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Court of Appeals No. 80596-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

From King County Superior Court No.17-2-12287-4

SOEUN AM and KHEAM CHEAM,

Appellants,

vs.

THE ESTATE OF DILLON K. O'BRIEN, STATE OF WASHINGTON and WASHINGTON STATE PATROL,

Respondents,

APPELLANTS' PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT

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I. IDENTITY OF PETITIONER

Petitioners Soeun Am and his mother, Kheam Cheam, were severely injured in a collision on Interstate 90 involving a wrong-way driver. They were Plaintiffs at trial and Appellants in this matter.

II. COURT OF APPEALS DECISION AND INTRODUCTION

Petitioners are seeking discretionary review of the Court of Appeals unpublished opinion filed in this case on April 19, 2021.

Since 2012 it has been the standard of care in Washington and throughout the nation that States must establish a reasonable warning system to alert motorist of wrong-way drivers. The danger of wrong-way drivers has been an increasing concern for several years. The standard of care would, at the very least, require Washington state officials to adopt policies and procedures designed to warn motorists of the threat of a wrong-way driver, including the use of the State's variable message signs (VMS) to warn motorists. The State of Washington and the Washington State Patrol ignored the standard of care. They did not develop any policies or procedures to warn motorist of wrong-way drivers on the highway. The trial judge ruled, *as a matter of law,* that Soeun Am and his mother, Kheam Cheam, could not argue to the jury that the States failure and refusal to adopt policies and procedures to warn motorists of wrong-way drivers was a

proximate cause of their injuries in this case despite the fact that the State made no effort at all to develop and implement procedures for warning motorists of wrong-way drivers. The Court of Appeals affirmed the trial court's decision focusing solely on the question of whether the State could have timely responded and activated available warning based on its outmoded existing procedure. The Court of Appeals did not address the Petitioners' important argument that the State failed in its duty to develop appropriate policies and procedures to provide an adequate warning system. The State had a legal duty to develop an appropriate warning system and they did nothing. The State's failure to develop appropriate policies and procedures should not provide it with a defense to this tragedy. The jury should have been permitted to determine if the State's failure to develop an adequate warning system utilizing the Variable Message Signs proximately caused the collision that injured the Petitioners.

If the State had developed a reasonable warning system and then activated the VMS system, the head-on collision between Mr. Am's vehicle and the car driven by the wrong way driver would have been avoided. The State was negligent. Sadly, the jury was not given the opportunity to decide this issue because the Court of Appeals affirmed the trial judge's erroneous ruling that the failure to develop a procedure and to activate roadside warnings was not a proximate cause of this crash.

III. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeal's err in upholding the trial court's ruling that as a matter of law legal proximate cause could not be established in this case, despite the State's complete failure to adopt and implement a reasonable system to warn motorists of oncoming wrong-way drivers by utilizing he State's existing Variable Message System?

B. Does States failure to adopt and implement a VMS based warning system to alert motorists of wrong-way drivers create a jury question on whether the State's negligence proximately caused the injury to Petitioners?

IV. STATEMENT OF THE CASE

A. Procedural Facts

On May 15, 2017, Soeun Am and his mother, Kheam Cheam, filed suit against Dillon K. O'Brien, the wrong-way driver, and the State of Washington alleging, *inter alia*, the State's failure to establish proper guidelines and policies in responding to wrong-way drivers and failure to warn Plaintiffs of the hazard of a wrong-way driver. (CP 1-5.) The State twice moved for summary judgment on these claims raising the public duty doctrine defense. (CP 20-29; 471-82.) Hon. Judge Ruhl denied the State's motions both times. (CP 395-98; 1022-27.) Judge Ruhl determined that

summary judgment was not appropriate because there were disputed issues of material facts. (*Id.* at 1022-27.)

Hon. Ketu Shah was the trial judge. At the conclusion of Plaintiffs' case the State moved for a CR 50 directed verdict on the issue of proximate cause. (RP 284-324.) Judge Shah denied that motion. While Judge Shah was skeptical about Plaintiffs' claim regarding use of the VMS system, he decided that this was a matter that should be left to the jury to decide. (RP 332, 335-36.) At the conclusion of all the evidence the State renewed its CR 50 motion for a directed verdict. (RP 649.) The State's argument focused only on the proximate cause argument related to whether the Washington State Patrol trooper could have prevented the accident if he had arrived at the scene before the crash. (RP 650–51.) The Court again denied the State's motion holding that "it is for the jury to decide that question about what inferences are reasonable and what they are to – what weight they are to be given to those explanations." (RP 656.)

Judge Shah then inexplicably ruled that "there is insufficient evidence to allow a jury to make a reasonable inference here that the reader boards were a proximate cause of this – or the lack of information on the reader boards was a proximate cause to this injury . . .." The Court then precluded "any argument related to the reader boards being causally related

to this accident" or that "lack of information on the reader board as a cause of this accident." (RP 667)

The jury returned its verdict finding the wrong-way driver negligent and the proximate cause of Plaintiffs' injuries but found no negligence or proximate cause on the part of the State. (CP 1367-68.)

B. Operative Facts

On May 17, 2015 Dillon K. O'Brien, a wrong-way driver on I-90, crashed head-on with a vehicle driven by Appellant Souen Am. (Exh. 4.) The crash resulted in grievous injuries to Mr. Am, serious injuries to his passenger Appellant Kheam Cheam (Mr. Am's mother) and the death of Mr. Dillon. By the time of the crash, Mr. O'Brien had been traveling on the wrong side of Interstate 90 for more than 14 minutes. (Exh. 3; Exh. 110).

As a result of the crash, Mr. Am suffered a significant brain injury that has rendered him unemployable and unable to live independently. (RP 146–47; 152-55). He does not remember the crash. His mother, Kheam Cheam, suffered significant personal injuries as well. (RP 134-35.) She was asleep in the rear seat at the time of the crash. (RP 135-38.)

At approximately 3:31 a.m. on May 17, 2015, a concerned citizen driver, Keith Tsang, called 911 to report an erratic driver who appeared to be under the influence (ERDDUI) eastbound on I-90 at milepost 38. (RP 275; 277–82; 606-07; Exh. 2.) The call was broadcast over the radio

network by a communications officer to WSP troopers. (RP 589-91; Exh. 2.) Trooper T. J Hahn was in the WSP detachment office (milepost 11-12 of I-90) doing paperwork. Trooper Hahn heard the call for assistance made by the communications officer and acknowledged as much by responding with his badge number "620" but then ignored the actual call and returned to his paperwork. (RP 461-62; 465; 472.)

Twelve minutes later, at 03:43, another call was received by WSP 911 reporting a wrong way driver also at milepost 38. (RP 594-96; Exh. 3.) On receipt of this call Trooper Hahn decided to respond. (RP 388; 472-73.) He responded immediately to the wrong-way driver report because that was a pretty grave incident and wrong-way driver incidents "don't end well." (RP 389.) He wanted to get to the scene as fast as he could. In responding to the wrong-way driver call Trooper Hahn drove at an average speed of 95 miles per hour. (RP 497.) Over the course of the next 15 minutes, dispatch received at least five other reports of the wrong- way driver traveling eastbound in the westbound lanes of I-90. (Exh. 3.) However, he did not ask dispatch to utilize the Variable Message System to alert westbound motorist of the impending danger of an intoxicated driver careening eastbound down the westbound lanes of Interstate 90. He admits that the State had never adopted a procedure for utilizing the VMS to warn motorists of wrong-way drivers and he had never received any training on how to

implement the system to warn motorists of wrong-way drivers. (RP 477, 487.)

Fourteen minutes later, at 03:57, the wrong-way driver crashed into the vehicle driven by Mr. Am. (RP 602; Exh. 110.) The two vehicles exploded into flames. (RP 503; 504; Exh. 4; Exh.100 [Timestamp 25:35-25:50]; Exh. 221 [Timestamp 4:10-4:13].)

At trial, a police practice and procedures expert, D. P. Van Blaricom, testified on behalf of the Plaintiffs. Mr. Van Blaricom is an expert in law enforcement practices and procedures. He was in law enforcement since he was 21-years-old and worked as a patrol officer, detective, supervising officer, and ultimately as the Chief of Police for the City of Bellevue. He has been a consulting expert on law enforcement issues since 1976. (RP 178–84.)

Mr. Van Blaricom testified that the Washington State Patrol has policies that required them to respond to emergencies, including reports of drunk drivers and wrong-way drivers. Erratic drivers suspected of driving under the influence of intoxicants are a high priority requiring immediate response. (RP 206-09.) Regarding wrong-way drivers, the WSP trooper has the authority to close the road or highway. Wrong-way drivers create an unsafe condition. The WSP does not have detailed policies or procedures on how to close roads, nor has the WSP trained their employees on this

matter. The WSP could use the VMS system to notify motorists of the road closure. (RP 214.)

Mr. Van Blaricom testified that the trooper in this case, or other WSP employees, should have contacted the Washington State Department of Transportation (WSDOT) asking them to activate the VMS system to warn oncoming drivers of the wrong-way driver. (RP 210-12.) The National Traffic Safety Board (NTSB) has recommended the use of VMS system to warn drivers of wrong-way drivers since 2012. WSP has not implemented this safeguard. It has not created polices to use the VMS system to warn drivers and it has not trained its employees on procedures or practices to implement to use the VMS system to warn motorist of the wrong-way drivers. (RP 211-13.)

Mr. Van Blaricom testified that the NTSB issued out a report in 2012 regarding wrong-way drivers and appropriate policies and procedures to prevent crashes. It recommended that the State and other municipalities use the VMS system to warn motorists of wrong-way drivers. This would include warnings posted on the VMS system about a wrong-way driver approaching. Washington State and the WSP have not adopted any policy, procedure, or training to implement this recommended procedure. (RP 230-33.) Mr. Van Blaricom concluded that the State did not meet industry

standards or the standard of care in its response to the wrong-way driver. (RP 244-45.)

The state of Washington uses a Variable Message Sign (VMS) system on heavily traveled highways such as Interstate 90. The VMS system consists of electronic billboards. The electronic billboards alert the motoring public when it is prudent to warn by displaying messages such as "ACCIDENT AHEAD EXIT AT EXIT 54" and "CRASH – PREPARE TO STOP" and "REDUCE SPEED – CONSTRUCTION AHEAD." These message signs are to be used to warn motorist of dangerous conditions and for traffic control. Here, the State should have activated its Variable Message Signs and warned Mr. Am that there was a wrong way driver coming toward him on Interstate 90. Unfortunately, the State has never developed a procedure for utilizing the VMS to warn motorists of oncoming wrong-way drivers. (RP 230-33.)

Trooper Hahn admitted that he had no training on wrong-way drivers and the use of the VMS system to warn motorists of wrong-way drivers. (RP 477, 487.) The Communications Officer, Tristin Cody, who was dispatching information on this call admitted that he did not have any training on using the VMS system to warn motorists of wrong-way drivers. (RP 616.)

Communications officers at WSP have the authority to contact the WSDOT to have them activate the VMS system. (RP 260-61.) WSP has a policy about contacting WSDOT to close Snoqualmie Pass (near the scene of this crash) for weather conditions or accidents. They regularly close this section of I-90 for accidents and bad weather. (RP 269-70.)

Trooper Hahn was trained in the implementation of the pass closure plan. (RP 397-98.) He understood that the road closure plan was only intended for use because of inclement weather. (*Id*.) He admitted that it never crossed his mind to contact WSDOT and ask them to put up warnings on the VMS system regarding the wrong-way driver. (RP 478.) For example, he knew that he could ask WSP dispatch to call WSDOT to activate the VMS system to warn motorists that chains are required on the pass. (RP 479.) He was aware that WSDOT put up warnings on the VMS system like "Accident ahead proceed with caution." He did not think WSDOT would post a warning about wrong-way driver hazards on the VMS system. (RP 479-81.) While he was aware of a plan to notify WSDOT to activate the VMS system for inclement weather-related warnings, Trooper Hahn was not aware of any plan by WSDOT and WSP to activate the VMS system for wrong-way drivers. (RP 516-19; Exh. 45.)

The evidence is undisputed that the State was aware of the wrong-way driver at 03:43 on May 17, 2015 and the collision occurred at 03:57.

The crash occurred west of MP 54 and west of exit 54. (Exh. 3; Exh. 110.) The State had 14 minutes to activate the VMS system to warn on-coming traffic of the wrong-way driver. It is also undisputed that there were at least two VMS reader boards active and available east of the accident site that could have warned Mr. Am of the dangers of a wrong-way driver. There was a VMS east of the crash site at MP 54 and another at MP 61. (RP 602-04; Exh. 110; Exh. 48; Exh. 95.) In fact, after the crash, at the request of WSP, WSDOT posted on the VMS units at MP 54 and 61 that I-90 was closed west of exit 54 and **that westbound traffic must exit**. (Exh. 104; 110.) Plaintiffs would have passed those signs before the collision.[1] There is no evidence to suggest that Mr. Am would not heed the warnings.

It is undisputed on the record that the standard of care would require warnings to motorist of the wrong-way driver and directions to exit the highway or use extreme caution. It is also undisputed that the WSP had the authority to use the VMS system when needed. In addition, it is undisputed that the WSP had not trained employees, including troopers

[1] The crash occurred at 3:57 a.m. (Exh. 110). Assuming that Mr. Am was driving 60 miles per hour (one mile per minute) he would have passed the VMS at MP 61 approximately seven minutes before the crash and the VMS at MP 54 one minute before the crash. He would have had ample time to respond to the warning to exit at exit 54.

and dispatchers, on a protocol to warn motorists of wrong-way drivers. This includes a failure to train troopers and other employees on the use of the VMS system. It is undisputed that the State had no policy or procedure in place to deal with wrong-way drivers or the use of the VMS system to warn motorists of the danger. (RP 477, 487, 516-17; 616.)

The jury returned a liability verdict in favor of Kheam Cheam in the amount of $217,071.29 and in favor of Souen Am in the amount of $10.4 million against the wrong-way driver but found that the State was not negligent or the proximate cause of the crash. (CP 1367-68.)

V. ARGUMENT

A. Standard of Review

The Court of Appeals concluded that "Ordinarily, cause in fact is a question for the jury to decide." (Opinion at 9) However, the Court of Appeals then concluded that reasonable minds could not differ on the facts of this case on the legal question of proximate cause. The decision of the Court of Appeals conflicts with decisions of the Supreme Court and decision of the Court of Appeals holding that proximate cause in fact should be decided by the jury. Furthermore, the question of the State's failure to adopt and implement a VMS based system to warn motorists of oncoming wrong-way driver involves an issue of substantial public interest that should be addressed by this Court.

This court reviews the trial court's ruling on a motion for judgment as a matter of law *de novo*.

B. The trial court and the Court of Appeals erred in deciding as a matter of law that development and implementation of a variable message sign-based warning system would not have prevented the collision.

The trial court and the Court of Appeals ruled that *as a matter of law* that the failure to utilize the VMS warning system was not a *factual* proximate cause of the crash. Both courts focused on whether the **existing VMS system** was able to provide a timely warning to motorists. **Neither court addressed the Petitioners' primary argument, that the States total failure to create and implement a reasonable VMS based warning system was the negligence that proximately resulted in the collision.** If the State had complied with industry standards and the established standard of care, it should have developed a warning system that would be immediately activated to warn motorists of the danger of oncoming wrong-day drivers, much like the "Amber Alert" system that exists in Washington. RCW 13.60.010 Instead, the State ignored its legal duty and did nothing. The Court of Appeals opinion exonerates the State from its negligent inaction without allowing the jury to decide if the State could have adopted and implemented an emergency warning system that

would timely warned the Petitioners and other motorists of the imminent danger.

The Court of Appeals affirmed the trial court's dismissal of the VMS warning claim for lack of evidence of **factual** proximate cause. This was clearly a matter for the jury to decide. Factual proximate cause is always an issue for the jury unless the Court determines that the facts are undisputed, and no reasonable jury would conclude otherwise. Similarly, legal proximate cause is a jury question if the facts are disputed. In this case, proximate factual and legal cause are based on disputed facts and should have been submitted to the jury for determination. As this court clearly held in *N.L. v. Bethel Sch. Dist.,* 186 Wn.2d 422, 436–37, 378 P.3d 162, 169–70 (2016), cause in fact is a jury question and legal causation, if the facts are disputed, is likewise a question for the jury. The Court of Appeals opinion in this case is contrary to the ruling in *N.L.*

The Court of Appeals premised its ruling on the fact that the record lacked sufficient evidence that the VMS (reader boards) could have been activated in time for Am to have noticed the warnings and avoided the collision. (Opinion at 10) The Court of Appeals fails to address Petitioners' primary argument, that the State never took any affirmative action to comply with its standard of care and adopt and implement an emergency warning system in the first place. There was ample evidence

in the record from which the jury could determine that if the State had adopted and implements a reasonable emergency warning system this collision could have been avoided.

Here, the evidence is that:

1. The VMS system was available for use to warn drivers of dangerous road conditions;
2. It has been the industry standard and the standard of care in Washington since 2012 that the VMS system should be used to warn motorists of wrong way drivers;
3. The State has used the VMS system in the past to warn drivers of inclement weather conditions, accidents and other road conditions on I-90 near the scene of this crash;
4. The State did not have any policy in effect to implement this standard of care regarding warning motorists of wrong-way drivers;
5. The State has not implemented training or trained Troopers, dispatchers or other key employees on how to use the VMS system to warn the traveling public of wrong way drivers;
6. While the WSP has adopted policies in conjunction with WSDOT to warn drivers of road conditions during inclement weather, it has not done anything to create a coordinated effort

between the WSP and WSDOT to warn motorists of wrong-way drivers;

7. The WSP had at least 14 minutes to implement the VMS warnings for westbound traffic regarding the wrong-way driver;
8. WSP and its employees did not make any effort to use the VMS system to warn motorists of the dangerous wrong-way driver;
9. There were VMS reader boards at mile posts 54 and 61 that were used after the crash to warn westbound motorists of the crash and directing them to exit as exit54; and
10. Plaintiffs would have passed the VMS reader boards at mile posts 54 and 61 before the crash and in time to pull over or exit the freeway.

The question of proximate cause was for the jury to determine. The Court's dismissal of the VMS system warning claim was in error. The only remedy to correct the error is a new trial.

The issue is not unique to Washington. Wrong-way drivers are becoming a more frequent menace on the highway. *Mendoza v. State,* 2020

WL 85401 (Ariz. App. Jan. 7, 2020) is instructive.[2] *Mendoza* was a wrongful death action resulting from a wrong-way driver crash. The trial judge excluded plaintiff's expert witness on the use of Dynamic Message Signs (DMS) to warn motorists about a wrong-way driver. The trial court then dismissed the claim on summary judgment for lack of evidence.

The Arizona Department of Public Safety (ADPS) and the Arizona Department of Transportation (ADOT) did not have a policy or protocol to formulate warnings on their DMS system. After hearing reports of a wrong-way driver on State Route 101, the ADOT operators used ADOT traffic cameras and police radio to track the wrong way driver's vehicle and anticipate his path. ADOT had not adopted a formal, scripted message to warn motorists of wrong-way driver emergencies. As a result, the ADOT operators were left to spontaneously craft their own digital DMS warning for motorists in the wrong-way driver's path. The three-line warning read: ONCOMING TRAFFIC AHEAD KEEP RIGHT." Plaintiff alleged the ADOT and the ADPS failed "to take reasonable measures to prevent wrong-

[2] This is an unpublished opinion. Arizona Supreme Court Rule 111(c)(1)(C) allows the citation of unpublished opinions (memorandum decisions) "for persuasive value, but only if it was issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a depublished opinion or a depublished portion of an opinion." GR 14.1(b) a party may cite as an authority an unpublished opinion "if citation to that opinion is permitted under the law of the jurisdiction of the issuing court."

way accidents" and failed "to provide reasonable and appropriate measures and law enforcement in light of the risks involved." *Id.* at *1.

Similarly, at bar Plaintiffs' expert, Donald Van Blaricom, testified that the Washington State Patrol did not have any appropriate training or adequate policy instructing its employees on how to activate the VMS system to warn motorists of oncoming wrong-way drivers, even though such policies and practices have been the standard of care since 2012. The Arizona Court of Appeals held that the use of a warning system was part of the State's duty to keep roadways reasonably safe. The *Mendoza* court wrote:

> His [the expert's] opinion is also relevant. A central issue in this lawsuit is whether the State breached its duty to keep roads "reasonably safe for travel." *See Dunham v. Pima Cty.,* 161 Ariz. 304, 306 (1989). "Where, as here, evidence is offered from which the fact-finder could reasonably conclude that the public agency or jurisdiction should have foreseen a danger to plaintiff from the negligent or inattentive conduct of plaintiff or of another, **then the question of the [government's] negligence is one for the jury**." *Id*. Dr. Boelhouwer's opinion may help the jury understand the evidence and decide the case.

Id at *6 (Emphasis added.)

Both the WSP and WSDOT had a duty to create and implement policies and practices that would use the VMS system to warn motorists of wrong-way drivers. It is undisputed that the duty was breached. The only

dispute is whether the breach of the duty was a proximate cause of the crash. The question of proximate cause must be decided by the jury. The trial Court's ruling as a matter of law was error and should be reversed.

VI. CONCLUSION

The Court should grant this Petition for Discretionary Review.

VII. APPENDIX

There are two documents attached to this brief. The documents consist of Appendix (1)**;** the Court of Appeals opinion and Appendix (2) Opinion in Mendoza v. State of Arizona, 2020 WL 85401 (Ariz. App. 2020).

RESPECTFULLY SUBMITTED this 18th day of May, 2021.

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APPENDIX

1. Court of Appeals Opinion
2. Mendoza v. State of Arizona, 2020 WL 85401 (Ariz. App. 2020)

APPENDIX 1

FILED
4/19/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SOEUN AM, a single individual, and KHEAM CHEAM, a single individual, Appellants/Cross-Respondents, v. THE ESTATE OF DILLON K. O'BRIEN, and the STATE OF WASHINGTON, its subdivisions and agencies, and the WASHINGTON STATE PATROL, Respondents/Cross Appellants.	DIVISION ONE No. 80596-7-I UNPUBLISHED OPINION

DWYER, J. — Soeun Am and Kheam Cheam appeal from the trial court's orders (1) entering final judgment in favor of the State of Washington with regard to several negligence claims, and (2) denying their motion for a new trial. At trial, Am and Cheam claimed that the Washington State Patrol, among other things, negligently failed to cause the activation of a message on highway reader boards to warn oncoming traffic of a wrong-way driver before that driver collided with Am's vehicle. Pursuant to a motion for judgment as a matter of law, the trial court ruled that insufficient evidence was adduced at trial to support a finding that the Washington State Patrol's failure to cause the activation of a warning on highway reader boards was a factual proximate cause of the injuries sustained by Am and Cheam. On appeal, Am and Cheam challenge that ruling. Finding no error, we affirm.

I

On May 17, 2015, at approximately 3:57 a.m., a vehicle driven by Dillon O'Brien was traveling eastbound in the westbound lanes of Interstate 90 and collided with a westbound vehicle driven by Soeun Am. Am's mother, Kheam Cheam, was a passenger in Am's vehicle. At the time of the collision, O'Brien was under the influence of alcohol and marijuana. O'Brien died as a result of the collision. Both Am and Cheam suffered severe injuries in the collision.

Approximately 26 minutes before the collision, at 3:31 a.m., a concerned citizen telephoned 911 and reported an erratic driver who was driving eastbound in the eastbound lanes of I-90 near milepost 38. Upon receiving the report, a Washington State Patrol (WSP) dispatcher broadcasted the report over a WSP radio frequency. At 3:32 a.m., state Trooper Theodore Hahn acknowledged the broadcast by reciting his badge number. At this time, Trooper Hahn was the only trooper on duty in his autonomous patrol area.[1]

When Trooper Hahn received the broadcast, he was located in a state patrol detachment office in Bellevue near milepost 11. Trooper Hahn was working on a work-related incident report. After receiving the broadcast, Trooper Hahn did not depart from the detachment office in order to search for the eastbound driver. He made this decision, the trooper testified, because, based on his training and experience, "trying to chase down an erratic driver is something that's very, very hard to locate." Trooper Hahn reasoned that, by the

[1] According to trial testimony, an "autonomous patrol area" is "the area to which an officer is assigned." The autonomous patrol area to which Trooper Hahn was assigned spanned from milepost 3.33 in Seattle to milepost 54.69 at Hyak near Snoqualmie Pass.

time he would have been able to reach the vehicle's location, "there is a number of places it could either turn around or exit." In the meantime, Trooper Hahn was positioned in a "major metropolitan area" where he was "centrally located to answer calls where the majority of the calls come out at that time of night." In short, the trooper concluded that, given that he was alone on the shift, it was most prudent to remain in Bellevue and complete the report.

Twelve minutes after the first report, at 3:43 a.m., a state patrol dispatcher received a report of a wrong-way driver heading eastbound in the westbound lanes of I-90 near milepost 38. At 3:44 a.m., the dispatcher notified Trooper Hahn of the report. Upon being notified of the existence of a wrong-way driver, Trooper Hahn immediately left the detachment office in order to pursue the wrong-way vehicle.

Also at 3:44 a.m., a state patrol dispatcher received another report, which indicated that the wrong-way driver had now been seen at milepost 46.[2] Next, at 3:46 a.m., another report was received, placing the wrong-way driver at milepost 47. Then, at 3:47 a.m., a report was received that placed the wrong-way driver at milepost 48. And at 3:50 a.m., another report was received that placed the wrong-way driver at milepost 50.

[2] At trial, a state patrol dispatcher testified—with regard to the 3:43 a.m. report that placed the wrong-way driver at milepost 38—that it was "possible that the original location was misunderstood or inaccurate from the caller."

At 3:57 a.m., a state patrol dispatcher received a report of a collision in the westbound lanes of I-90. The collision occurred between mileposts 53 and 54.[3] The state patrol dispatcher received the report from a Kittcom dispatcher.[4]

At 4:14 a.m., 30 minutes after leaving the Bellevue detachment office, Trooper Hahn arrived at the scene of the collision. On his way there, Trooper Hahn drove his patrol vehicle at an average speed of approximately 95 miles per hour.

At 4:34 a.m., a Kittcom dispatcher requested that the Washington State Patrol contact the Department of Transportation (DOT) to request activation of a message on highway reader boards to warn oncoming traffic of the collision.[5] At 4:42 a.m., Trooper Christine White contacted a state patrol dispatcher, Donna Warren, and informed Warren that the DOT had not yet activated a message on the reader boards. A recording of the exchange between Trooper White and dispatcher Warren was presented to the jury at trial:

> Trooper White: Can you have DOT maybe put something up on the reader boards? There's nothing coming

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[3] A state patrol dispatch report generated by a WSP dispatcher, provided the location of the collision as follows:

> DETAILS: TWO CAR FATALITY COLLISION INVOLVING WRONG WAY VEHICLE. ALL WESTBOUND LANES BLOCKED.
> LOCATION: WESTBOUND I90 JUST WEST OF MILEPOST 54 KITTITAS COUNTY 22 MILES EAST OF NORTH BEND

[4] Kittcom is the 911 dispatch center for Kittitas County emergency communications.

[5] An entry on a state patrol dispatch report provided: "04:34 KITTCOM REQ HAVE DOT PUT UP ON READERBOARDS TO EXIT TO 54." Testimony from a state patrol dispatcher explained the meaning of this entry in the following exchange:

> Q. . . . . So tell us what that entry means from 4:34.
> A. That Kittcom is requesting that we advise DOT to indicate on the reader board that there is a collision, and that traffic needs to exit at 54, or Exit 54.
> Q. Okay, and so according to the [dispatch] log, at least, that request is being made at 4:34 in the morning?
> A. Yes.

up westbound that advises you that the road will be closed.

Warren: They were advised to put up on the reader boards for all traffic to exit westbound.

Trooper White: Yeah they haven't done so. There's nothing up.

Warren: I'll call them back. Four forty two.

A state patrol dispatcher testified that, when Warren stated "four forty two," she was referring to the then-current time. Thus, the exchange between Trooper White and Warren indicates that the DOT had initially received a request to program a warning on highway reader boards sometime before 4:42 a.m.

At 5:20 a.m., an entry on a state patrol dispatch log indicated that the DOT had activated a message on two reader boards—located at mileposts 54 and 61—which provided, "ALL VEHS MUST EXIT."[6] No evidence was adduced at trial demonstrating that a message on the highway reader boards had been activated at any time prior to 5:20 a.m.

On May 17, 2017, Am and Cheam filed a complaint against the estate of Dillon O'Brien and the State of Washington. The complaint alleged, among other things, that employees and agents of the State of Washington owed a duty of care to "warn Plaintiffs of potential hazards on the state-regulated highway." According to the complaint, the State "negligently breached" this duty and, as "a

[6] In particular, an entry on a state patrol dispatch report provided: "05:20 DOT ADV CURRENTLY HAVE SIGNS DIVERTING TRF AT MP61 AND MP54 READS 'ALL VEHS MUST EXIT.'" A state patrol dispatcher testified with regard to the meaning of this entry as follows:

Q. Now, what you still have in front of you there, [defense exhibit] 110, would you continue to look through that and tell me if you can find any entry indicating that DOT has been able to change the reader boards?

A. At 0520.

Q. Do you see any indications before 5:20 that the reader boards had been changed?

A. No.

direct and proximate cause of [the State's] breach of the duty of care," Am and Cheam "suffered, and continue to suffer, from physical and emotional injuries."

The case proceeded to a jury trial. During the trial, Am and Cheam adduced evidence that, pursuant to a Washington State Snoqualmie Pass closure plan, the Washington State Patrol was expected to contact the DOT in order to activate warnings on highway reader boards when "inclement weather" impacted highway conditions.[7]

Am and Cheam also elicited testimony from expert witness Donald Van Blaricom, a retired chief of police. Van Blaricom testified that a 2012 report from the National Highway Transportation Safety Board recommended that, when a wrong-way driver is located on a highway, law enforcement agencies should contact the "Department of Transportation[] to program their reader boards to warn oncoming traffic that they have a wrong-way driver coming in their direction." Van Blaricom additionally testified that the Washington State Patrol had not adopted any training or policy to instruct state troopers on how to utilize highway reader boards in order to warn oncoming traffic of a wrong-way driver.

At the close of the evidence, the State moved for judgment as a matter of law. With regard to the claim that the State was negligent for failing to cause to be activated a message on highway reader boards in order to warn oncoming

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[7] According to the Snoqualmie Pass closure plan:

DOT and WSP will activate "Variable Message Signs" (VMS), informing and directing motorists about the existing conditions.

- Variable message signs are located both east- and westbound on I-90 from Milepost 34 near North Bend to Milepost 71 at Easton. The sign messages are entered at Hyak DOT and individual messages can be entered on each sign.

Trooper Hahn testified that this plan applies when there is "inclement weather" during "the winter months."

traffic of the wrong-way driver, the State argued that insufficient evidence supported a finding of factual proximate cause:

> [DEFENSE COUNSEL]: In pointing out that on this morning it took an hour for it to happen so it could have made no difference, and there's no evidence as to how long does it take – let's say they make the request as soon as they hear about the wrong-way driver at 3:43. Say they make it right away. It's 14 minutes later when the report of the collision comes in. There is no evidence in the record to suggest that DOT gets a sign changed within 14 minutes.

The trial court partially granted the State's motion for judgment as a matter of law, ruling that insufficient evidence was introduced from which a jury could find that the State's failure to request DOT to activate a warning on the highway reader boards was a factual proximate cause of the injuries sustained by Am and Cheam:

> [T]he Court will find that there is insufficient evidence to allow a jury to make a reasonable inference here that the reader boards were a proximate cause of this -- or the lack of information on the reader boards was a proximate cause to this injury, and so the Court will preclude any argument related to the reader boards being causally related to this accident.

The jury returned a verdict finding that the State was not negligent with respect to any of the claims advanced by Am and Cheam.[8] Am and Cheam subsequently filed a motion for a new trial. In the motion, Am and Cheam claimed that the trial court erred by ruling that insufficient evidence supported a finding that the State's failure to cause to be activated a warning on the highway reader boards was a factual proximate cause of their injuries. Additionally, Am

[8] The jury did, however, find that Dillon O'Brien was negligent and that his negligence was a proximate cause of the injuries sustained by Am and Cheam. The jury assessed damages with respect to Cheam as amounting to $217,071.24. Additionally, the jury assessed damages with respect to Am as amounting to $10,400,000.

and Cheam asserted that the State improperly argued during closing argument that any failure to activate a warning on the reader boards was not a proximate cause of their injuries. The trial court denied the motion for a new trial.

Am and Cheam appeal.

II

Am and Cheam contend that the trial court erred by ruling, as a matter of law, that the State's failure to request DOT to activate a message on highway reader boards in order to warn oncoming traffic of the wrong-way driver was not a factual proximate cause of their injuries. We disagree.

We review a trial court's ruling on a motion for judgment as a matter of law de novo, applying the same legal standard as the trial court. Hawkins v. Diel, 166 Wn. App. 1, 13, 269 P.3d 1049 (2011). Additionally, we may affirm the trial court on any ground established by the pleadings and supported by the record. Linth v. Gay, 190 Wn. App. 331, 336, 360 P.3d 844 (2015). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997). The applicable court rule provides that a motion for judgment as a matter of law may be granted

> [i]f, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or

> third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

CR 50(a)(1).

Proximate cause has two elements: cause in fact and legal causation. "Cause in fact refers to the 'but for' consequences of an act—the physical connection between an act and an injury." Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Ordinarily, cause in fact is a question for the jury to decide. Hartley, 103 Wn.2d at 778. However, the court may decide this question as a matter of law when "the causal connection is so speculative and indirect that reasonable minds could not differ." Doherty v. Mun. of Metro. Seattle, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996). "'The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another.'" Jankelson v. Sisters of Charity of House of Providence in Territory of Wash., 17 Wn.2d 631, 643, 136 P.2d 720 (1943) (quoting Frescoln v. Puget Sound Traction, Light & Power Co., 90 Wash. 59, 63, 155 P. 395 (1916)). Put differently,

> if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947).

Am and Cheam assert that that the "jury could reasonabl[y] have determined that the [Washington State Patrol]'s failure to adopt and implement policies in the first instance to warn motorists of wrong-way drivers was the proximate cause of the collision." Additionally, Am and Cheam contend that "the

jury could have surmised from the evidence that if the [Washington State Patrol] can promptly warn motorists of fast changing weather conditions and pass closures in a very short time frame, they certainly could have quickly posted warnings of the wrong-way driver."

However, under either of these theories, insufficient evidence was adduced at trial to establish that a warning on the highway reader boards could have been activated in time for Am to have noticed the warning and avoided the collision. Notably, the record does not contain any evidence regarding the process utilized by the DOT to program messages on highway reader boards.[9] In the absence of such evidence, we must resort to the evidence adduced at trial regarding how long the DOT actually took to program the reader boards after the collision had already occurred. This is the only evidence of this type in the trial record.

At 4:34 a.m., a Kittcom dispatcher requested that the Washington State Patrol contact the DOT and request DOT to activate a warning message on the I-90 reader boards. At 4:42 a.m., Trooper White contacted Warren, a state patrol dispatcher, and requested Warren to "have DOT maybe put something up on the reader boards." Warren responded that "they were advised to put up on the reader boards for all traffic to exit westbound" and that she would "call them back." Thus, the evidence adduced at trial indicates that the DOT had been

[9] To the contrary, Van Blaricom testified that he did not have an understanding of the procedures utilized by the DOT to program messages on highway reader boards:

> Q. And do you understand . . . how DOT engages the warning signs on these roadway warnings?
>
> A. I don't know how they program them, no.

initially requested to program a message on the I-90 reader boards sometime between 4:34 a.m. and 4:42 a.m.

The evidence in the record indicates that the DOT did not actually activate such a message on the I-90 reader boards until 5:20 a.m. Assuming that the DOT was initially requested to activate the highway reader boards by 4:41 a.m. (which was immediately before Warren informed Trooper White that the DOT had already been requested to activate a message on the reader boards), then 39 minutes elapsed between the request being made and the message on the reader boards being activated.

The evidence in the case is that the Washington State Patrol was not informed of the wrong-way driver in the westbound lanes of I-90 until 14 minutes before the collision was reported.[10] Assuming that Am was driving at a speed of 60 miles per hour, his vehicle would have been located somewhere between mileposts 67 and 68 when the Washington State Patrol was initially informed of the wrong-way driver.[11] Moreover, the evidence adduced at trial indicates that the nearest highway reader boards were located at mileposts 54 and 61.

Therefore, in order for Am to have seen any warning on the I-90 reader board located at milepost 61, the DOT would have had to program and activate a message on that reader board in less than 7 minutes from the time of the

[10] A wrong-way driver was initially reported at 3:43 a.m. The collision was reported at 3:57 a.m. Thus, 14 minutes elapsed between the initial report of a wrong-way driver and the first report of the collision.

[11] According to a state patrol incident report, the collision occurred "JUST WEST OF MILEPOST 54." Assuming that Am was driving at a speed of 60 miles per hour—or one mile per minute—his vehicle would have been located between mileposts 67 and 68 when the Washington State Patrol was initially informed of a wrong-way driver (54 + 14 = 68). Of course, this assumes that the collision was reported immediately after it occurred.

Washington State Patrol initially being informed of a wrong-way driver.[12] Additionally, in order for Am to have noticed any warning on the reader board located at milepost 54, the DOT would have had to program and activate that message in less than 14 minutes from the time of the initial report of a wrong-way driver being received.[13]

Yet there is no evidence in the record demonstrating that a message on the highway reader boards was capable of being programmed and activated in less than either 7 or 14 minutes. Rather, the evidence adduced at trial indicates that, when the DOT was actually requested to activate a warning on the highway reader boards, the DOT took—at the very least—39 minutes to program and activate the message.[14] No evidence was presented from which a jury could conclude that the process could be completed, at that time of the day, in any quantifiably quicker time frame.

Had the jury been permitted to decide the issue of factual proximate cause with regard to the claims advanced by Am and Cheam concerning the

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[12] Assuming that Am was driving at a speed of 60 miles per hour, it would have taken Am less than 7 minutes to travel from a location in between mileposts 67 and 68 to milepost 61.

[13] Assuming that Am was driving at a speed of 60 miles per hour, it would have taken Am less than 14 minutes to travel from a location in between mileposts 67 and 68 to milepost 54. It is also worth noting that, even if a warning had been activated at milepost 54, it is unclear from the record whether Am would have had a sufficient amount of time to respond to the warning and avoid the collision. Indeed, a state patrol incident report provided that the collision occurred "JUST WEST OF MILEPOST 54." Thus, Am would have had less than one minute to respond to any notice on the reader board located at milepost 54 in order to avoid the collision.

[14] For this reason, even if the Washington State Patrol had requested the DOT to prepare to activate a warning on highway reader boards when the initial report regarding an erratic driver was made, insufficient evidence supported a finding that the DOT would have been capable of activating a warning on the reader boards in time for Am to have noticed the warning. Indeed, the initial report of an erratic driver at milepost 38 was received by a state patrol dispatcher at 3:31 a.m. This was 26 minutes before the collision was reported at 3:57 a.m. Moreover, the initial report of an erratic driver indicated that the driver was heading eastbound in the eastbound lanes of I-90. Thus, any warning on the reader boards concerning an erratic driver would have been posted for eastbound (not westbound) traffic. Such a warning would not have been seen by Am.

Washington State Patrol's failure to ask DOT to activate a warning on the I-90 reader boards, the jury would have been left to speculate as to whether the reader boards were even capable of being activated in the time remaining prior to the collision. The trial court correctly ruled that insufficient evidence was introduced to support a jury finding of factual proximate cause.

Accordingly, the motion was properly granted.

III

In their opening brief, Am and Cheam assert that the State improperly argued during closing argument that any failure to activate a warning on the highway reader boards was not a proximate cause of the injuries sustained by Am and Cheam. However, in their reply brief, Am and Cheam state that they "concede that whether the [State]'s final argument at trial regarding the proximate cause of the variable message sign was proper, it does not constitute reversible error." Accordingly, we consider this assignment of error to be abandoned.

IV

Finally, Am and Cheam contend that the trial court erred by denying their motion for a new trial. The motion for a new trial was based on the same assignments of error that we have already addressed. Because Am and Cheam are not entitled to relief on any of their claims, the trial court's ruling on the motion for a new trial was correct.[15]

[15] Moreover, because of the manner in which we have resolved the issues herein, the judgment on the verdict is affirmed and we need not address any other issues raised by the parties on appeal.

Affirmed.

WE CONCUR:

APPENDIX 2

2020 WL 85401
Only the Westlaw citation is currently available.
NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona, Division 1.

Mary Ann MENDOZA, Plaintiff/Appellant,
v.
STATE of Arizona, Defendant/Appellee.

No. 1 CA-CV 18-0350
|
FILED 01/07/2020

Appeal from the Superior Court in Maricopa County; No. CV2015-051831; The Honorable Aimee L. Anderson, Judge *Retired*.
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Attorneys and Law Firms

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Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Jennifer M. Perkins joined.

MEMORANDUM DECISION

WEINZWEIG, Judge:

*1 ¶1 This is a wrongful death action. Mary Ann Mendoza appeals the superior court's exclusion of her expert witnesses and its entry of summary judgment for the State of Arizona and the Arizona Department of Transportation ("ADOT"). We affirm in part, reverse in part and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Just after midnight on May 12, 2014, a motorist called 911 to report that Raul Silva-Corona ("Corona") was driving northbound in the southbound lanes of State Route 101 near Cactus Road. From there, Corona would drive in the wrong direction for over 30 miles—spanning three Arizona freeways—before colliding with Brandon Mendoza's oncoming vehicle. Both drivers died instantly. A post-mortem exam revealed that Corona had methamphetamine and almost three times the legal limit of alcohol in his blood.

¶3 A pair of ADOT operators watched the tragedy unfold from ADOT's Traffic Operations Center, where ADOT monitors traffic conditions and disseminates public information. The Operations Center also has programmatic control over the large digital signs mounted above and along Arizona's freeways, Dynamic Message Signs ("DMS"), which ADOT uses to inform motorists about hazards and roadway conditions in real time.

¶4 After hearing reports of a wrong-way driver on State Route 101, the ADOT operators used ADOT traffic cameras and police radio to track Corona's vehicle and anticipate his path. ADOT had not adopted a formal, scripted message to warn motorists about wrong-way driver emergencies. As a result, the ADOT operators were left to spontaneously craft their own digital DMS warning for motorists in Corona's path. The three-line warning read:

ONCOMING TRAFFIC AHEAD KEEP RIGHT

¶5 Mary Ann Mendoza is Brandon's mother. She sued the State alleging ADOT and the Arizona Department of Public Safety ("ADPS") were negligent in failing "to take reasonable measures to prevent wrong-way accidents" and failing "to provide reasonable and appropriate traffic measures and law enforcement in light of the risks involved."

¶6 Mendoza timely disclosed three expert witnesses, including Dr. Robert Bleyl and Dr. Eric Boelhouwer.[1] Dr. Bleyl was disclosed as an expert witness on "highway safety and transportation engineering," but the thrust of his opinion was that Arizona had not reasonably responded to the increase in wrong-way crashes and fatalities on its freeways between 2004 and 2014. He opined that "Arizona has been negligent for decades, failing to address or implement procedures to remedy [the] known problem [of wrong-way drivers] on the state highways," and that Arizona has not deployed the countermeasures used by other states. Meanwhile, Dr. Boelhouwer was offered as a human-factors and warnings expert. He was "also expected to address causation issues," including whether Brandon's death "would probably have been avoided" if ADOT "had displayed a reasonably adequate warning."

*2 ¶7 The State deposed Dr. Bleyl and Dr. Boelhouwer. After discovery concluded, the State moved for summary judgment on four grounds, including absolute immunity under A.R.S. § 12-820.01 and qualified immunity under A.R.S. § 12-820.02(A)(1). The State further argued that summary judgment was proper because "Plaintiff cannot establish the standard of care" or its breach, and "cannot establish causation because she cannot show the collision would not have occurred had the State acted differently." Separately, the State moved to exclude the expert testimony of Dr. Bleyl and Dr. Boelhouwer under Arizona Rule of Evidence 702 ("Rule 702").

¶8 The superior court later granted all the State's motions in a single minute entry. It first excluded the expert testimony of Dr. Bleyl and Dr. Boelhouwer because Mendoza had "failed to meet her burden" to show the proposed experts satisfied the requirements of Rule 702. More specifically, the court excluded Dr. Bleyl's testimony because (a) he was "not qualified as an expert on wrong-way driver countermeasures or the applicable standard of care," (b) his opinions were "unreliable as they are not the product of reliable principles and methods," (c) his opinions were unhelpful "as the opinions are not sufficiently tied to the facts of the particular collision in this case," and (d) he offered "impermissible legal conclusions." The court then excluded Dr. Boelhouwer's testimony because he was "not qualified on DMS, and [did] not know the applicable standard of care." It also found his opinions were "not relevant and unreliable as they are not based on the standard of care imposed by law."

¶9 The court then granted summary judgment for the State on grounds of qualified immunity and because Mendoza could not "establish or prove the standard of care," breach of the standard or causation.

¶10 Mendoza moved for reconsideration on both fronts. She argued that summary judgment was inappropriate because questions of material fact remained on breach and causation, even if the court did not consider her experts' testimony. She asked the court to reconsider its exclusion of her experts, offered supplemental expert affidavits and sought permission "to retain new experts."

The court denied both motions. The court found it would be "highly improper" and "contrary" to Arizona law if Mendoza could "select new experts [or] amend her existing experts' opinions to cure any deficiencies." It also explained the State would suffer "extreme prejudice" and her supplemental affidavits were untimely. [2]

¶11 Mendoza timely appealed, but abandoned her claims against ADPS during briefing. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1). [3]

DISCUSSION

¶12 We first examine the court's exclusion of Mendoza's expert witnesses, which, if admissible, impacts the propriety of summary judgment.

I. Expert Witness Testimony

¶13 Arizona Rule of Evidence 702 governs the admissibility of expert testimony. Expert testimony is admissible when (a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, (b) the testimony is based on sufficient facts or data, (c) the testimony is the product of reliable principles and methods, and (d) the expert has applied the principles and methods reliably to the facts of the case. Ariz. R. Evid. 702. Courts may also consider whether "an expert developed his opinion based on independent research, or whether the expert developed his opinion 'expressly for the purposes of testifying.' " *State ex rel. Montgomery v. Miller*, 234 Ariz. 289, 303, ¶ 47 (App. 2014) (citation omitted).

*3 ¶14 The superior court has broad discretion to admit or exclude expert testimony. *Lohmeier v. Hammer*, 214 Ariz. 57, 64, ¶ 25 (App. 2006). It serves as the "gatekeeper" to ensure an expert's testimony is reliable and helpful to the jury. Ariz. R. Evid. 702 cmt. (2012). But the court must be careful not to "replace the adversar[ial] system" or "supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony." *Id.* Thus, "[c]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.*

¶15 We review the court's decision to exclude an expert's testimony for abuse of discretion, *State v. Bernstein*, 237 Ariz. 226, 228, ¶ 9 (2015), even when presented in the summary judgment context, *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 387, ¶ 30 (2013) (stating that the abuse of discretion standard "equally applies to admissibility questions in summary judgment proceedings"). An "abuse of discretion" exists when the court commits an error of law in reaching a discretionary decision that is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres for & on Behalf of Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40 (App. 1982).

¶16 Mendoza bore the burden to prove by a preponderance of the evidence that the testimony of her expert witnesses satisfied the requirements of Rule 702. *Miller*, 234 Ariz. at 298, ¶ 19.

A. Dr. Robert Bleyl

¶17 Mendoza first argues the superior court abused its discretion by preventing Dr. Bleyl from offering his expert opinion on whether the State failed to reasonably respond to the wrong-way driver problem on Arizona highways before the Mendoza crash, and whether the State's alleged failure to respond with countermeasures increased the likelihood of Brandon's death. The court excluded Dr. Bleyl's testimony under Rule 702 on grounds that he was unqualified, and his opinions were unreliable, unhelpful and legal conclusions.

¶18 We conclude the court did not abuse its discretion in determining that Dr. Bleyl's opinions were unreliable. Rule 702 requires that an expert's opinion be based on "sufficient facts or data" and represent "the product of reliable principles and methods." Dr. Bleyl lacked basic facts and data, and "there [was] simply too great an analytical gap between the data and the opinion offered." *Miller*, 234 Ariz. at 298-99, ¶¶ 23, 26 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

¶19 Dr. Bleyl lacked information and knowledge about Arizona's pre-collision efforts and measures to combat the wrong-way driver problem. *See Lay v. City of Mesa*, 168 Ariz. 552, 554 (App. 1991) ("The trial court did not abuse its discretion in excluding" expert's testimony where "he was not familiar with the [signage placement] standards the City followed."). Although Dr. Bleyl opines that Arizona "had no system in place to address" the wrong-way driver problem, he was unaware of Arizona's pre-crash countermeasures or "what [the State] actually did" to combat the problem before the crash, conceding that he neither sought nor received an explanation about what Arizona had historically done to prevent wrong-way crashes.

¶20 Nor did Dr. Bleyl identify what countermeasures ADOT could or should have deployed to prevent an extremely impaired person from driving into the face of oncoming traffic for over 30 miles, seemingly unaware of the world around him, and avoiding Brandon's tragic death. He merely "confirmed" that "there are recommendations and things that might be done to resolve and provide countermeasures to address the problem." And even when he articulated possible countermeasures, he offered no basis for them. Thus, he opined that Arizona "ought" to expand its use of "wrong way" signs beyond freeway entrances, but offered no source for his opinion and agreed the signs are not required or addressed by the Manual on Uniform Traffic Control Devices. He also criticized the size and placement of prior signs, but never explained why their height, size and placement were unreasonable. Instead, he only pointed to the State's recent sign modifications, which prove nothing about the prior signage or whether the modifications were needed to meet some minimum standard of care.

*4 ¶21 Also problematic is Dr. Bleyl's total reliance on Mendoza's counsel for information crucial to his opinions, without verification, and absence of any independent research, analysis or cognizable methodology. *Miller*, 234 Ariz. at 303, ¶ 47. At his deposition, Dr. Bleyl conceded that he performed no independent research or analysis of Arizona's roadways to determine "what wrong-way signage or detection systems do or do not exist," but instead relied on Mendoza's counsel to furnish the necessary information and articles. Moreover, Dr. Bleyl never even inquired how Mendoza's counsel found or selected the universe of materials to provide. He further recognized that "[i]t's impossible to know what's out there that I don't know about."

¶22 Dr. Bleyl tried to justify his blind reliance by explaining that Mendoza's counsel had hired him "over the years" and "not really cover[ed] up" or "hid[den] specific things" from him that "subsequently [came] up [and] should have been provided," and by vouching that Mendoza's counsel had provided him with "fair and objective" materials. But, while Dr. Bleyl can rely on information provided by counsel in forming an independent opinion, he "cannot forgo his own independent analysis and rely exclusively on what an interested party tells him." *Orthoflex, Inc. v. ThermoTek, Inc.*, 986 F. Supp. 2d 776, 798 (N.D. Tex. 2013).

¶23 Beyond that, Dr. Bleyl conceded he lacked the data to test or confirm the California Department of Transportation report supplied by Mendoza's counsel, which provided the "only basis" for his analysis about the effectiveness of reasonable countermeasures. This omission buttressed the superior court's reliability concerns. *See, e.g.*, *Munoz v. Orr*, 200 F.3d 291, 301-02 (5th Cir. 2000) (describing expert testimony as "unreliable" where premised on plaintiffs' data and expert "did not seek to verify the information presented to him").

¶24 This court is mindful that "[c]ross-examination [and] presentation of contrary evidence" are the "traditional and appropriate means" to "attack[ ] shaky but admissible" expert testimony, Ariz. R. Evid. 702 cmt., but Dr. Bleyl's testimony is not just shaky—it is unreliable and inadmissible. This is not one of the "close cases" where cross-examination can solve the problem. *Bernstein*, 237 Ariz. at 230, ¶ 18. The superior court found that Dr. Bleyl lacked the foundational knowledge and information to reach a meaningful conclusion on the State's historical approach and contemporary response to wrong-way drivers—he relied solely on others, without question or direction, to marshal the only materials he consulted in forming the conclusion. As such, his testimony was fatally flawed as a matter of law and of no meaningful assistance to the trier of fact.

¶25 Mendoza counters that this court found Dr. Bleyl was qualified and his opinions were reliable in an earlier case. But that case, *Glazer v. State*, 234 Ariz. 305 (App. 2014), *vacated in part*, 237 Ariz. 160 (2015), is irrelevant here. *Glazer* had different facts and issues—placement of freeway median barriers—and Dr. Bleyl offered his expert testimony on a different topic altogether—whether "the State should have installed a median barrier in the area where the crash occurred." *Id.* at 309, ¶ 5. Courts must vet the opinions of an expert witness based on the facts and issue of each case. "[T]he fact that a witness has qualified as an expert on previous occasions does not make him any more qualified to testify in the case at bar." *Englehart v. Jeep Corp.*, 122 Ariz. 256, 258 (1979).

¶26 On this record, we cannot say the superior court abused its discretion in excluding Dr. Bleyl's expert testimony as unreliable.

B. Dr. Eric Boelhouwer

*5 ¶27 Mendoza next argues the superior court erroneously excluded the expert testimony of Dr. Boelhouwer, who concluded that ADOT posted an inadequate and inappropriate DMS warning message, the warning contributed to the accident, and ADOT should have scripted a formal DMS warning for operators to post in wrong-way emergencies. The court excluded this testimony as irrelevant and unreliable under Rule 702, emphasizing his opinions were "not based on the standard of care imposed by law," he did "not know the applicable standard of care," and he "performed no standard of care analysis" related to dynamic freeway warning signs. The court also found Dr. Boelhouwer unqualified because he had "nothing to support his opinions other than his prior general experience in human factors (unrelated to DMS) and his review of documents provide[d] to him by [Mendoza]'s Counsel."

¶28 We reverse in part and affirm in part. The superior court abused its discretion in barring Dr. Boelhouwer's human factors opinion, including whether the warning language was appropriate and adequate to warn motorists, how humans perceive and react to alternative warning messages and how a different DMS warning might have impacted a driver's behavior. The court did not err, however, in excluding Dr. Boelhouwer's opinion concerning ADOT protocol and any conclusion that warning scripts were required under reasonable state transportation practices.

1. Language of Warning

¶29 Mendoza should have been allowed to offer Dr. Boelhouwer's expert opinion that ADOT operators posted an "inadequate" and "inappropriate" DMS message to warn motorists about a wrong-way driver. A human factors expert "may opine about the behavior of an average person in some settings." 1 McCormick on Evidence § 13 (Kenneth S. Broun, ed., 7th ed. 2016).

¶30 Dr. Boelhouwer is qualified as an expert to offer his opinion about the adequacy of specific warnings, especially under the "liberal minimum qualification" standard. *State v. Delgado*, 232 Ariz. 182, 186, ¶ 12 (App. 2013) (qualifications of expert witness are "construed liberally"). He has knowledge, education and experience beyond the ken of lay jurors related to "how humans process information, warnings, and instructions." *State v. Davolt*, 207 Ariz. 191, 210, ¶ 70 (2004) ("The test of whether a person is an expert is whether a jury can receive help on a particular subject from the witness."). He has a Ph.D. and master's degree in industrial and systems engineering, and a B.A. in chemical engineering. He belongs to various organizations related to human factors and product safety; works as a product-warning consultant on the format, content and layout of warnings; and has published and presented on human-factors issues.

¶31 Rule 702 does not require that Dr. Boelhouwer be the most qualified person to offer an opinion in the particular area of expertise. *See Lay*, 168 Ariz. at 554; *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1244 (10th Cir. 2000) (holding that human-factors expert testimony was admissible in a products liability action against milling machine manufacturer even though the expert witness lacked firsthand experience with milling machines).

¶32 In that regard, the superior court erred by narrowly focusing on Dr. Boelhouwer's experience with wrong-way driver incidents. The State can probe and explore Dr. Boelhouwer's professional focus with a robust cross-examination, but his relative inexperience with highway signs and wrong-way drivers goes to the weight of his testimony, not its admissibility. *State v. Romero*, 239 Ariz. 6, 11, ¶ 23 (2016) (stating that an expert's "lack of experience in performing toolmark analyses and firearm identification experiments might have affected the weight a juror would give his testimony, but it did not bar its admission"); *see also* *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 251, ¶ 16 (App. 2013) (explaining that an expert's "background and familiarity with certain building regulations goes to the weight of his testimony, not its admissibility").

*6 ¶33 Dr. Boelhouwer's warning opinion is also reliable enough to be tested on cross-examination at trial. *Romero*, 239 Ariz. at ¶ 17 ("Careful study may suffice to qualify an expert if it affords greater knowledge on a relevant issue than the jury possesses.") (quoting *State v. Girdler*, 138 Ariz. 482, 490 (1983)). Unlike the opinion of Dr. Bleyl, Dr. Boelhouwer's opinion is the product of independent research, background, experience, training and education. He conducted and relied on his own research and knowledge of human factors and warnings. He reviewed industry and research publications, related standards and studies about the effectiveness of wrong-way driver warnings. He reviewed four depositions and "a significant amount of production from both sides, plaintiff and defense." He relied on scientific literature provided by counsel, but also performed independent research and relied on materials he found on his own.

¶34 He examined the warning message at issue, explained how it was flawed and proposed an alternative warning. He generally identified the elements of a proper warning, which should "include a signal word, hazard, and avoidance information." He then challenged the use of "oncoming traffic" as too vague and ambiguous to warn motorists that a vehicle was racing towards them in the wrong direction, and offered "danger" and "wrong way driver" as the "strong, clear" alternative. He also criticized the absence of guidance on how motorists might avoid the danger, pointing to Houston's warning since 2008: "ALL TRAFFIC MOVE TO SHOULDER AND STOP."

¶35 His opinion is also relevant. A central issue in this lawsuit is whether the State breached its duty to keep roads "reasonably safe for travel." *See Dunham v. Pima Cty.*, 161 Ariz. 304, 306 (1989). "Where, as here, evidence is offered from which the fact-finder could reasonably conclude that the public agency or jurisdiction should have foreseen a danger to plaintiff from the negligent or inattentive conduct of plaintiff or of another, then the question of the [government's] negligence is one for the jury." *Id.* Dr. Boelhouwer's opinion may help the jury understand the evidence and decide the case.

¶36 The State counters that Dr. Boelhouwer mistakenly believed the DMS message used "caution" instead of "keep right." But Dr. Boelhouwer also challenged the use of "oncoming traffic" and omission of "danger" and "wrong way driver." The State can expose and amplify the point at trial with evidence and cross-examination, but the asserted weakness is not reason to exclude the testimony altogether. *See* *Pipher v. Loo*, 221 Ariz. 399, 404, ¶ 17 (App. 2009) (challenges to "the accuracy and reliability of a witness' factual basis, data, and methods go to the weight and credibility of the witness' testimony").

¶37 The State also argues that Dr. Boelhouwer is not a traffic engineer and has no basis to address causation and the chances of a car accident. We understand and appreciate the argument, but the State can probe and explore the subject with fulsome cross-examination—casting doubt on whether and how Dr. Boelhouwer's general knowledge and experience in the human-factors world translates to motorists on Arizona highways. Ariz. R. Evid. 702 cmt. (2012) ("Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). "In close cases, the trial court should allow the jury to exercise its fact-finding function, for it is the jury's exclusive province to assess the weight and credibility of evidence." *Bernstein*, 237 Ariz. at 230, ¶ 18.

2. ADOT Protocol

¶38 The court did not abuse its discretion, however, in excluding Dr. Boelhouwer's opinion that ADOT should have responded to wrong-way driver emergencies with warning scripts. Mendoza points to no training or experience that qualifies Dr. Boelhouwer to offer an expert opinion about reasonable state government protocols and strategies in response to transportation safety issues. He has studied no literature and performed no research on reasonable policy decisions and formal government practices.

II. Summary Judgment

*7 ¶39 Mendoza argues the superior court erroneously entered summary judgment for the State on her claims against ADOT. We reverse and remand for the court to consider Dr. Boelhouwer's expert testimony about the DMS warning and human-factors opinions, and determine whether summary judgment remains appropriate. We express no opinion on the State's qualified immunity defense, and the court should consider the merits of this defense on remand given the allowable parameters of Dr. Boelhouwer's opinions.

¶40 Although we do not reach the issue here, we remind the superior court that expert testimony is not required to prove the standard of care in ordinary negligence cases. *Rossell v. Volkswagen of Am.*, 147 Ariz. 160 (1985). This is true because the factfinder "can rely on its own experience in determining whether the defendant acted with reasonable care under the circumstances." *Bell v. Maricopa Med. Ctr.*, 157 Ariz. 192, 194 (App. 1988). In Arizona, juries are composed of motorists who regularly navigate and read signs on the state's highway system. *See* *Seide v. Rhode Island*, 875 A.2d 1259, 1271 (R.I. 2005) (explaining that expert testimony is not required for determining an officer's standard of care when in high-speed pursuit). By contrast, an average juror would not likely possess the knowledge or experience needed to critique the State's historical strategies and countermeasures to wrong-way drivers.

CONCLUSION

¶41 We affirm the superior court's order excluding Dr. Bleyl's expert testimony, but affirm in part and reverse in part the exclusion of Dr. Boelhouwer's expert testimony. We also remand for further consideration of the State's motion for summary judgment based on admissible record evidence. As the successful party on appeal, Mendoza is awarded her taxable costs upon compliance with ARCAP 21.

All Citations

Not Reported in Pac. Rptr., 2020 WL 85401

Footnotes

1 Mendoza also disclosed an expert on police practices, W.D. Robinson. The superior court excluded Robinson's testimony, but Mendoza does not challenge that decision on appeal.

2 Mendoza does not contest the court's refusal to accept her supplemental expert affidavits and we do not consider the affidavits here. *Tilley v. Delci*, 220 Ariz. 233, 238, ¶ 17 (App. 2009) ("The superior court was not required to accept and examine evidence presented to it for the first time in connection with [a] motion for reconsideration.").

3 We deny the State's motion to strike Mendoza's notice of supplemental authorities.

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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the foregoing via JIS/ACCORDS. I further certify that I emailed a copy of this document to:

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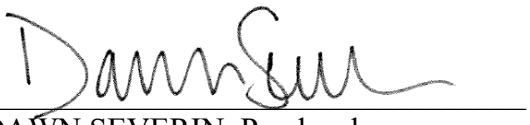
DATED this 18th day of May 2021 at Ephrata, WA.



DAWN SEVERIN, Paralegal

MOBERG RATHBONE KEARNS

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