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NO. 66352-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARLA KRESS and JERRY KRESS, husband and wife, and the marital community composed thereof,

Appellants,

v.

THE STATE OF WASHINGTON; TRI-STATE CONSTRUCTION, INC., a Washington Corporation, and RICHARD MOBLEY and JANE DOE MOBLEY, husband and wife, and the marital community composed thereof,

Respondents.

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COURT OF APPEALS
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Appeal from the Superior Court of King County
The Honorable Jean Rietschel
No. 09-2-28966-2 SEA

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# OPENING BRIEF OF APPELLANTS KRESS

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## I. INTRODUCTION

This appeal is the result of the trial court judge deciding multiple factual issues reserved for the jury by Article 1, § 21 of the Washington State Constitution.

The underlying case arises out of a collision that occurred when an oncoming vehicle driven by Defendant Richard Mobley crossed into Plaintiff Marla Kress' lane of traffic and crashed into her vehicle leaving Ms. Kress severely injured. This collision happened on a curve in a construction zone on SR 202 operated by Defendant State of Washington and Defendant Tri-State Construction at a location where the Defendants had failed to replace a missing double-yellow centerline. The evidence establishes that this gap in the yellow centerline presented a hazard to motorists because it indicated an intersection at the location of the gap when there was no intersection. Additionally, the missing centerline eliminated guidance for drivers relying upon it to identify the boundaries of their lane during periods of darkness, as was the case here.

The evidence is that both Defendants State and Tri-State should have been aware of this missing centerline and the potential hazard it presented to drivers since they had workers in this area almost daily, yet neither Defendant did anything to correct the dangerous condition until after Plaintiff Kress was severely injured on January 23, 2007.

Compounding the lack of a centerline to provide positive guidance for motorists at this location is the fact that motorists' stopping sight distance at the location of the crash was greatly impaired by the erection of an 11-foot high retaining wall created by the Defendants. The evidence shows that this temporary retaining wall obstructed Ms. Kress' view of the highway as it curved west and eliminated crucial reaction time. As with the missing centerline, neither Defendant State nor Defendant Tri-State took any steps to correct the sight distance hazard created by the retaining wall. Instead of reducing the speed limit in this construction zone to compensate for this hazard – as required by the State's own standards – the Defendants allowed the speed limit to remain at 55 miles per hour, just as it was prior to the start of the construction project and the creation of this sight obstruction.

The evidence shows that Defendants State and Tri-State also negligently failed to replace missing or damaged centerline reflectors at the subject location, and further that they negligently failed to repaint the fading fog line edge. As explained in more detail below, the evidence establishes that these multiple negligent acts of the Defendants combined to proximately cause this collision.

This appeal arises out of two rulings made by the trial judge in which she made material factual determinations reserved exclusively for the jury. The first ruling was made on November 12, 2010 on Defendants' joint motion for summary judgment. The second ruling was made on December 3, 2010 on additional issues of the proximate cause of

Plaintiffs' injuries, including increased severity of injuries (i.e. had the speed limit been 35 mph instead of 55 mph Plaintiff Kress would have suffered relatively minor injuries).

At the November 12th hearing, Defendants State and Tri-State argued that Plaintiffs lacked evidence necessary to prove that the missing centerline and other conditions in the construction area caused the crash. In response to this argument, Plaintiffs produced multiple expert declarations and a factual declaration from Ms. Kress all showing that the missing and damaged reflectors, the degraded fog line, the lack of lighting, the missing centerline, the reduced sight distance and an excessively high posted speed limit that was too fast under these construction zone conditions, all combined to proximately cause this crash.

Based on this evidence, the trial judge found that the Plaintiffs had "definitely established" that

- Mr. Mobley ended up in Ms. Kress' lane and that his car hit her car.
- The speed limit was 55 mph.
- Mr. Mobley was going approximately 24 mph and Ms. Kress was going approximately 50 mph.
- Ms. Kress suffered catastrophic, serious injuries.
- There was a retaining wall on Ms. Kress' side of SR 202 due to the construction.
- There was absence of lane marking in the middle at one point in the center lane.
- There was a lane edge that was obscured or obliterated.

- Plaintiffs' experts conclude that the lack of the lane marking was a hazard, that the obliteration of the lane edge was a hazard, that the plaintiff's sight distance was obstructed by the retaining wall, and that the lighting was poor.

- Plaintiffs' expert opined that more probably than not Mr. Mobley was misled into turning into the oncoming line.

- Plaintiffs' highway engineering expert opined that, due to the retaining wall and the lack of sight distance, the speed limit should have been reduced.

- Plaintiffs' highway engineering expert opined that, based on standards set forth in the State's own manual, the speed limit should have been 35 mph due to the sight obstruction imposed on westbound drivers facing it.

- Based on the opinion of Plaintiffs' expert accident reconstructionist, there is evidence that the position of Mr. Mobley's vehicle at the crash scene appeared to show a greater angle than drifting over the centerline and that Mr. Mobley "may have made a right steering that reduced his heading angle to return to his own lane." *See* Report of Proceedings (RP) at 51-52 (Nov. 12, 2010).

Although she specifically acknowledged these "definitely established" facts in her ruling, the trial judge nevertheless entered summary judgment against the Plaintiffs finding among other things that "[t]here is no direct or circumstantial evidence showing that Mr. Mobley was in fact misled or confused by the conditions of the roadway." RP at 51-52 (Nov. 12, 2010).

Notwithstanding her ruling which effectively dismissed the Plaintiffs' case against the Defendants, the trial judge then invited the parties to submit additional briefing on "whether the failure to lower the speed limit itself can be a proximate cause on its own of the injuries or can only be an enhancement of the injuries." RP at 51-52 (Nov. 12, 2010).

The trial court conducted a hearing on this new issue on December 3rd. The Defendants argued that no such tort theory exists under Washington law and that therefore their failure to reduce the speed from 55 miles per hour to 35 miles per hour was not a proximate cause of Ms. Kress' injuries. In response, Plaintiffs argued that under Washington law the failure to reduce the speed limit is potentially a proximate cause of the plaintiff's injuries. Specifically, Plaintiffs relied upon *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 469-470, 921 P.2d 1098 (1996) in which the court held that issues of fact existed as to proximate cause -- "but for the bus driver's failure to yield" the plaintiffs' "injuries would have been less severe." Ignoring *Doherty*, the trial court in this case granted summary judgment for Defendants, holding that the "cause of action" was not "recognized in Washington at this point in time." RP 51 (Dec. 3, 2010).

After granting Defendants' motions for summary judgment twice, at the conclusion of the December 3rd hearing, the trial judge surprised all of the parties by referencing theories that had "not been ruled on",[1] implying that the Plaintiffs' case was still viable. Rather than confusing matters even more, the parties agreed to the entry of summary judgment orders in favor of Defendants State and Tri-State to proceed with this appeal.

[1] RP 15, 56 (December 3, 2010).

Because the trial judge overstepped her role on summary judgment and invaded the province of the jury by erroneously deciding factual issues belonging to the trier of fact, Plaintiffs appeal from the trial court's orders dismissing Defendants State of Washington and Tri-State Construction, as well as the trial court's order dismissing the Plaintiff's increased severity of injuries claims against Defendant Tri-State.

## II. ASSIGNMENTS OF ERROR

The trial court erred in entering the following orders:

1. Order Granting Defendant State of Washington's Motion for Summary Judgment and Defendant Tri-State's Joinder entered by Judge Rietschel on November 12, 2010;

2. Order Dismissing Plaintiffs' Increased Severity of Injuries Claims Against Defendant Tri-State Construction entered by Judge Rietschel on December 3, 2010; and

3. Order Granting Defendant State of Washington's Motion for Summary Judgment Re: Increased Severity of Injuries entered by Judge Rietschel on December 3, 2010.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

**ISSUE**: Did the trial court err in granting Defendant State of Washington's Motion for Summary Judgment and Defendant Tri-State's Joinder in the motion when the evidence viewed in a light most favorable to the Plaintiffs shows that genuine issues of material fact exist as to whether or not the Defendants breached their duty to the traveling public

to maintain the subject section of SR 202 in a reasonably safe condition for ordinary travel?

**ANSWER**: Yes. This is a simple negligence case that involves the issue of whether or not the Defendants breached their duty of ordinary care to the traveling public to safely maintain their roads in a reasonably safe condition. The uncontroverted evidence in this case is that both Defendant State and Defendant Tri-State breached their duty. The evidence also establishes that the multiple negligent acts of the Defendants were a proximate cause of this collision and Ms. Kress' injuries. Based on this evidence and the trial judge's specific acknowledgment of the facts established by this evidence, genuine issues of material exist as to the Defendants' negligence that clearly should have precluded the entry of summary judgment. By entering summary judgment in favor of the Defendants, the trial judge committed reversible error by deciding factual issues that are reserved for the trier of fact under CR 56(c). For this reason, as well as those set forth below, the trial court should be reversed and this case remanded back to the lower court for trial.

## IV. STATEMENT OF CASE

### A. Introduction.

Marla Kress was severely injured on January 23, 2007, when an oncoming vehicle driven by Defendant Richard Mobley crossed into her lane through a 110-foot gap in the painted, double-yellow centerline on SR 202 near Redmond. CP 5. The crash occurred in a Washington State Department of Transportation (WSDOT) construction area on a curve with

missing and damaged reflectors, a degraded fog line, lack of lighting, a missing centerline, reduced sight distance and a speed limit that was dangerously fast under these unusually circumstances. CP 4-5.

Plaintiff Marla Kress never left her lane of travel and followed all the traffic rules.[2] Ms. Kress describes what happened on the night of the collision as follows:

> On the night of the subject crash, I could not see Mr. Mobley's headlights until they were upon me. If he had his left turn indicator on, I would not have been able to see it due to the obstruction from the retaining wall. If I could have seen the lights coming toward me earlier, I would have taken evasive action to avoid serious injury.
>
> My ability to avoid the collision was impeded because of the reduced sight distance and because the retaining wall to my right prevented my escape.
>
> I was driving close to the speed limit. I wish I had been warned to drive at a much lower speed. If I had been driving more slowly, and had more time to react, I could have done more to slow my car and prevent the serious injuries I have suffered.
>
> I slammed on my brakes but by then it was too late to do much good. If the speed limit had been lower and I had seen him coming for a longer time I could have done more to slow my car and protect myself from such a serious injury.[3] CP 1389.

The picture below shows Ms. Kress' view as she approached the crash site. CP 624.

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[2] Ms. Kress was, in fact, found by the trial court on summary judgment to be fault-free. CP 2305-2307.

[3] The crash broke Ms. Kress' right elbow, right leg, right femur, right patella, right foot, left tibia, and back. In the places where her body was fractured she is held together with pins, screws, plates and rods. These injuries were caused by the offset frontal collision with Mr. Mobley's vehicle, and the speed at which the collision occurred. Mr. Mobley suffered a brain injury during the crash.

Ms. Kress and her husband have presented substantial evidence that the crash and resulting injuries were caused by the negligence of Defendant State of Washington ("WSDOT") and its contractor, Tri-State Construction, Inc. CP 6-7.

**B. Background leading up to the collision.**

The WSDOT project was designed to widen the SR 202 corridor between Sahalee Way NE and I-405 to correct the reportedly unsafe condition of the roadway. CP 661. According to WSDOT, there were more than 1,100 crashes on that portion of SR 202 from 1995 to 2007. *Ibid.* Of these crashes, two of the collisions involved fatalities, and 387 of these crashes involved injuries to 501 people. *Ibid.* According to WSDOT, the existing highway was unsafe in part because "only a painted

centerline separated opposing traffic." *Ibid.* WSDOT also recognized sight distance problems on the old highway, and that "[d]rivers had a difficult time seeing oncoming ... traffic along the corridor." *Ibid.* Based on the corridor's dismal safety record, "WSDOT targeted the area for needed safety improvements." *Ibid.*

The crash took place on the inside of a curve near the former intersection with NE 55th Place. CP 78; CP 84-85. At the time of the crash, traffic was routed over the old road surface while new lanes were constructed to the north of the old highway. CP 559. These new lanes were elevated. *Ibid.* Gravel and fill were brought in by truck. A massive, temporary retaining wall just north of the westbound lane that Ms. Kress occupied held the gravel in place during construction. CP 584-585; CP 559. A Jersey barrier was placed between the wall and the westbound lane. CP 559. At the location of the crash the Jersey barrier was just one foot from the westbound lane and eliminated any escape shoulder. CP 1366; *see also* CP 584-585.

The crash occurred on a curve. CP 584. Because the wall was built on the inside of the curve, it obstructed stopping sight distance in Ms. Kress' lane, cutting it from more than 550 feet prior to construction to just 283 feet. CP 1361-1364; CP 1387. The wall also reduced stopping sight distance in Mr. Mobley's lane. Because of the obstruction caused by the wall, Mr. Mobley would not have been able to see Ms. Kress' approaching vehicle at the time he began to enter her lane. CP 1967-1969. Nor could

Ms. Kress see Mr. Mobley's vehicle at the time he began to cross over. CP 1389.

Although sight distance was cut nearly in half, WSDOT never lowered the 55-mph posted speed limit and never posted advisory speed signs or other warnings about the reduced sight distance. CP 1052; CP 1268. Nor did Tri-State alert WSDOT's engineer of the reduction in sight distance at the curve.

**C. Stopping sight distance is essential.**

The State of Washington's Design Manual is mandatory on State highway projects. CP 1051. The Manual states:

> It is essential that the driver of a vehicle be able to see far enough ahead to assess developing situations and take appropriate action. CP 1052.

The Design Manual and its supplements describe sight distance requirements and provide tables giving the appropriate speeds for given sight distances. CP 1378. Higher speeds require more stopping sight distance. CP 1052. The posted speed limit of 55 mph at the scene was excessively high under WSDOT's own design standards, which call for at least 495 feet of stopping sight distance to support a 55 mph speed limit. CP 1378.

According to Transportation Engineer Edward Stevens, with the 55 mph speed limit and sight distance of just 283 feet, Marla Kress did not have sufficient sight distance to avoid a head-on collision. CP 1052.

Mr. Stevens testified that because of the reduction in sight distance and the lack of an escape shoulder, the speed limit should have been cut

from 55 mph to 35 mph. CP 1052-1053. Traffic Engineer James Bragdon also testified that WSDOT and Tri-State were negligent for failing to reduce speeds appropriately. CP 1379-1380. However, the posted speed limit was never changed, and no warnings about reduced sight distance were posted.

**D. Traffic control devices were missing or damaged.**

The crash occurred in the westbound lane, near the wall and Jersey barrier, close to the end of a 110-foot gap in the double-yellow no-passing centerline. The entire construction area was part of a no-passing zone. CP 1265. A double-yellow centerline is used to separate oncoming traffic in a no-passing zone. Gaps in the double-yellow line are used to mark the locations of intersections.

Mr. Mobley was travelling from west to east and crossed into the westbound lane at the western end of the 110-foot gap. At the point where he crossed, his view of Ms. Kress' approaching vehicle was blocked by the retaining wall on his left. CP 1968.

The gap was at a former intersection with NE 55th Place. The gap had originally marked a permissible left turn from Mr. Mobley's eastbound lane onto NE 55th Place. CP 1265. However, the intersection with NE 55th Place was closed in 2003. State engineers admit that the gap in the centerline served no useful purpose after closure of the intersection (CP 1225; CP 1267), but when the intersection was closed, no one extended the missing double-yellow centerline to eliminate the gap. CP 1266.

In discovery responses and deposition, WSDOT initially disclaimed any knowledge of why or when the intersection with NE 55th Place was closed. CP 907; CP 920-927. Later, Ms. Kress learned that WSDOT had proposed closing the intersection in 2003 as part of the widening project, and that WSDOT had approved and inspected the closure work. CP 900-904; CP 929. The closure plan included installation of several "no turn" signs but didn't include elimination of the gap. CP 934. (The "no turn" signs were removed during construction several months prior to the crash. CP 1266.) The gap remained open for nearly four years after the intersection was closed. The missing centerline was painted in within a few weeks after the crash.

Transportation Engineer Edward Stevens testified that "The double-yellow stripe should be continuous through a no-passing zone." CP 1050. "Positive guidance, as provided by bright, continuous striping, consistent and appropriate warning, and adequate delineation is a critical part of work zone safety." CP 1049.

Civil Engineer James Bragdon testified that the gap in the centerline was hazardous because it "gave a false indication to eastbound motorists that this may be an intersection." CP 1375-1376. Mr. Bragdon explained the hazard:

> With this or any other traffic control device, we try to be consistent with what we do. It goes back to motorists' expectancy, and what they would expect to see when they see a traffic control device of some description out there. All of our intersections have gaps in the centerline at the intersection, and so, to me, you get used to seeing gaps in intersections—or gaps in the centerlines at intersections. Now, all of a sudden we have a gap and there is no

> intersection, so that's why I'm saying it presents a hazardous condition and gives false information to drivers. CP 1273

Pavement markings such as the double-yellow centerline, fog or edge line and reflectors are considered traffic control devices. CP 1264. WSDOT admits that traffic control devices, including pavement markings, provide important information to drivers. *Id.* WSDOT also admits that outdated or confusing traffic control devices can be dangerous. CP 1266.

There were other notable defects at the scene. Reflectors placed within the gap were either missing or dysfunctional, and the edge or fog line for the eastbound lane was obliterated by roadway filth.

**E. Mr. Mobley was "going in the wrong direction."**

According to the Washington State Patrol report, Mr. Mobley was lost at the time of the crash and talking on his cell phone to a friend, David Giroux. CP 553. The WSP report states:

> David and Richard were on the phone and Richard told David he was by 148th. David told Richard to go home because he was closer to home. David heard Richard say "Oh s—t!" and lost phone reception with him. *Ibid.*

Years later, Mr. Giroux corroborated the report when he testified that Mr. Mobley "took the wrong exit" and was "going in the wrong direction." CP 1930. The two were discussing whether or not Mr. Mobley should go home. CP 1930-1931. Records show that the call was originated by Mr. Giroux. *Ibid.*

Mr. Mobley suffered a traumatic brain injury and has no memory of the events, but testified that if he had wanted to go home, his likely course would have been to turn around and go back the way he had come.

### F. Mr. Mobley's vehicle was traveling slowly.

Mr. Mobley crossed into Ms. Kress' lane at the western end of the gap. CP 1386-1387; CP 1976. His vehicle was moving quite slowly—just 23.5 mph, or more than 30 mph under the posted speed limit—at the time of the crash. CP 1386. His speed and angle were therefore consistent with an intentional turn. CP 1935.

Because of a curve in the road and a massive temporary retaining wall that obstructed vision of the road ahead, Mr. Mobley would not have been able to see Ms. Kress' approaching vehicle at the time that his vehicle began to turn left. CP 1967-1969.

Ms. Kress was approaching from the east. She was fully within her own lane next to the massive temporary retaining wall.

At the point of impact Ms. Kress was going 49 mph—or more than five miles per hour under the posted speed limit. CP 1386. (Prior to impact, entering the curve, she was driving at or below the posted speed limit of 55 mph; she managed to brake just enough to slow to 49.) *Ibid.* She was fully within her own lane. However, the massive retaining wall reduced sight distance in her lane from more than 550 feet to less than 286 feet, and reduced the time she had to brake or steer out of the way by sharply reducing her view of the road in front of her and the oncoming vehicle. CP 1389. The wall and barrier also eliminated any escape shoulder on Ms. Kress' right. *Ibid.*

The two vehicles collided at a combined speed of 72-73 mph. CP 1386. Both vehicles (by coincidence they were identical models) experienced a change in velocity, or "Delta V," of 37 mph. *Id.*

Ms. Kress' injuries were directly related to the high 37 mph "Delta V," or "change in velocity," that she and her vehicle experienced. CP 1382-1383. But for the high Delta V, her serious injuries would not have occurred. CP 1383.

**G. The defects in the roadway at this location were a proximate cause of the collision.**

The undisputed evidence shows that Mr. Mobley crossed into the oncoming lane of traffic and crashed with Ms. Kress at the very spot where there was a gap of 110 feet in the "no-passing" double-yellow centerline.[4] Human Factors Engineer Richard Gill testified that the gap in the double-yellow centerline, the missing and degraded reflectors, and the reduced sight distance created a hazard to motorists and were proximate causes of the crash. CP 1605-1606. According Dr. Gill:

> [A]ll of this evidence leads me to form the opinion that, more probably than not, the gap in the double-yellow line, obstructed sight distance caused by the temporary retaining wall, combined with poor maintenance of the fog line, poor lighting at the scene, and an absence of operable reflectors in the centerline were defective and dangerous conditions that, more probably than not,

[4] The fact that Mr. Mobley crossed into the oncoming lane at the very spot where the "no-passing" centerline ended is clear circumstantial evidence that the sudden lack of positive guidance at this section of SR 202 was a cause of this collision. Based on this evidence, a reasonable jury would find that the lack of consistent positive guidance caused Mr. Mobley to cross into the oncoming lane. *See* Section V., D. *infra*.

> temporarily misled Mr. Mobley into turning into the oncoming lane where his car struck Ms. Kress' car and injured her. CP 1604

Dr. Gill also explains that the gap in the double-yellow line made it more difficult for Ms. Kress to determine whether or not Mr. Mobley had crossed or was crossing into her lane as it came around the bend. CP 1605-1608. The line provides an essential point of reference for drivers in both directions, particularly where, has here, the road lacks street lights and is dark at night. CP 1609.

**H. The State and Tri-State were negligent**

The intersection between SR 202 and NE 55th Place had been closed for approximately four years at the time of the crash, but in all that time no one ever closed the gap in the double-yellow centerline. WSDOT originally testified that it did not know why the intersection was closed and had not been notified of the closing. However, that testimony proved to be false. Documents obtained by Plaintiffs from King County showed that closure of the intersection was proposed by WSDOT as part of the widening project, and "sight distance" along the very curve was a reason for the project. WSDOT approved the closure plan and all the closure work, even though the gap was never eliminated. WSDOT inspected the closure work six different times in 2003, and once again in the fall of 2006, without eliminating the gap. CP 1145-1147. "No Turn" signs that were part of the original temporary closure plan were removed just three months prior to the crash—with no change to the gap. CP 1146.

### I. Defendant Tri-State had a contractual duty to bring the gap in the double-yellow line to the State's attention

The State's Engineer, Mr. Dobbins, testified that he would have authorized eliminating the gap if he had been asked to. CP 1227. Mr. Dobbins was never told about the gap, and didn't know it was there. CP 1222-1223. According to Mr. Dobbins, the gap would have been painted for about a dollar a foot. CP 1224.

Frank Newboles, a CR 30(b)(6) witness for the State of Washington, testified regarding Defendant Tri-State's negligence. According to Mr. Newboles, under its contract with the State, Defendant Tri-State was obligated to bring the gap in the double-yellow line to the State's attention and Tri-State was obliged to ensure that there was a visible fog line in the area. Also according to Mr. Newboles, Defendant Tri-State could have erected a "warning" or "slow" sign for motorists and could have provided roadway illumination in the area. CP 1312-1315, 1316-1325, 1327-1328; CP 655-658.

Expert engineers testified that Tri-State was negligent and that it breached its contract when it failed to recognize and repair the hazardous conditions created by the 110-foot gap in the double-yellow "no-passing" centerline, the missing and damaged reflectors, and the degraded fog line on State Route 202 during routine inspections by their Traffic Control Manager/Supervisor. CP 1376; CP 1050-1051. The Standard Specifications of Tri-State's contract required Tri-State to "maintain existing roads and streets within the project limits, keeping them in good, clean, safe condition at all times." CP 655; CP 598. Tri-State had a

contractual duty to inspect and maintain all traffic control devices, including the double-yellow centerlines, fog lines and reflectors. CP 594-595; CP 598. The contract required Tri-State to inspect traffic control devices (including centerline, fog line striping and reflectors) and nighttime lighting for proper location, installation, message, cleanliness, and effect on the traveling public. CP 1376; CP 639. The contract required temporary pavement markings -- including fog lines, double-yellow centerlines and reflectors -- to be "maintained in serviceable condition throughout the project," and required that that "temporary pavement markings that are damaged shall be repaired or replaced immediately." CP 599. But at the scene of the crash all of these items were defective, and the defects proximately caused the crash. (Bragdon, Stevens, Gill).

**J. Defendant Tri-State was contractually responsible for the safety of motorists in the SR 202 construction zone.**

Tri-State's Jason Cadle testified that Tri-State is responsible for the safety of motorists who are travelling through the work site, and that safety is "part of the contract." CP 594. According to Mr. Cadle, the contracts gave Tri-State responsibility for "Overseeing all requirements of the contract that contribute to the convenience, safety and orderly movement of vehicular and pedestrian traffic." CP 595; CP 638. Mr. Cadle admits in testimony that Tri-State had a duty under its contract with the State to provide traffic control devices necessary to protect the public, whether or not those devices were furnished by the State or ordered by the

State's engineer. CP 595; CP 637. Mr. Cadle testified that pavement markings are traffic control devices. CP 594-595. State Project Engineer Dobbins agreed. CP 1223.

Tri-State claims to have no authority to change or alter the plans provided by the State, but the State's Engineer Dobbins testified on behalf of the State of Washington that Tri-State wasn't limited by the terms of its contract, and testified that if a contractor sees something that has to be done they are authorized to bring it to the state's attention. CP 1226-1227.

Tri-State's contract required Tri-State to discuss traffic control measures with the State's Engineer. CP 638. The State Project Engineer expected it and encouraged it. CP 1223-1224. Also, Tri-State's Cadle admitted that "We could point out work to the State if we saw that there was a hazard or some work that needed to be done, yes." CP 593.

Tri-State also had contractual authority to make "minor revisions to the traffic control plan to accommodate site conditions provided that the original intent of the traffic control plan is maintained and the revision has the concurrence of both the contractor and the engineer." CP 596-597; CP 639. Mr. Cadle testified that if Tri-State saw a gap in the centerline that they thought might be a hazard, they would identify that and pass that along. CP 597.

But for 12 months, from January 2006, when it was awarded the contract, until January 23, 2007, when Marla Kress was injured, Tri-State and its employees, supervisors, engineers and subcontractors worked in the immediate vicinity of this 110-foot gap in the double-yellow line (CP

586-591; CP 566-571) and failed to either paint the gap, or notify the State's engineers of its existence. CP 1223.

**K. Defendants worked near the gap every day.**

During construction, Tri-State's employees and State inspectors and supervisors worked near the gap every day. CP 666-690. Tri-State used the former intersection at NE 55th Place as a work zone. CP 586. Tri-State maintained "stockpiles" there. CP 586-587. Tri-State's workers removed old "road closed" barriers at the old intersection and replaced them with moveable barriers. CP 588; CP 683. Tri-State's employees moved barrels and barriers to let Tri-State's trucks pass through the old intersection. CP 586; CP 592; CP 666-690. This truck traffic caused degradation of the fog line at the former intersection. Steven's Dec. at para. 8. Tri-State's flaggers stood and directed traffic at or near the gap. CP 571-574; CP 589; CP 666-690. Tri-State's inspectors supervised those operations.

**L. The trial judge made findings of fact of her own, and, on this basis, granted summary judgment against the Plaintiffs.**

To recover for her injuries, Ms. Kress filed suit against the State of Washington and Tri-State Construction as Defendants, alleging negligent highway design and construction by operating SR 202 with a hazardous 110-foot gap in the double-yellow "no-passing" centerline at the location where the Kress/Mobley collision occurred. CP 6-7. Plaintiffs also alleged that Defendants negligently reduced the sight distance in the same stretch of road by erecting an 11-foot retaining wall and that they negligently

failed to lower the speed. *Ibid.* Ms. Kress also filed suit against Defendant Mobley for his negligence in colliding with her in her lane of travel. *Ibid.*

After discovery, the parties filed a number of summary judgment motions. On September 10, 2010, the trial court heard Defendant Tri-State's motion for summary judgment which was filed on August 23, 2010. The arguments raised by Defendant were the same arguments later raised in Defendant State's September 24, 2010, motion for summary. CP 50. Both Defendants argued that there was insufficient evidence to establish that the road defects were a proximate cause of the crash. ("Although the work did occur within a marked and unmanned construction zone, there is no evidence to suggest that any work, stripings or markings within the construction zone caused or contributed to the accident.) CP 53. (...there is no evidence any obliteration of the fog line was a proximate cause of the accident.) CP 61. At the hearing on September 10, 2010, the trial Judge denied Defendant Tri State's motion for summary judgment. CP 734-736.

The court asked "How do I just ignore their experts? Doesn't that create a material issue of fact, whether their experts are, in fact, correct about that? How do I just put that aside?" RP 13 September 10, 2010. Yet on December 3, 2010, the Court reversed course and granted a joint motion for summary judgment filed by Defendant State and joined by Defendant Tri State which repeated the proximate cause argument.

The trial court granted Plaintiffs' motion for summary judgment against Defendant Mobley on liability and entered an order to that effect

on November 12, 2010. CP 2058-2059. The trial judge also granted Defendants State of Washington's and Tri-State Construction's motions for summary judgment on liability[5] notwithstanding the fact that she found that the Plaintiffs had "definitely established" a number of facts that should have precluded summary judgment as a matter of law:

> We know some facts in this case which the Court can say are definitely established. We know Mr. Mobley ended up in Miss Kress' lane, that his car hit her car, the parties disagree on whether we want to call that a head-on collision or not but it was a collision, and we have fairly established by expert that he was going about 24, she was going about 50.
>
> We know the speed limit was 55. We know that she suffered catastrophic serious injuries. We know there was a retaining wall on her side due to the construction. We know there was absence of lane marking in the middle at one point in the center lane. We know that there was a lane edge that was obscured or obliterated and looking at the evidence from the plaintiffs' experts, their conclusions are that the lack of the lane marking was a hazard, the obliteration of the lane edge was a hazard, that the plaintiff's sight distance was obstructed by the retaining wall, that their lighting was poor.
>
> There is an opinion that more probably than not Mr. Mobley was misled into turning into the oncoming line. There is a further opinion that due to the retaining wall and the lack of sight distance, the speed limit should have been reduced.
>
> Their expert Stevens says the speed limit should have been 35 due to the distance obstruction from the westbound drivers facing it on the State's manual. There is another opinion from Stevens that the failure to eliminate the gap, the reflectors, the fog line edge and the lower speed not having a lower speed limit all amount to a breach of duty.
>
> The expert Tompkins -- there is a great deal of his opinion. It did appear to the Court that his opinion was that the angle appeared greater than drifting. He did have a number of scenarios as to what this angle would be. And based on the expletive, he

[5] *See* CP 2056-2057.

> may have made a right steering that reduced his heading angle to return to his own lane. RP 51-52 (Nov. 12, 2010).

Despite her acknowledgment of these "definitely established" facts, including Dr. Gill's opinion that Mr. Mobley was misled by the gap in the centerline, the trial judge found that there was no direct or circumstantial evidence that the gap in the double-yellow centerline played a role in this collision:

> This comes down to is there any actual evidence, direct or circumstantial, showing an attempt for an actual left turn. The Court's conclusion is that there is not direct or circumstantial evidence showing an attempt or an actual left turn. There is no direct or circumstantial evidence showing that Mr. Mobley was in fact misled or confused by the conditions of the roadway. So on that basis, I would grant the State and .... Tri-State's motion for summary judgment. RP 52-53 (Nov. 12, 2010).

And, of course, the trial judge's ruling ignores the sudden lack of positive guidance that the centerline, with its reflectors, provided.

Oddly, even though she had granted Defendants State and Tri-State's motions for summary judgment, the trial judge called for more briefing from the parties on the issue of the increased severity of Ms. Kress' injuries due to the failure of the Defendants to lower the speed limit in the SR 202 corridor construction zone. RP 53-54 (Nov. 12, 2010).

A hearing on this issue was held on December 3, 2010, and the trial judge once again dismissed the Plaintiffs' claims against Defendants State and Tri-State by signing yet another order granting Defendant State's motion for summary judgment, this time dismissing the Plaintiffs' claim for "enhanced injuries" (CP 2308-2309), as well as an Order Dismissing Plaintiffs' Increased Severity of Injuries Claims Against Defendant Tri-

State Construction. CP 2310-2312. The trial court also signed an order on December 3, 2010 granting Plaintiffs' motion for partial summary judgment striking the Defendants' affirmative defense of contributory fault on the part of Ms. Kress. CP 2305-2307.

Notwithstanding the fact that she had held two hearings relating to the Defendants' summary judgment motion and signed a summary judgment order in favor of the Defendants, after granting summary judgment in favor of Defendants on December 3, 2010 the trial Judge appeared to consider Plaintiffs' case as still viable:

> Ms. Brodkowitz: Your Honor, plaintiffs would simply ask for clarification. Has the Court ordered summary judgment against plaintiff such that plaintiff cannot pursue or continue with her case?
>
> The Court: I did not rule on your latest theory that the Court precluded you from arguing today. So that theory has not been ruled on. The first theory that you tried to argue today has not been ruled on. That -- that one theory has not been before the Court, because the Court ruled summary judgment.
>
> And as far as I know, the four issues that you brought -- I mean you've asked for reconsideration, which I have not looked at.
>
> But the summary judgment motion that I did hear, as far as I understood it, was based on what Mr. Mobley was doing and not on what Ms. Kress was doing. And I have not heard that theory. So I don't know if you're pursuing that theory. I don't presume to tell you what to do with your litigation. So all the theories that have been before me I have ruled on. RP 55-56 (Dec. 3, 2010); *see also* RP 15 (Dec. 3, 2010).

Because the trial judge overstepped her role on summary judgment and invaded the province of the jury by erroneously deciding factual issues belonging to the trier of fact, Plaintiffs appealed from the orders dismissing Defendants State of Washington and Tri-State Construction, as

well as the order dismissing the Plaintiff's increased severity of injuries claims against Defendant Tri-State. Similarly, Defendants State and Tri-State have both appealed from the Court's order striking the affirmative defense of contributory fault.

## V. ARGUMENT

### A. Standard of review on appeal.

Article 1, § 21 of our State Constitution mandates that "[t]he right of trial by jury shall remain inviolate." *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 644, 771 P.2d 711 (1989). Under Article 1, § 21, "[i]t is the function of the jury – not the court – to settle disputed issues of fact." *State v. Furth*, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). Likewise, RCW 4.44.090 provides that "[a]ll questions of fact ... ***shall*** be decided by a jury, and all evidence thereon addressed to them" (emphasis added).

A party's ***right*** to submit issues of fact to a jury is the "essence" of the constitutional right to a jury trial:

> Subsequent cases [to *Mullen, supra*] underscore the jury's fact finding province as the *essence* of the right's scope. *See, e.g., State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910); *In re Ellern*, [23 Wn.2d 219, 160 P.2d 639 (1945). *Sofie*, 112 Wn.2d at 645.

On a motion for summary judgment, a court does not try issues of fact; it only determines whether or not factual issues are present. *See Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302-303, 616 P.2d 1223 (1980). Summary judgment is not to be used as a substitute for a trial or to try an issue of fact. *City of Seattle v. Dept. of Labor and Industries*, 136 Wn.2d 693, 696-697, 965 P.2d 619 (1998); *Thomas v. C.J. Montag &*

*Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from the evidence, considering the facts in the light most favorable to the nonmoving party. *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 394-395, 823 P.2d 499 (1992).

Washington appellate courts review *de novo* a superior court's summary judgment dismissal of a plaintiff's negligence claim, considering the facts and any reasonable inferences drawn from them in the light most favorable to the plaintiff, as the non-moving party. *Shellenbarger v. Brigman,* 101 Wn. App. 339, 345, 3 P.3d 211 (2000). In reviewing a grant of summary judgment, appellate courts engage in the same inquiry as the trial court. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.,* 120 Wn.2d 573, 580, 844 P.2d 428 (1993). Summary judgment is proper only when the court finds that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Scott Galvanizing,* 120 Wn.2d at 580.

In this case, genuine issues of material fact clearly exist as to whether or not Defendants State and Tri-State breached their duty to keep SR 202 reasonably safe for ordinary travel. The existence of the factual issues addressed above should have precluded summary judgment for the Defendants as a matter of law under CR 56(c).

### B. The Defendants have a duty as a matter of law to keep SR 202 reasonably safe for ordinary travel.

The duty of Defendants State and Tri-State in this case arises under well-established Washington law. The Supreme Court has repeatedly emphasized in recent years that governmental entities owe a duty to the traveling public to provide reasonably safe roadways. *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005); *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). A major highway with a 55-mph speed limit through a construction zone with a centerline that suddenly vanishes is not reasonably safe, particularly at night.

In *Keller*, *supra*, the Supreme Court set forth the general duty owed by governmental entities to all persons on public roadways as follows:

> We ... hold that a municipality owes a duty to all persons, whether negligent or fault-free, to build and ***maintain*** its roadways in a condition that is reasonably safe for ordinary travel. *Keller,* 146 Wn.2d at 249. (emphasis added).

More recently, the Supreme Court has set forth this requirement in terms of an overarching duty to ***provide*** reasonably safe roadways:

> Tukwila acknowledges that it has a duty to provide reasonably safe roads and this duty includes the duty to safeguard against an inherently dangerous or misleading condition. A city's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon. *See Keller*, 146 Wn.2d at 249. The inherently dangerous formulation recognizes that "[a]s the danger becomes greater, the actor is required to exercise caution commensurate with it." *Ulve v. City of Raymond*, 51 Wn.2d 241, 246, 317 P.2d 908 (1957). Simply stated, the existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings. *Id.* at 246, 251-52. *See also*

*Bartlett v. N. Pac. Ry. Co.*, 74 Wn.2d 881, 882-83, 447 P.2d 735 (1968). *Owen,* 153 Wn.2d at 787-788.

As held by the Supreme Court in *Owen*, a governmental entity's duty to provide reasonably safe roadways is an "overarching" duty that encompasses other duties. These other duties include maintaining roadway surfaces in a proper condition so that they are reasonably safe for ordinary travel. This overarching duty also includes a duty to eliminate hazards such as snow and ice on public roadways and bridges. See *Wright v. Kennewick*, 62 Wn.2d 163, 167, 381 P.2d 620 (1963); *Bird v. Walton*, 69 Wn. App. 366, 368, 848 P.2d 1298 (1993).

Here, the evidence presented by Plaintiffs Kress established a *prima facie* case of the Defendants' negligence. The ***undisputed*** evidence in this case establishes that the Defendants breached their duty to provide a reasonably safe road in the subject construction zone of SR 202. The evidence also raises triable issues of fact as to whether or not the Defendants breach of their duty was a proximate cause of Plaintiff Marla Kress' injuries.

**C. Defendants breached their duty to keep SR 202 reasonably safe for ordinary travel.**

The evidence in this case, when viewed in a light most favorable to Ms. Kress as the nonmoving party, establishes the following:

1. Defendant Richard Mobley was lost and driving eastbound through a dark, unlit road construction project on SR 202.

2. Immediately prior to the collision, Mr. Mobley was talking on the phone to his friend, David.

3. Mr. Mobley told David that he was near 148$^{th}$.

4. David told Mr. Mobley to go home because he was closer to home.

5. David then heard Mr. Mobley say "Oh s—t!" and David lost phone reception with Mr. Mobley.

6. Mr. Mobley was travelling less than 24 mph, more than *30 miles per hour under* the posted 55 mph speed limit.

7. Mr. Mobley crossed into the westbound lane at the western end of a gap in the double-yellow "no-passing" centerline.

8. The original purpose of the gap, years prior to the crash, was to indicate a permissible left turn onto NE 55th Place.

9. The intersection with NE 55th Place had been closed for years, and was now blocked by construction of a large, temporary construction retaining wall and a concrete Jersey barrier.

10. After closure of the intersection, the 110-foot gap in the double-yellow "no-passing" centerline served no useful purpose.

11. The gap presented a hazardous condition to motorists because it falsely indicated an available left turn to drivers.

12. This area of SR 202 was dark, with no artificial lighting except that from headlights.

13. Because of the sight distance obstruction caused by the retaining wall, Mr. Mobley would have been unable to see Ms. Kress' vehicle at the time he started through the gap.

According to Traffic Engineer Edward M. Stevens, this missing centerline was ***critical*** in providing positive guidance for motorists in that it defines the lane and the direction of travel within that lane, and that,

lacking such positive guidance, drivers are at risk of traveling into an opposing lane of traffic:

> Delineation of travel path was poorly done. The westbound edge line was worn off, obliterated by dirt, and paved over in the accident vicinity. Additionally, there was a gap in the double-yellow centerline stripe at the scene of the accident. This missing centerline was critical in providing positive guidance for motorists in that it defines the lane and the direction of travel within that lane. Lacking that lane delineation, drivers are *at risk* of traveling into an opposing lane of traffic, as occurred here. Further, the gap did not contain the 4-inch yellow reflectors between the stripes. There was a substandard lack of positive guidance in the accident area due to missing striping and reflective markers. *Positive guidance*, as provided by bright, continuous striping, consistent and appropriate warning, and adequate delineation is a *critical part of work zone* safety. CP 538 (emphasis added).

Likewise, human factors expert Dr. Richard Gill reports that the various road defects cited by Mr. Stevens misled Mr. Mobley into crossing into Ms. Kress' lane of travel. CP 1604.

As explained above, during the November 12, 2010 hearing on Defendant State's summary judgment motion, the trial judge acknowledged most of the above facts as definitely established. RP 51-52 (Nov. 12, 2010).

The evidence also establishes that Defendant State breached many of its own standards near the accident scene when it (1) failed to eliminate the gap, (2) failed to install and maintain reflectors, (3) failed to maintain the fog or edge line, and (4) failed to lower speeds at the scene to a limit appropriate to the circumstances, which included reduced sight distance and a reduction in shoulder width. CP 1363. Double-yellow centerlines are required in no-passing zones, and this was a no-passing zone. CP

1324-1325; 1326-1329; CP 1221. Yellow centerline pavement markings are used to separate traffic lanes that have opposite directions of travel (according to the Manual on Uniform Traffic Control Devices Chapt.3B – hereinafter "MUTCD"). CP 1369-1371.

The State of Washington is responsible for speed limits on State highways. The appropriate stopping sight distance for a 55-mph design speed is 495 feet. CP1378. The 55 mph speed limit was appropriate prior to construction of the temporary retaining wall. CP 1377. But construction of the temporary retaining wall reduced sight distance in Ms. Kress' lane from more than 550 feet to less than 300 feet. CP1364; CP 1387. The significant reduction in stopping sight distance and the absence of any escape shoulder required a reduction in the speed limit in Marla's lane to 35 mph. CP 538. However, despite reducing sight distance with the wall, the State did not reduce the speed limit as was needed. CP 1364; CP 1376-1377. There is no evidence that the State even conducted an investigation to ascertain the appropriate maximum speed within the project limits. RCW 46.61.405.

The above standards and requirements also apply equally to Tri-State. When Defendant Tri-State signed the contract with the State of Washington, it agreed to assume responsibility for the safety of the traveling public within the project limits. CP 1312-1315; 1316- 1325; 1327-1328; CP 1331-1332. By entering into this agreement, Tri-State became an agent of the State. Tri- State agreed to be responsible for the maintenance of State Route 202, where Marla Kress was injured, and it

accepted responsibility along with the State for keeping the roadway up to applicable road safety standards. CP 1331-1332.[6]

The lack of centerline, dark construction zone, lack of visible fog line, and the lack of warning to motorists heading east to slow down, were all omissions of both Defendants State and Tri-State that Plaintiffs contend proximately caused the crash that injured Marla Kress. This evidence was all for the jury to weigh, not the court, and the trial court erred with the bench trying the case.

### D. The undisputed evidence creates a reasonable inference that Defendants' breach of duty was a proximate cause of Plaintiff Kress' injuries.

"[A]ll elements of a negligence action, including proximate cause, may be established by inferences based upon circumstantial evidence." *Raybell v. State*, 6 Wn. App. 795, 799, 496 P.2d 559 (1972). This includes proof of causation. For example, in *Klossner v. San Juan County*, 21 Wn. App. 689, 586 P.2d 899 (1978), the court explained that proximate cause may be established in highway design cases -- such as this case -- by inferences arising from circumstantial evidence:

> The county contends that the record is devoid of evidence on how the accident occurred, and there can only be speculation or conjecture to connect the condition of the road with the cause of death. Precise knowledge of how an accident occurred, however, is not required to prove negligence, and all elements, including proximate cause, can be proved by inferences arising from

[6] In fact, the State claims that under the contract Defendant Tri State was obligated to bring the gap in the double-yellow line to the State's attention and Tri-State was obliged to ensure there was a visible fog line in the area. The State further claims that Defendant Tri State could have erected a "warning" or "slow" sign for motorists and could have provided roadway illumination in the area.

> circumstantial evidence. *Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972). The question of whether or not the defendant's conduct caused plaintiff's harm is generally a question of fact. *Moyer v. Clark*, 75 Wn.2d 800, 804, 454 P.2d 374 (1969). It is only when the inferences are plain that proximate cause is a question of law. *Leach v. Weiss*, 2 Wn. App. 437, 440, 467 P.2d 894 (1970). *Klossner*, 21 Wn. App. at 692.

The court also explained that all reasonable inferences from the evidence must be drawn in favor of the nonmoving party, in that case the plaintiff:

> If any genuine issue of material fact exists, ***there must be a trial.*** *Costanzo v. Harris*, 71 Wn.2d 254, 427 P.2d 963 (1967). In the application of this rule, Klossner is entitled, as the non-moving party, to the benefit of another rule that all reasonable inferences from the evidence must be drawn in her favor. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

*Ibid* (emphasis added). The court then went on to hold that the trial court erred in granting the county's summary judgment motion. *Id.* at 694.

As in *Klossner*, the circumstantial evidence in this case, when viewed in a light most favorable to the Plaintiffs as the nonmoving party, raises a reasonable inference that the Defendants' breach of duty was a proximate cause of this collision. The evidence shows that the Defendants failed to provide positive guidance to motorists at SR 202 at its former intersection with NE 55th Place. There is no question of this. The required double-yellow centerline that should have guided motorists through this curve was non-existent. This double-yellow centerline is required in no-passing zones. This was a no-passing zone curve.

The undisputed evidence also shows that Mr. Mobley crossed into the oncoming lane of traffic and crashed into Ms. Kress at the very spot where there was a gap of 110 feet in the "no-passing" double-yellow

centerline. The evidence also establishes that the missing centerline was critical in providing positive guidance for motorists in that it defines the lane and the direction of travel within that lane. CP 538. Additionally, the evidence establishes that, lacking proper lane delineation, drivers are at risk of traveling into an opposing lane of traffic, as occurred here. *Ibid.* The fact that Mr. Mobley crossed into the on-coming lane at the very spot where the "no-passing" centerline ended raises a strong inference that the sudden lack of positive guidance at this section of SR 202 was a proximate cause of this collision.

In addition to the gap in the double-yellow centerline, evidence of the obliterated westbound fog line, the missing and worn reflectors, the short sight distance, the former presence of an intersection at the accident site, Mr. Mobley's speed at the time of the crash, and the location and position of the vehicles at impact are all material facts from which it can also be reasonably inferred that Mr. Mobley was misled by the defective pavement markings into entering the oncoming lane. CP 1202-1205, 1209-1212.

Washington courts have long recognized that an expert may testify in terms of inference if, under the circumstances, resorting to inferences is necessary to convey to the jury the full import of the factual testimony and will assist the jury in understanding matters outside common knowledge. *Palmer v. Massey-Ferguson, Inc.,* 3 Wn. App. 508, 511-512, 476 P.2d 713 (1970). In addition, an expert may express an opinion on the ultimate fact to be determined by the jury, so long as the inference drawn is not

misleading or a matter of common knowledge. *Parris v. Johnson*, 3 Wn.App. 853, 479 P.2d 91 (1970).

Briefly reviewing the factual evidence and expert opinions from which the jury may draw key inferences, Plaintiffs' experts based their opinions on evidence that the original purpose of the gap in the centerline at the point of the collision was to indicate a left turn at that spot. CP375, 1362. Expert James Bragdon states that this gap in the double-yellow centerline "gave a false indication to eastbound motorists that this may be an intersection." CP 1375. Traffic engineer Edward Stevens confirms that centerline reflectors were missing or damaged inside the gap. CP 1361. Both Mr. Bragdon and human factors expert, David Strayer, state that the reflectors on the Jersey barrier shine brightly in westbound photos, but dimly in eastbound. CP 1272, CP 1278-1280. Similarly, both Mr. Bragdon and human factors engineer, Richard Gill, state that while there was a fog line on the right, there was no fog line on the left, further reinforcing the misperception that a left turn could be made there. CP 1273-1274; CP 1210. Therefore, it is reasonable to infer, as Dr. Gill did, that Mr. Mobley was deceived by the lack of positive guidance (fog line, a continuous double-yellow centerline, and functional reflectors) and by a gap that was no longer applicable to circumstances. CP 1211-1212.

According to Dr. Gill, "the 110 foot long gap in the double-yellow centerline and the missing/degraded centerline reflectors created a hazardous condition for eastbound motorist such as Mr. Mobley, particularly at night." CP 1210. Dr. Gill also states that "[t] he roadway

on the night of the subject accident was in an unreasonably dangerous condition," and "said condition was what likely caused the accident." CP 1211. According to Dr. Gill's testimony, "the sudden/acute 110 foot long gap in the double-yellow centerline, the missing/degraded centerline reflectors, and the obliterated fog line on the north side of the roadway interacted to create an illusion that Mr. Mobley had found what he was looking for; namely, a place to turn." CP 1211.

This is proper and sufficient evidence from which a jury could ***reasonably infer*** that Mr. Mobley was lost and slowed and turned left through the gap because he perceived that the gap signified an intersection where he could turn left and go home. This inference, when viewed in a light favorable to Ms. Kress as the nonmoving party, should have precluded the granting of Defendant State's motion for summary judgment by the Court as a matter of law.

The undisputed evidence also raises a reasonable inference that had the obstructive retaining wall, the reduced sight distance, the improper posted speed limit, and the lack of road markings not been factors that evening, Marla Kress would not have been seriously injured. For instance, Ms. Kress states that she could not see Mr. Mobley's headlights until they were upon her. CP 1389. If Mr. Mobley had his left turn indicator on, Ms. Kress states that she would not have been able to see it due to the obstruction from the retaining wall. *Ibid.* Ms. Kress also states that if she

could have seen the lights coming toward her earlier, she would have tried to take evasive action to avoid serious injury. *Ibid.*[7]

According to Ms. Kress, her ability to avoid the collision was impeded because of the reduced sight distance and because the retaining wall to her right prevented her escape. CP 1389. If she had been directed by a speed advisory warning to drive at a reduced speed, she would complied ultimately preventing the serious injuries she has suffered. *Ibid.* According to Ms. Kress, she slammed on her brakes but by then it was too late to do much good. *Ibid.* If the speed limit had been lower and had she seen Mr. Mobley coming for a longer time, Ms. Kress states that she could have done more to slow her car and protect herself from such a serious injury. *Ibid.* Reconstruction engineer Tompkins and Human Factors Engineer Gill both agree.

According to Mechanical Engineer Larry Tompkins, based upon facts in the record, Mr. Mobley crossed into the westbound lane at the western end of a gap in the double-yellow "no-passing" centerline traveling at speed less than 24 mph. CP 1386-1387. Also according to Mr. Tompkins, Mr. Mobley steered through the western edge of the gap at an angle inconsistent with drift. *Ibid.* Plaintiffs' expert Richard Gill states that Mr. Mobley was deceived by the lack of road markings into crossing into the oncoming lane. CP 1211. Mr. Tompkins states that at the time

[7] According to Dr. Gill, the lack of a centerline made it more difficult for Ms. Kress to recognize that Mr. Mobley had crossed into her lane. CP 1209.

that he crossed into her lane, Mr. Mobley could not see Ms. Kress' vehicle. CP 1291.

Based on this evidence it is reasonable to infer that the retaining wall, the reduced sight distance, and the posted speed limit were each a proximate cause of the collision. CP 1212. Plaintiffs' evidence clearly establishes that genuine issues of material fact exist as to whether or not the Defendants' negligence was a proximate cause of the collision and the serious injuries sustained by Ms. Kress. Based on the facts in evidence, the trial court erred in making factual determinations pertaining to the issue of proximate cause, and in granting summary judgment in favor of the Defendants.

**E. The trial court erroneously relied on *Miller v. Likins* and its progeny in finding that there was no evidence of proximate cause.**

In support of their joint motion for summary judgment, Defendants relied heavily on *Miller v. Likins*, 109 Wn. App 140, 34 P.3d 835 (2001). But the facts in *Miller* are markedly different from this case. In *Miller*, an elderly driver struck a pedestrian, but died before he could testify. An expert for the pedestrian had testified that the pedestrian plaintiff was struck by a car while "off the vehicle portion of the roadway" but the expert also admitted in his testimony that he did not know where the injury occurred and that the damage caused "fits being hit on the shoulder, but it also fits being hit in the lane of traffic." *Id.* at 149. The trial court struck the expert's testimony because it lacked an adequate factual basis. *Id.* The appellate court affirmed stating that "there was no direct or

circumstantial evidence showing that *Likins* was in fact confused or misled by the condition of the roadway." *Miller*, 109 Wn.App. at 147.

As set forth above, this is the same rationale that the trial judge in this case used when granting the Defendants' joint motion for summary judgment on November 12, 2010:

> This comes down to is there any actual evidence, direct or circumstantial, showing an attempt for an actual left turn. The Court's conclusion is that there is not direct or circumstantial evidence showing an attempt or an actual left turn. There is no direct or circumstantial evidence showing that Mr. Mobley was in fact misled or confused by the conditions of the roadway. So on that basis, I would grant the State and .... Tri-State's motion for summary judgment. RP 52-53 (Nov. 12, 2010).

In this case, the trial court erred in relying on *Miller*. Unlike in *Miller*, the Defendants made no effort to strike the testimony of Plaintiffs' expert witnesses Tompkins, Stevens, Bragdon, Gill and Ward that forms the basis of Plaintiffs' case. Indeed, the Defendants never even deposed Mr. Gill, Mr. Stevens or Dr. Ward. In direct contrast to the *Miller* case, the evidence here establishes exactly where the crash occurred, as well as the speed, location, and trajectory of Mr. Mobley's vehicle.

The evidence shows that Mr. Mobley steered his vehicle through the western end of the gap at a speed, angle and location consistent with his turning left. The undisputed evidence is that the gap was originally meant to signal a left turn. Because of the obstructions at the scene of the crash, the evidence establishes that Mr. Mobley could not see Ms. Kress' car when he began the turn.

The Defendants also relied on *Gardner v. Seymour*, 27 Wn.2d 802, 803-804, 180 P.2d 564 (1947) in support of their joint motion. In *Gardner*, the decedent's wife sued the owner of the building where her husband fell to his death down an elevator shaft. Because no one knew how the accident took place, the plaintiff relied on a legal doctrine to satisfy proximate cause: the presumption that the decedent used due care. *Id.* at 807, 811. The court noted that a presumption is a legal burden, not evidence of anything. *Id.* at 807. Accordingly, the Court held that the existence of facts, those that would prove proximate cause, cannot rest in guess, speculation, or conjecture. *Id.* at 808.

The Defendants also cited *Marshall v. Bally's Pacwest*, Inc., 94 Wn. App. 372, 972 P.2d 475 (1999) in support of their motion. In *Marshall*, the plaintiff fell off a treadmill and suffered a brain injury but could not remember how the incident occurred. Because the plaintiff could not show any malfunction of the treadmill machine and had no recollection of how she was injured, the court held that the plaintiff had failed to present any evidence of causation except for speculation and therefore dismissed the plaintiff's case.

Both the *Gardner* and *Marshall* lacked evidence of proximate cause and instead had to rely on speculation as to how the events occurred because the victim could not testify and there were no eyewitnesses.

While it is true that Mr. Mobley has no memory of the collision or the events leading up to it, this was not an unwitnessed event like the circumstances in *Gardner* and *Marshall*. In those cases, there was *no*

*evidence* of the conduct of the decedent/injured plaintiff prior to the accident. The evidence in *Gardner* did not even show what floor of the building the decedent plummeted from. And in *Marshall*, the plaintiff could not even provide evidence that she was thrown from the treadmill, what caused her to be thrown, or how she was injured. Without evidence to trace the events of the decedent/injured plaintiff, there was nothing but conjectural theories to proceed upon, making summary judgment appropriate. On the other hand, in this case, the evidence traces Plaintiff Marla Kress' actions as well as Mr. Mobley's actions right up until the moment of impact.

Under Washington law, precise knowledge of how a crash occurred is not required to prove negligence, and there are a number of Washington cases holding that a lack of eyewitness testimony (which is not the case here) is not fatal to proximate cause. It is "sufficient if [the party's] evidence affords room for men of reasonable minds to conclude that there is a greater probability that the matter in question happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable." *Mason v. Turner*, 48 Wn.2d 145, 291 P.2d 1023 (1956) (jury allowed to consider whether drowning victim was on the barge as an employee or voluntarily at the time of his death despite a lack of eyewitness testimony); *see also Conrad v. Alderwood Manor*, 119 Wn. App. 275, 78 P.3d 177, (2003).

For example, in *Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978), the court held that that the trial court improperly granted a summary judgment motion brought by the County in a wrongful death action based on highway design. In *Klossner* there were no eyewitnesses to testify regarding the fatal one vehicle accident, but the plaintiffs asserted a number of circumstantial facts in their interrogatory answers to establish that the County's negligence caused Mr. Klossner's death. *Id* at 690-693.[8]

Moving for summary judgment, the County argued that the record was devoid of evidence of how the accident occurred, and there could only be speculation or conjecture to connect the condition of the road with the cause of death. The trial court granted summary judgment in favor of the County on this basis, and the plaintiffs appealed.

Looking at the evidence in the record in the evidence most favorable to the plaintiffs, the appellate court held that the trial court improperly granted summary judgment and reversed and remanded the case because "the county never met its burden of negating the existence of admissible evidence to prove Klossner's case". *Id.*. at 690-694.

Likewise in *Sketo v. Olympic Ferries, Inc.* 436 F.2d 1107 (9th Cir. 1970), a Ninth Circuit case applying Washington law, the Court rejected Defendant's reliance on *Gardner v. Seymour,* 27 Wn.2d 802, 180 P.2d 564

[8] Interestingly, these interrogatory answers did not state that the information was based upon personal knowledge and no other evidence was presented.

(1947) and found that circumstantial evidence is enough to prove proximate cause even in unwitnessed fatal accident cases:

> Circumstantial evidence is clearly proper in Washington to support liability, including proximate cause, in negligence cases. 'Circumstantial evidence is sufficient to establish a prima facie case of negligence, if it affords room for men of reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not.' *Sketo* at 1109 *citing Wise v. Hayes*, 58 Wash.2d 106, 108, 361 P.2d 171, 172 (1961).

The Court went on to hold that there was ample circumstantial evidence to support a finding that a potentially deceptive ferry step was a proximate cause of the alleged unwitnessed hemophiliac's death. The circumstantial evidence was that prior to the slip and fall the boy was not acting carelessly and that he was aware of his condition and need to exercise extreme caution. *Id.*

In this case, Plaintiffs presented extensive circumstantial evidence showing that Mr. Mobley was in fact confused or misled by the condition of the roadway. Based on this evidence, the trial court erroneously relied on *Miller v. Likins* and its progeny in ruling that there was no evidence of proximate cause.

**F. Defendants' failure to lower the speed limit itself can be a proximate cause on its own of the Plaintiffs' injuries.**

As discussed above, the trial judge requested further briefing from the parties on the issue of whether the Defendants' failure to lower the speed limit itself can be a proximate cause on its own of the Plaintiffs' injuries. The answer to this question is "yes."

In *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 466, 921 P.2d 1098 (1996), Reiko Doherty, then five months pregnant and traveling with her 23-month-old daughter, lost consciousness and then lost control of her rental car. *Doherty*, 83 Wn. App. at 466. Ms. Doherty veered across several lanes of traffic, and then ran head-on into a Metro bus that failed to yield. *Id* at 467. Ms. Doherty died in the crash and her daughter was seriously injured.

Ms. Doherty's husband filed suit, contending that the Metro driver owed a duty of care to all oncoming traffic, and breached this duty by failing to yield the right of way. Mr. Doherty argued that but for the bus driver's failure to yield, his wife's and daughter's injuries would have been less severe. Metro moved for summary judgment on the theory that proximate cause could not be established. It argued that the crash and resulting injuries would have occurred even if the bus had fully stayed within its left turn pocket and contended that any connection between the placement of the bus and the ultimate tragic result of the crash was too remote to impose legal liability.

In opposing Metro's motion, the plaintiff presented evidence from an expert crash reconstruction that Ms. Doherty's car would not have hit the bus head-on if the bus had remained in its left turn lane. At most, it likely would have struck the bus at a 15- 20 degree angle. Assuming that her car continued at the same speed and direction, the evidence established that the severity of this glancing blow to the bus's side would have been

substantially less than the head-on collision that actually occurred. *Id.* at 467-469.

In addition to the reconstruction evidence, plaintiff also produced a declaration from Dr. Carley Ward that his wife would likely not have suffered fatal or seriously disabling injuries had the bus remained within the left turn lane. The trial court struck Dr. Ward's declaration because it failed to explain her qualifications to provide medical opinions. The trial court then granted summary judgment to Metro on the issue of proximate cause. *Id* at 468.

On appeal, the Court of Appeals held that it was error for the trial court to grant summary judgment to defendant on the issue of proximate cause, even without considering Dr. Ward's declaration. The Court remanded the case, holding that "He [Doherty] argues that a reasonable person would conclude from the evidence that, but for the bus driver's failure to yield, Doherty's wife's and daughter's injuries would have been less severe. We conclude that these are genuine issues of material fact and should be determined by a jury." *Id* at 470.

The Court of Appeals reasoned that on the one hand, defendant "Metro did not establish that the same accident and same consequences would have occurred even if Metro's driver were not blocking part of the northbound roadway." While "[o]n the other hand, even without the affidavit of Dr. Ward, Doherty has produced sufficient evidence to raise a genuine issue of material fact as to the nature and severity of the collision had the bus remained within its left turn lane." *Id.* at 471.

The *Doherty* case is exactly on point in this case. As in *Doherty*, the Plaintiffs argue that without the negligence of Defendant State of Washington and Defendant Tri-State, the crash and ***resulting injuries*** would be less severe, *i.e.*, the nature and severity of the crash would have been reduced. Meanwhile, neither Defendant State nor Tri-State can show that the same accident and consequences would have occurred without the significantly reduced sight distance and lack of reduction in the speed limit in Ms. Kress' lane to 35 mph.

As in *Doherty*, the Plaintiffs responded to Defendants' joint motion for summary judgment with unrebutted expert testimony from a crash reconstruction engineer and an expert in injury causation. With regard to the testimony of the crash reconstructionist in *Doherty*, the Court of Appeals held that "Inferences from this evidence, when viewed in the light most favorable to the nonmoving party, raise sufficient factual issues to proceed to trial."

Here, and in *Doherty*, the resulting injuries are catastrophic.[9] Plaintiffs have provided unchallenged, unquestioned testimony from a biomechanical expert that her more serious injuries were directly related to

[9] At last count Ms. Kress has endured at least 18 surgeries resulting from the crash. Ms. Kress' right elbow bone was completely crushed; her right leg was broken just below the hip joint; and her right and left femurs were also broken; her patella was crushed, as was her right foot; her left tibia broke in half and erupted out of her skin; and a disk in her back fractured. In the places where her body was fractured she is held together with pins, screws, plates and rods. Three and a half years after the crash she is still enduring surgeries as her doctors work to alleviate pain caused by hardware and new bone growth. Her most recent surgery took place on September 23, 2010.

the high speed nature of the crash and would not have occurred, or would have been less serious, in a lower speed crash.

As she did in *Doherty*, biomechanical engineer Dr. Carly Ward, opined in this case that a reduction in the impact speed of the Moberly and Kress vehicles would have substantially reduced Ms. Kress' potential for sustaining severe injuries in the crash:

> Any reduction in impact speeds and Delta-V will reduce the potential for, and limit the severity of, injuries to the lower extremities. Energy in an impact is a function of velocity squared, exponentially related to the Delta V. High speed impacts are also very high energy impacts. Had Ms. Kress' vehicle been traveling at 40 mph, resulting in a Delta-V of approximately 22.5 mph, a reduction in the severity of her injuries would be expected. Vehicle intrusion would be reduced, and the forces reacting on her lower extremities would be reduced, and the likelihood of a femur fracture is reduced with a reduction in the severity of the collision. Fractures and injuries to her thoracic spine and pelvis would be less likely to occur and would be less severe if they did occur.
>
> I have reviewed the revised calculations and the Delta-V's as provided by the accident reconstruction engineer Larry Tompkins. Considering the 35 mph approach speed of Ms. Kress' Dodge Durango, with revision of the Delta-V from 12.5 mph to 16.5 mph, the likelihood of Ms. Kress sustaining severe injury would not occur, and the 16.5 mph Delta-V would have no appreciable effect for causing lower extremity, thoracic spine or pelvic injuries. CP 489.

Here, as in *Doherty*, the unrebutted, unchallenged testimony of engineer Larry Tompkins is that a 35-mph speed limit would have produced a much lower speed crash. Here, as in *Doherty*, the unrebutted testimony is that the Defendants' negligence played a direct role in the nature and severity of the crash. In *Kress*, experts Bragdon and Stevens have testified that a lower speed limit was required because of the sharply reduced sight distance, and Dr. Richard Gill and Mr. Stevens testified that

additional sight distance would have allowed Marla Kress to assess and react to situation by braking and steering.

As the *Doherty* opinion explains, negligence consists of "(1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) injury; and (4) that ***the claimed breach was a proximate cause of the resulting injury***." *Doherty*, 83 Wn. App. at 469 (emphasis added). Similarly, RCW 4.22.070 requires the jury to allocate fault to "to every entity which caused the claimant's damages." See also WPI 41.04 ("you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury to the plaintiff)."

The Ninth Circuit also recognizes liability for increased severity of injuries in negligence cases. *Pacific Greyhound Lines v. Rumeh*, 178 F.2d 652 (9th Cir. 1950). In *Rumeh*, a Greyhound bus collided with a Ford. Injured bus passengers sued. The Defendant bus company argued that the Ford swerved into its lane and the swerving of the Ford was so sudden that the collision was unavoidable, and the bus's excessive speed was not the proximate cause of the passenger's injuries. The court stated "However, it is obvious that even if inevitable the negligent excess speed increased the violence of the impact and contributed to the injuries to appellees which, as later seen, were very severe, while the two occupants of the Ford car were killed." *Id* at 653.[10]

[10] Other courts across the nation also recognize liability where a crash would have been less severe but for the defendants' negligence, regardless of the specific duty owed. *See, e.g. Boodoo v. Cary*, 21 F.3d 1157, (D.C. Cir.1994); *State v. Two Bulls*, 547 N.W.2d 764 (S. Dakota, 1996); *Brownell v. Fred M. Manning, Inc.*, 102 F. Supp. 138 (D.C.Mont. 1952).; *Hennessey v. Burlington Transp. Co.*, 103 F. Supp. 660 (D.C.Mont. 1952).

Here, the trial court erred in failing to recognize that the Defendants' failure to lower the speed limit itself can be a proximate cause on its own of the Plaintiffs' injuries.

## VI. CONCLUSION

On summary judgment, Defendants State and Tri-State had the burden of showing that no genuine issues of material fact existed as to its negligence. CR 56(c). All factual claims were to be viewed in a light most favorable to Ms. Kress, as the non-moving party.

Defendants failed to meet their burden. The evidence clearly shows that they breached their duty to provide a reasonably safe roadway at the SR 202 construction zone. The evidence also shows that the breach of duty by the Defendants was a proximate cause of Ms. Kress' injuries.

In the face of this clear evidence pointing to the Defendants' negligence, the trial court erroneously granted their summary judgment motions. It improperly and prejudicially dismissed this important action brought to hold Defendants State and Tri-State accountable for the injuries that they caused Ms. Kress. In doing so, the lower court usurped the fact-finding role of the jury in this case. For this reason, as well as those above, the orders of the trial court must be reversed and the case remanded for trial.

Respectfully submitted this 28th day of April, 2011.

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## CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on April 28, 2011, I served or caused to be served a true and correct copy of Opening Brief of Appellant Kress, by email and by U.S. Mail, postage prepaid and addressed as follows:

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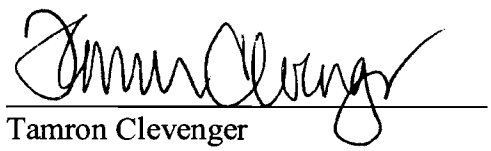

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