this caused Mr. Asher to lose control of his vehicle leading to the accident. Throughout jury selection, opening arguments, cross-examination, and closing, the defense stressed its theme: that this was an accident, not a crime. In voir dire, counsel asked prospective jurors whether any of them had ever exceeded the speed limit, exceeded the speed limit on wet pavement, or run a stop sign — and received an almost unanimous show of hands to each question.

At trial, the defense brought a number of motions in limine to limit allegations by several witnesses that the

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defendant had driven previously in a reckless and fast manner, as well as statements made to the defendant regarding his driving on the day in question. The trial court granted these motions.

The defense tried its case largely through cross-examination and the strong presentation by its two experts: Tom Fries and Ted Mitchell. Mr. Fries, of Forensic and Mechanical Engineering in Portland, Oregon, testified that the application of the hand brake was the most likely cause of the accident. He also testified that, based on the momentum of the vehicles and the damage to them, the defendant's speed was in the range of 40 to 46 mph, far lower than estimated by the state's experts and witnesses.

Mr. Mitchell, a forensic engineer from Jay, Okalahoma, was a nationally known expert on Pantera sports cars, having formerly been a Ford Motor Company engineer as well as the master mechanic of the Pantera Club of America. He explained to the jurors that the application of the hand break (most likely by the passenger) was the likely cause of the accident. Mr. Mitchell also presented an analysis of

the videotape of the accident. Based on the speed of the videotape and the wheelbase of the Pantera he was able to deduce that the speed of the Pantera at impact was between 32 and 35 mph.

After presenting its experts, the defense felt the case was going reasonably well and the defendant elected not to testify. The state brought a motion to preclude the defense from arguing its theory that the passenger applying the hand break was the cause of the accident because there was only thin circumstantial evidence through the expert testimony that the passenger had applied the hand break. The defense survived this motion.

Mr. Thayer strenuously argued for a proximate cause instruction that included the language "if an intervening act by the deceased, which is not reasonably foreseeable by the defendant, breaks the chain of causation created by the defendant's driving, then it is a superseding cause of the collision, and if so, the defendant's driving is not a proximate cause of the death or injury." After vigorous debate about this instruction, the court crafted a "proximate cause" instruction that included the defense's

proposed language.

In closing argument, defense counsel told the jury "this was an accident not a crime . . . and if we exceed the speed limit, that doesn't make us a criminal, only human . . . and if the police made mistakes in collecting evidence at the scene of an accident, that doesn't make them incompetent, only human . . . and sometimes eyewitnesses exaggerate the speed of a vehicle; that doesn't make them liars, it only makes them human." Defense went on to explain that the accident was caused by the application of the hand brake by the passenger and that the defendant's driving was not the actual (proximate) cause of the death and injury in the case.

After six days of trial and argument the jury went out to deliberate the case. After five and a half hours they returned verdicts of not guilty to the charges of vehicular homicide and vehicular assault. WACDL member Steven W. Thayer of Vancouver, Washington represented Mr. Asher. The case was *State of Washington v. Steven Asher*, Clark County Superior Court Cause No. 99-1-00504-0. The trial judge was the Honorable Roger Bennett.



left to right: Heidi R. Peacock, D. Mark Eide, Philip Dunlap, Ernest Vogel of counsel

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Violation of Interstate Detainer Agreement Leads to Plea Withdrawal and Dismissal

Edward Garcia was charged with robbery in the first degree. At the time the charges were filed Mr. Garcia was serving an unrelated sentence in California. While in custody in California, Mr. Garcia repeatedly inquired about his Washington case and eventually had a letter sent to the warden of the correctional facility he was in demanding a trial under the Interstate Detainer Agreement. On his return to Seattle some five and a half months later, Mr. Garcia's public defender objected to the base of the agreement and noted that his speedy trial rights had been violated.