

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

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REPLY BRIEF OF APPELLANTS KRESS/APPELLANTS'  
RESPONSE TO DEFENDANTS' CROSS APPEALS

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## I. INTRODUCTION

The undisputed evidence in this case clearly establishes that Defendants State of Washington and Tri-State Construction negligently failed to keep the subject construction zone of SR 202 in a reasonably safe condition for ordinary travel as required by the law of Washington. This evidence establishes that the Defendants negligently failed to correct a number of serious hazards present in this construction zone at the time of the collision. These hazards included a 110 foot gap in the center line, missing reflectors inside the gap, shortened sight distances, a dangerously high speed limit, and a degraded fog line.

Based on this evidence, neither Defendant State nor Defendant Tri-State seriously disputes their negligence in this case.<sup>1</sup> Instead, Defendants both claim that there is no evidence that their negligence proximately caused Mr. Mobley to cross into Ms. Kress' lane of travel. But this claim is wrong. The undisputed evidence in this case shows that Mr. Mobley crossed into the opposite lane of travel and crashed into Ms. Kress' vehicle at the very location in the construction zone where the Defendants had negligently failed to keep SR 202 reasonably safe for ordinary travel due to the hazards discussed above.<sup>2</sup>

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<sup>1</sup> In fact, on September 10, 2011, the trial court denied Defendant Tri-State's motion for summary judgment. CP 734-736.

<sup>2</sup> Defendants claim that Mr. Mobley was in the wrong lane for "[f]or an unknown period of time and distance..." Respondent Tri-State's Opp. at 5. But they offer no evidence in support of this claim. The only evidence on this issue is that up until the time that he exclaimed "oh sh\*t," Mr. Mobley had been on his cell phone with David Giroux for twelve minutes (CP 1703), driving and following curves, without any incident until he reached the location in the construction zone where the centerline was missing.

In addition to misleading Mr. Mobley, the Defendants' negligence robbed Marla Kress of the opportunity to recognize the impending crash and take evasive action to protect herself. The unrebutted testimony of Plaintiffs' expert engineers establishes that the gap in the center line, the shortened sight distance, and the other alleged defects all made it impossible for *Marla Kress* to perceive and react to her predicament in time to avoid serious injury.

The crash occurred on a curve where sight distance had been reduced by a temporary wall but where the speed limit remained 55 mph. The crash also occurred in a location where there was no centerline and where centerline reflectors were either missing or damaged and at a spot where the safety shoulder on Ms. Kress's right had been eliminated by placement of the temporary retaining wall and Jersey barrier. The unrebutted evidence is that each of these defects was a proximate cause of Ms. Kress's injury without regard to *why* Mr. Mobley crossed into her lane. In other words, the same defects affected both parties to the crash, and the same defects proximately caused Ms. Kress' injuries. The roadway within this construction zone was simply unsafe.

Defendants have rebutted none of this evidence. Instead, they argue that the Plaintiffs cannot prove causation against them because Mr. Mobley has no memory of how the collision occurred. But the law does not require precise knowledge of how an accident occurred in order to prove proximate cause. *Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978), *citing Raybell v. State*, 6 Wn. App. 795, 496

P.2d 559 (1972). All elements of a negligence claim, including proximate cause, can be proved by inferences arising from circumstantial evidence. *Ibid.* The undisputed circumstantial evidence in this case supports an inference that Defendants' negligence caused Mr. Mobley to be misled as he attempted to drive through the construction zone and that the negligence of the Defendants in failing to safely maintain this portion of the SR 202 construction zone was a proximate cause of this collision.

The Defendants further ignore that under Washington law there can be more than one proximate cause of an event or injury. *See* WPI 15.01. Given the undisputed fact that the Mobley/Kress collision occurred in a location where the Defendants negligently failed to provide a reasonably safe roadway, the evidence, when viewed in a light most favorable to the Plaintiffs, supports a strong inference that Mr. Mobley's inattention combined with the Defendants' negligence in causing this particular collision.

The inference raised by the circumstantial evidence in this case, along with evidence that the Defendants' negligence deprived Marla Kress of a chance to react to Mr. Mobley and avoid serious injury, created genuine factual issues as to causation that should have precluded the trial court from entering summary judgment in favor of Defendants State and Tri-State as a matter of law under CR 56(c). By taking it upon herself to decide disputed factual issues as to causation, the trial judge invaded the province of the jury. In doing so, the trial judge failed to consider the evidence in a light most favorable to the Plaintiff and required a higher

standard of proof of proximate cause than what the law requires. For these reasons, as well as those below, this case should be remanded back to the lower court for trial.

## **II. COUNTERSTATEMENT OF FACTS IN REPLY TO DEFENDANTS' STATEMENTS OF FACT**

### **A. The Defendants' negligence at the subject location created multiple hazards for motorists.**

For purposes of summary judgment, Defendants do not dispute their negligence in this case. *See* Respondent State of Washington's Brief at 11; Respondent Tri-State Construction's Opposition to Appellants' Opening Brief at 16. Although the negligence of the Defendants is no longer at issue in this appeal, it is important to set forth the extent of the Defendants' negligence in order to understand how their negligence combined with Mr. Mobley's inattention to proximately cause Marla Kress' injuries.

The Mobley/Kress collision occurred in a construction zone on SR 202 at the eastern end of a 110 foot gap in the double yellow center line. CP 4-5; CP 78; CP 84-85; CP 1386-1387. The construction zone was operated by the State and Tri-State. *See* Respondent Tri-State Construction's Opp. at 1. The original purpose of the 110 foot gap was to mark an intersection and a left turn onto NE 55<sup>th</sup> Place. CP 1265. When the intersection was closed the gap was never painted in. CP 1266. This 110 foot gap in the yellow centerline presented a hazard to motorists because it falsely indicated that there was an intersection at the location of the gap when no intersection in fact existed there. CP 1375-1376; CP

1273. The missing centerline also eliminated positive guidance for drivers relying on the double yellow to indicate their lanes of travel while traveling at night. CP 1361-1362.

The State of Washington knew about the gap because the State proposed closure of the intersection as part of the construction project and approved and inspected the closure work. CP 929-930. State and Tri-State workers worked near the gap often during construction. CP 666-690. Defendants both should have known about this missing centerline and the hazard it presented to drivers, but neither the State nor Tri-State took any steps to correct this hazard by repainting the missing yellow line until after the Mobley/Kress collision on January 23, 2007. CP 1387. Within a few weeks of the collision, the gap was painted. CP 1387; CP 1375. Remarkably, Defendants deny any knowledge of who painted the center line or why.

Defendants State and Tri-State further compounded the hazards created by the missing double yellow line by erecting a temporary 11-foot high retaining wall on the north side of this curve that significantly impaired motorists' stopping sight distance. CP 1361-1364; CP 1378-1379; CP 1387. As with the missing double yellow line, Defendants negligently failed to correct the sight distance hazard created by the retaining wall. CP 1049; CP 1051-1052; CP 1379. Rather than compensate for this hazard by reducing the speed limit in this construction zone – as the State's own standards required – Defendant State negligently left the speed limit in this construction zone at 55 miles per hour, and

Defendant Tri-State negligently failed to notify the State of that the speed limit was too high for conditions created by the construction project and wall. CP 1052; CP 1268; CP 1379-1380.

In addition to these acts of negligence, Defendants State and Tri-State also negligently failed to replace missing or damaged centerline reflectors on the curve and they negligently failed to repaint the fading fog line edge at this location. CP 1361-1363. The 110 foot missing double yellow centerline, the temporary 11 foot retaining wall, the missing or damaged centerline reflectors and the faded fog lines, all combined to create a hazardous condition for motorists at the precise location of the crash. CP 1604. In particular, these factors combined to eliminate the necessary guidance for motorists traveling through the curve, particularly at night, as was the case here. CP 1210-1211, CP 538. These factors also combined in such a fashion that they could mislead motorists into believing that they could make a left turn at the missing 110 foot gap in the double yellow centerline. CP 1604, CP 538.

Although the Defendants claim the retaining wall was visible and obvious, it was curving left, away from Mr. Mobley's headlights, in darkness, and even Defendants' experts concede that reflectors mounted on the Jersey barrier did not shine as brightly in WSP photos taken from Mr. Mobley's direction. CP 1215-1216; CP 1278-1280; CP 1272. Moreover, Defendants' expert, Dr. David Strayer, testified that Mr. Mobley would be partially "blinded" by his cell phone conversation, able to see some objects but not others. CP 1281-1282. In fact, Dr. Strayer

admitted that Mr. Mobley might have seen the gap, but not the temporary retaining wall. CP 1281-1282.

**B. The evidence raises an inference that the Defendants' negligence misled Mr. Mobley into believing that he could turn left at the gap.**

Defendants both dispute Plaintiffs' theory of the case that Mr. Mobley saw the 110 foot gap in the centerline and intended to turn left, believing that there was an intersection in this gap with a side road where he could turn around and head towards his home. But the undisputed evidence in case establishes that Mr. Mobley was heading in the "wrong direction," was told to "go home," and that to do so would require turning and backtracking. CP 1930; CP 553.

Contrary to the Defendants' arguments, the evidence suggests that Mr. Mobley slowed and turned left into the gap. The undisputed evidence in this case, both direct and circumstantial, establishes the following facts:

- Mr. Mobley was lost. CP 553.
- Mr. Mobley was distracted. CP1277; CP 1205.
- Mr. Mobley was going in the wrong direction. CP 1930.
- Mr. Mobley was told to "go home." CP 553; CP 1391.
- Going home meant turning around. CP 1391.
- There was a gap in the double yellow no passing lines. CP1361-1363.
- The gap originally marked an intersection and a left turn. CP 1265.

- 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.
- Drivers expect gaps at intersections. CP 1273.
- WSDOT admits that traffic control devices, including pavement markings, provide important information to drivers. CP 1264. WSDOT also admits that outdated or confusing traffic control devices can be dangerous. CP 1266.
- There was an uninterrupted fog line to the right, meaning no right turn at that location. CP 1273.
- The fog line to the left was filthy and impossible to see. CP 1362-1363.
- The area was dark with no lighting. CP 1202; CP 1210-1212.
- The barrier and wall curved away from Mr. Mobley’s headlights. CP 1215-1256; CP 1278-1280; CP 1272.
- There were missing and dysfunctional reflectors within the gap. CP 1361.
- The reflectors on the barrier appear much dimmer from Mr. Mobley’s direction than from Ms. Kress’s direction. CP 1215-1216; CP 1278-1280; CP 1272.
- Because of the obstructive wall Mr. Mobley could not see Ms. Kress’s vehicle when he began his turn. CP 1854.
- A “No Left Turn” sign for the eastbound lane had been removed by Tri-State during construction. CP 1266.<sup>3</sup>

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<sup>3</sup>DOT Engineer Hyunh testified that “No Turn” signs that once marked the defunct intersection were taken down by the Contractor. These signs, though in conflict with the gap, at least would have alerted eastbound drivers not to turn.

- Mr. Mobley turned left at the western end of the gap. CP 1856, 1860.
- Mr. Mobley yelled “Oh sh\*t!” just prior to the crash. CP 87; CP 1784.
- Mr. Mobley crashed at the eastern end of the gap. CP 1202.
- Mr. Mobley crashed at a 4.3 degree angle that was too acute to be consistent with drift. CP 1935.
- Mr. Mobley crashed at a speed of 23.5 miles per hour, which was consistent with making a turn. CP 1203.
- The posted speed limit was 55 mph.

The evidence in this case (undisputed for purposes of the summary judgment motion) shows that Mr. Mobley crossed into the opposite lane of travel and crashed into Ms. Kress’ vehicle at the very location of the 110 foot gap in the double yellow-line. CP 1386-1387; CP 1976. As explained above, this location was not only hazardous due to the 110 foot gap, it was also hazardous due to the temporary 11 foot retaining wall, the missing or damaged centerline reflectors and the faded fog lines, all of which combined to deprive motorists of positive guidance through the curve. CP 1604; CP 1361. The circumstantial evidence that the Mobley/Kress collision occurred in this very location raises a strong inference that the negligence of both Defendant State and Defendant Tri-State combined to

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They were removed before the crash and are nowhere to be seen in police photographs. CP 1203.

mislead Mr. Mobley into believing that he could make a left turn at the centerline gap in the curve.

**C. Defendants ignore evidence from the Washington State Patrol that further raises an inference that Mr. Mobley was misled into believing that he could turn left at the gap.**

Immediately prior to the collision, Mr. Mobley was conversing on his cell phone with an acquaintance, David Giroux. CP 553; CP 1774-1785. Mr. Mobley's telephone records show that their conversation lasted twelve minutes. CP 1703. According to the WSP report, this phone conversation ended abruptly when Mr. Giroux heard Mr. Mobley exclaim "oh sh\*t" and his phone went dead. CP 553.

Defendants quote liberally from the deposition of Mr. Giroux taken four years after the crash. Respondent Tri-State's Opp. at 21-22. Mr. Giroux's deposition largely corroborates a WSP investigation report made just days after the crash which the Defendants (and their expert, Dr. Strayer) ignore. According to the WSP report:

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 sh\*t!" and lost phone reception with him.

CP 553 (emphasis added).

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. Mr. Giroux's instruction to Mr. Mobley to "go home" just prior to the crash is significant circumstantial

evidence that Mobley was misled into turning left at the gap, particularly when Mr. Mobley himself testified that to “go home” he would have had to turn around and “retrace” his course. CP 1391.

**D. Defendants’ negligence deprived Ms. Kress of the opportunity to either avoid the crash or substantially reduce the severity of her injuries.**

Both Defendants focus primarily on evidence relating to Richard Mobley. They argue that there is no evidence from which a jury could find that their negligent failure to repair road defects on their construction site – including the gap in the center line, missing reflectors inside the gap, shortened sight distance, dangerously high speed limit, and a degraded fog line, all within the crash scene – proximately caused Mr. Mobley to stray into Marla Kress’s lane.

In making this argument, the Defendants ignore the fact that their negligence and the hazardous road conditions that they allowed to exist also deprived Marla Kress of the opportunity to avoid crashing with Mr. Mobley and to take evasive action to protect herself from serious injury.

The evidence establishes that:

- The lack of a center line and center reflectors on the curve eliminated Ms. Kress’s ability to perceive which *side* of the road Mr. Mobley was on until it was too late. CP 1206; CP 1209.
- The drastically reduced sight distance and inappropriately high speed limit in this location eliminated the reaction time Ms. Kress needed to use her brakes effectively or take evasive action. CP 1364.

- The temporary Jersey barrier used during construction eliminated the safety shoulder on Ms. Kress's right, cutting off her only escape route. CP 1365.

Because the negligence of the State and Tri-State made it impossible for Ms. Kress to protect herself from injury, her case against the Defendants should have survived summary judgment no matter *when* or *why* Mr. Mobley crossed into her lane. These road defects would have reduced her ability to perceive and react to the oncoming danger even under the unlikely scenario that Mr. Mobley was driving blindly down the road negotiating curves in the wrong lane for an extended period, as the Defendants suggest.

**E. Defendant Tri-State's claim that Mr. Tompkins developed his reconstruction "with no factual support" is false.**

Defendant Tri-State devotes a good portion of its brief to attacking the accident reconstruction done by Engineering Expert Larry Tompkins. Respondent Tri-State Construction's Opp. at 8-11; 23-26; *see also* Respondent State's Brief at 5-7. In doing so, Tri-State uses out-of-context quotes from its rambling, seven hour, still unfinished deposition of Mr. Tompkins.

Defendant Tri-States' quotes are misleading and its attacks on Mr. Tompkins are unfounded. CP 1829-1833. For example, Tri-State claims that Mr. Tompkins developed his reconstruction "with no factual support." Respondent Tri-State's Opp. at 8. This is untrue. Mr. Tompkins' analysis is based on the WSP reports and other photographs. CP 1838-1841. Mr. Tompkins utilized WSP measurements of the scene. CP 1845. He

measured the crush of the vehicles. CP 1863-1866. He compared crush measurements to crash test data, including crash tested Dodge Durangos. CP 1863-8; 1878-80. Mr. Tompkins used physical evidence that he obtained from WSP photos to ascertain that Mr. Mobley's vehicle was pushed rearward in the crash (CP 1839-41), and to show that Mr. Mobley was driving just 23.5 mph at the time that he turned into the oncoming lane – a speed consistent with turning. CP 1879.

In addition, Mr. Tompkins calculated impact speeds and change of velocity for both vehicles. CP 1857; CP 1875-1876. He determined rotation of the vehicles, and their post impact movement and from this determination Mr. Tompkins calculated that the two vehicles collided at an angle of 4.3 degrees. Mr. Tompkins then calculated the arc of Mr. Mobley's trajectory. CP 1979; CP 1855-1856; CP 1860-1862; CP 1891-1892. Mr. Tompkins also measured sight distances from various locations. CP 1852-1854. Mr. Tompkins determined Mr. Mobley's speed at impact consistent with an effort to complete a left turn. CP 1857-1858. He determined that Mr. Mobley's trajectory was inconsistent with drift. CP 1862. Mr. Tompkins even timed himself uttering the expletive Mr. Mobley was heard to utter just prior to the crash in order to accurately estimate reaction time. CP 1849-1850.

Mr. Tompkins is an engineer with decades of experience designing and testing vehicles for major manufacturers and a forensic engineer who has performed over 1000 accident reconstructions. CP 1862. His accident reconstruction in this case followed normal reconstruction protocols. Mr.

Tompkins did his work the old fashioned way, using pencil, paper, physics, mathematics, careful measurements, and hard work. Tri-State's claim that Mr. Tompkins developed his reconstruction "with no factual support" is simply untrue.

**F. Plaintiffs "left turn theory" is supported by its experts and is consistent with the physical and circumstantial evidence in this case.**

Defendant Tri-State also claims that engineering expert Larry Tompkins is "solely responsible for the 'Left Turn Theory.'" Respondent Tri-State Construction's Opp. at 8. This too is false. At least three separate experts provide testimony that the defective road conditions falsely indicated a left turn where there was none. Transportation Engineer Edward Stevens testified that "The double-yellow stripe should be continuous through a no-passing zone." CP 1050. Mr. Stevens testified that "Lacking that lane delineation, drivers are *at risk* of traveling into an opposing lane of traffic, as occurred here." CP 538. 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, CP 1273. (Mr. Bragdon also testified that the gap was dangerous for all drivers on the road, including westbound drivers such as Ms. Kress. CP 1273.) 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 that when combined proximately caused the crash. CP 1605-1606.

Defendant Tri-State also claims that Mr. Mobley was in the wrong lane “[f]or an unknown period of time and distance...” and that there is “no evidence to establish how long Mobley was traveling in the wrong lane of travel.” Respondent Tri-State Construction’s Opp. at 5. Again, these statements are untrue. Mr. Tompkins provided detailed, un rebutted evidence that Mr. Mobley crossed over “right at the end of the double yellow line” and “right at the beginning of the gap.” CP 1856; CP 1860. In response to questions from Defendant State, Mr. Tompkins testified that it was “unlikely” that Mr. Mobley would have been in the westbound lane any sooner than he calculated, that Defendants’ theory was “considerably more speculative” and that his opinions were given on a “more probable than not” basis with “reasonable engineering certainty.” CP 1900-1901. Defendant Tri-State pretends as if this evidence does not exist, but Tri-State presented no alternative engineering opinion or reconstruction to the trial court.

**G. Defendant Tri-State attacks a perception reaction time employed by its own experts**

Defendant Tri-State attacks Mr. Tompkins’ decision to use a two second reaction time for Ms. Kress, claiming that 1.5 seconds is commonly used by Accident Reconstruction and human factors experts. Respondent Tri-State Construction’s Opp. at 13. Mr. Tompkins testified that he chose the two second time after consultation with Richard Gill, Ph.D., because of the *complexity* of the situation Ms. Kress faced – nighttime, on a curve, with reduced reaction time, in a construction zone.

CP 1883-1885. Dr. Gill gives additional detailed reasoning for his own choice of the two second reaction time in his declaration at CP 1206-1209. Dr. Gill testifies that that the absence of center line increased Ms. Kress's reaction time. CP 1209. Ironically, despite *their* apparent objections to the two second reaction time, Defendants' own Accident Reconstruction experts, Mr. Hunter and Mr. Hunter, also used the same two second reaction time. CP 1917-18.

**H. Defendant Tri-State cherry picks information from the WSP accident report.**

Defendant Tri-State again illustrates the factual nature of this dispute by cherry picking information from the WSP report – exactly as it did with David Giroux's "go home" remark. Tri-State claims that Trooper Bassett "noted that the 'construction zone, signage, and roadway configuration was well defined and easy to read and maneuver.'" Respondent Tri-State Construction's Opp. at 6. But Tri-State ignores that part of the same investigation report that says "The Westbound shoulder is approximately 16 inches wide and is marked with *a dirt covered painted white fog line.*" CP 632 (emphasis added).

The fog line was degraded to the point of invisibility. CP 539-540. The State's Project Engineer could not see the fog line in WSP photographs of the crash scene. Transportation Engineer Edward Stevens opines that the fog line was "obliterated by dirt" and that Defendant Tri-State's own trucks, which crossed that fog line on their way to and from stockpiles maintained at the former intersection with NE 55<sup>th</sup> Place, likely

caused the damage to the fog line, which was localized at the former intersection. CP 1362-1363. State Project Engineer and CR 30(b)(6) designee Dobbins agreed that Tri-State's trucks were a potential cause of the road markings being obliterated. CP 576.

Allowing the fog line to degrade was negligence, and contrary to the contract between DOT and Tri-State, which required temporary pavement markings – including fog lines – to be “maintained in serviceable condition throughout the project,” and further required that “temporary pavement markings that are damaged shall be repaired or replaced immediately.” CP 599. The State's Project Engineer, Mr. Dobbins, testified that “the contractor” was responsible for maintaining the fog lines. CP 565. According to the unrebutted testimony of Dr. Gill, the gap in the double yellow centerline, defectively short sight distance, and *poor maintenance of the fog line* and reflectors all contributed to this driving error and the resulting crash. CP 1211-1212.

### **III. ARGUMENT**

#### **A. Standard of Review**

Appellate courts review a summary judgment order de novo, conducting the same inquiry as the trial court. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Summary judgment is appropriate only when there is no genuine issue of material fact. CR 56(c).

In ruling on a motion for summary judgment, a court should merely determine whether a genuine issue of material fact exists. *Balise v.*

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*Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (“The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.”); *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 461, 166 P.3d 807 (2007). In making this determination, the Court must consider all the material evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Mountain Park Homeowners Ass’n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). If reasonable persons considering the evidence and inferences could reach different conclusions, summary judgment must be denied. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502, 834 P.2d 6 (1992).

Summary judgment also must be denied if the record shows a reasonable hypothesis that would create a genuine issue of material fact. *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). It is improper for a court to grant summary judgment based merely on a belief that the moving party is likely to prevail at trial. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 882, 431 P.2d 216 (1967). Conflicting assertions of fact in affidavits and counter-affidavits, or in other supporting and opposing documents, raise an issue of credibility requiring that summary judgment be denied. *Balise*, 62 Wn.2d at 200.

There are conflicting assertions of fact in this case. Plaintiffs Kress have presented expert opinion testimony that the Defendants’ negligence was a proximate cause of this crash. According to the

Plaintiffs' experts, the left turn gap in the double yellow line combined with shortened sight distance, obliterated paving stripes and missing reflectors, invited the lost and distracted Mobley to make a critical, split second error and turn left where a former intersection had been blocked by construction.

Additionally, both Defendants acknowledge in their briefs that there is conflicting evidence in this case. For example, Defendant State underscores the fact that there are jury issues to be resolved by stating that "[t]he parties have competing theories as to how and why this accident occurred." Respondent State's Brief at 7. The State then presents its own expert's opinion on proximate cause. *Id.* at 4. Tri-State spends most of its brief creating issues of fact by quoting Plaintiffs' engineering expert, Larry Tompkins, out of context from a deposition that, Tri-State claims was never even finished.

These conflicting assertions of fact, as well as other arguments regarding the evidence raised in the briefing of the parties, are issues of fact to be resolved by a jury. *Balise*, 62 Wn.2d at 200. Indeed, the trial court recognized them as such and applied the law properly when denying Tri-State's original motion for summary judgment on the same facts and evidence:

How does this Court ignore their experts and grant you summary judgments when they have experts -- given that I'm supposed to take all the evidence in their favor -- and they have experts that say the loss of the sight distance when the wall was created, the speed limit should have been less because of that and if the speed had been less there wouldn't have been severe

accidents, just as an example. 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 at 14 (Sept. 10, 2010 transcript).

The Court's conclusion is, in viewing the evidence in the light most favorable to the plaintiff, basing it on the contract requirements, the duties of Tri-State to keep a safe condition at all times, that there are factual issues that are not resolvable today in a summary judgment based in part on the declaration provided by all counsel and the declarations of the various experts, so I will not grant summary judgment at this time. I leave to another day the issue brought to me by the State that apparently will be briefed at another day and, obviously, I'm not deciding any other issues today but I will not grant the motion for summary judgment at this time.

RP at 45 (Sept. 10, 2010 transcript).

As the trial judge recognized at the September 10<sup>th</sup> hearing, the evidence in this case raises genuine issues of fact as to the cause of the Mobley/Kress collision and the cause of Ms. Kress' serious injuries that preclude summary judgment as a matter of law. Based on this evidence, the trial judge erred in granting the Defendants' summary judgment motions later on in the course of this case.

**B. Circumstantial evidence is sufficient to establish a question of fact as to proximate cause.**

“The term proximate cause means a cause which in a direct sequence produces the event complained of and without which, such event would not have happened.” WPI 15.01. There can be more than one proximate cause of an event. *Ibid.*

By its very nature, the issue of proximate cause is ordinarily a question of fact for the jury. *Bordynoski v. Bergner*, 97 Wn.2d 335, 340,

644 P.2d 1173 (1982). It is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that proximate cause can be decided as a matter of law by the Court. *Bordynoski*, 97 Wn.2d at 340; *Mathers v. Stephens*, 22 Wn.2d 364, 370, 156 P.2d 227 (1945); *Harris v. Burnett*, 12 Wn. App. 833, 532 P.2d 1165 (1975). As the evidence in this case shows, that is not the case here. Genuine issues of material fact exist as to the causation of the Mobley/Kress collision. By deciding these factual issues, the trial judge erred by deciding factual issues that should be for the jury.

Circumstantial evidence is sufficient to establish a question of fact as to proximate cause, if it affords room for 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. *Hernandez v. Western Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969); *Wise v. Hayes*, 58 Wn.2d 106, 108-109, 361 P.2d 171 (1961).

The rationale underlying this rule was explained by our Supreme Court over 70 years ago:

There are very few things in human affairs, and especially in litigation involving damages, that can be established to such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for the damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause.

*Nelson v. West Coast Dairy Co.*, 5 Wn.2d 284, 296-297, 105 P.2d 76 (1940); see also *Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978) (precise knowledge of how an accident occurred is not required to prove negligence; all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence).

An example of a case applying this rule is *Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972). *Raybell* involved the death of a motorist whose car left a state highway and plunged to the bottom of a canyon. There were no witnesses. *Raybell*, 6 Wn. App. at 796. The evidence was that the decedent was generally unfamiliar with the highway in that area. *Raybell*, 6 Wn. App. at 798. On behalf of the decedent, the plaintiff contended that there was inadequate warning of the narrowing of the roadway and the absence of a shoulder or guardrail. *Raybell*, 6 Wn. App. at 799. At the outset, the court noted that “all elements of a negligence action, including proximate cause, may be established by inferences based upon circumstantial evidence.” *Raybell*, 6 Wn. App. at 801. The court held that the circumstantial evidence was sufficient to support a verdict in favor of the plaintiff on the inadequate warnings claim:

\* \* \* There is a growing awareness that highway design and the manner in which drivers are informed of the design plays more than an incidental part in highway accidents.

In the case at bar, the evidence was sufficient, in our judgment, to establish a fact question for the jury that the locus in quo was inherently dangerous and of such character as to mislead a traveler exercising reasonable care. The type of harm which occurred was reasonably foreseeable. [citation omitted] There was, likewise, ample testimony that the state breached its duty,

both in failing to adequately warn of the hazard and in failing to install a feasible barrier system along the roadway to protect those who reasonably became confused by the design of the highway.

\* \* \*

Defendant urges, however, that where causation is based upon circumstantial evidence, the factual determination may not rest upon speculation and conjecture; and if there is nothing more substantial 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 there would be no liability, a jury is not permitted to speculate on how the accident occurred. [citations omitted]

That rule is applicable only where the jury must speculate on how the accident occurred. While we cannot know with certainty why decedent's vehicle left the road, there is neither a presumption that he did so negligently nor that he committed suicide. [citation omitted] [T]here were substantial and not conjectural theories as to why his vehicle left the roadway and the outcome depended upon which circumstantial evidence the jury chose to believe. In our view, the rule contended for is not applicable here.

*Raybell*, 6 Wn. App. at 803.

Another illustrative case is *Schneider v. Yakima County*, 65 Wn.2d 352, 397 P.2d 411 (1964), which involved the death of a teenager who was a passenger in a car that left a county road on a curve at the top of a steep declivity and hurtled downward, landing 120 feet below the road. There were no advisory speed signs or other warnings that one's speed should be reduced for the curve. The legal speed limit on the road was 60 mph, but there was evidence that any speed in excess of 35 mph was dangerous on the curve. *Schneider*, 65 Wn.2d at 355. Although the driver survived, he did not testify at the trial. Thus, there was no direct evidence from the driver as to whether he was familiar with the presence of the curve and the

need to reduce his speed, or whether he was actually deceived by the lack of warning signs. Despite this lack of direct evidence from the driver of the vehicle, the Supreme Court held the evidence to be sufficient to support a verdict for the plaintiff:

From this testimony [of the passengers in the front seat], it can be inferred that the signs posted did not convey an adequate warning of the situation ahead and that had there been any signs to indicate the urgent necessity to reduce speed, this accident would have been averted.

This is far from conclusive proof of proximate cause, as must always be the case where the negligence relied upon is a failure to give adequate warning; ***but it clearly rises above speculation and conjecture to the level where reasonable minds can conclude that more likely than not adequate warnings would have prevented the accident which caused the injuries.***

*Schneider*, 65 Wn.2d at 359 (emphasis added).

Numerous other cases stand for the proposition that proximate cause may be proved by circumstantial evidence. *See, e.g., Hernandez v. Western Farmers Association*, 76 Wn.2d 422, 425, 456 P.2d 1020 (1969) (“Circumstantial evidence is sufficient to establish a prima facie case of negligence, if it affords room for . . . 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.” (quoting *Wise v. Hayes*, 58 Wn.2d 106, 108-109, 361 P.2d 171 (1961))); *Papac v. Mayr Bros. Logging Co.*, 1 Wn. App. 33, 38, 459 P.2d 57 (1969) (“Inferences based upon circumstantial evidence may be, and in this case are, sufficient to establish proximate cause.”).

A fact is not based upon speculation when the fact is based upon reasonable inferences drawn from admissible circumstantial evidence. When there are conflicting inferences that can be drawn from the evidence, it is for the *jury* to draw from the evidence any reasonable inferences fairly deducible therefrom. *Harrison v. Whitt*, 40 Wn. App. 175, 177-179, 698 P.2d 87 (1985); *State Farm Mut. Ins. Co. v. Padilla*, 14 Wn. App. 337, 339, 540 P.2d 1395 (1975). That is certainly the case here.

As in *Raybell* and *Schneider*, a reasonable inference can be drawn from the evidence in this case that a cause of Mr. Mobley's crossing into Marla Kress' lane of travel was due to the negligence of the Defendants, including the gap in the center line, missing reflectors inside the gap, shortened sight distance, dangerously high speed limit, and a degraded fog line, all within the crash scene. Whether or not this inference supports a finding of causation rests with the jury rather than the court and should have precluded summary judgment as a matter of law under CR 56(c).

**C. The evidence in this case supports a reasonable inference that Mr. Mobley's inattention combined with the Defendants' negligence in proximately causing the crash.**

There can be more than one proximate cause of an event or injury. *See* WPI 15.01. Here, the undisputed facts establish that the Mobley/Kress collision occurred in a location where the Defendants negligently failed to provide a reasonably safe roadway due to a 110 foot gap in the center line, missing reflectors inside the gap, shortened sight distance, dangerously high speed limit, and a degraded fog line. This evidence, when viewed in a light most favorable to the Plaintiffs, supports a strong inference that Mr.

Mobley's inattention combined with the Defendants' negligence caused this particular collision.

The inference that road defects in the WSDOT/Tri-State construction project contributed causally to Mr. Mobley's driving error is supported by a thorough accident reconstruction and thorough analysis of the scene and construction defects. For example, Human Factors Engineering Expert Richard Gill, Ph.D., testified that "Mr. Tompkins' reconstruction of the speed and steer angle of Mr. Mobley's vehicle is consistent with a driver attempting to make a left hand turn through the gap in the center line." CP 1204. Dr. Gill testified that "the extended gap in the yellow center line created a "trap" for a distracted driver such as Mr. Mobley" (CP 1205) and that this gap would have cued drivers that there was an intersection at this location:

the extended gap in the double yellow would have been a cue that there was an intersection at that location. The combination of the roadway curving left in front of him, the solid and visible edge line to his right, and his headlights inherently aimed to the right, would all have alerted him to the fact there was no road exiting to the right; hence, the likely conclusion is that the intersecting road was to the left.

*Id.* at 1204.

Dr. Gill further testified that this gap created a hazardous condition for motorists such as Mr. Mobley:

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 (and created a hazard for all motorists, such as Ms. Kress, who shared the road with Mr. Mobley). That is, centerlines are

important to provide positive guidance to motorists; not only are they vitally important in assisting motorists in maintaining their lateral lane position, but centerlines also provide information as to when it is safe to pass and/or cross over the centerline (i.e. such as when it is safe to make a left hand turn).

CP 1210.

Making matters even more hazardous at this location, Dr. Gill testified that “The faded/obliterated fog line on north side of the roadway (i.e. on Mr. Mobley’s left) exacerbated the illusion that the gap in the centerline was marking an intersection.” CP 1211.

Dr. Gill additionally testified that all of these hazardous conditions made SR 202 unreasonably dangerous in this location unsafe and that they contributed to the Mobley/Kress collision:

The roadway on the night of the subject accident was in an unreasonably dangerous condition; furthermore, said condition was what likely caused the accident. More specifically, the following defective conditions contributed to the collision:

- a. The defectively short site distance for westbound motorists;
- b. The gap in the centerline, along with the defective/missing centerline reflectors;
- c. The degraded fog line on the north shoulder of the roadway.

CP 1211-1212.

Finally, Dr. Gill testified that the State’s own standards require highway designers to take into account distracted drivers when designing road plans:

None of this excuses Mr. Mobely’s own negligence. However, the Washington State Department of Transportation’s

own standards require that designers consider both distracted and even impaired drivers when designing roads and traffic control plans. Here the situation created by the State and its contractor was confusing, with conflicting messages, and was a hazard to Mr. Mobley and, more importantly, to Ms. Kress.

CP 1212.

Regarding his opinion, Dr. Gill testified that his opinion was not speculation” but founded in the science of human factors engineering:

This opinion is not speculation – it is founded in the science of human factors engineering. In arriving at this conclusion I have ruled out other hypothesis. For example, it has been hypothesized that Mr. Mobley merely drifted because of inattention. But the trajectory of his vehicle is consistent with steering, not drift; and on a road that curves left, an inattentive driver would be more likely to head more or less straight and drift off the right side of the road. The only hypothesis that matches all of the evidence in a logical way is that Mr. Mobley steered through the gap before recognizing that there was no intersection. This is something many inattentive or distracted drivers do. (Each of us has probably seen a driver who has turned the wrong way on a one way street.)

CP 1205-1206.

Although Defendants’ Human Factors expert David Strayer, Ph.D., has a *conflicting theory* on proximate cause (Respondent State’s Brief at 3), Dr. Strayer testified that he used a methodology very similar to the one used by Dr. Gill, and that it was not “speculation.” CP 1283-1284. Dr. Strayer testified that human factors experts rely upon records such as police reports, medical records, testimony, phone records, etc., to form their opinions. CP 1285. Dr. Strayer testified that the gap in the double yellow line served no purpose and could be confusing to motorists (CP 1280); that “cell phone blindness” causes drivers to see some things and

not see others (CP 1281); that it is possible that Mr. Mobley saw the gap but did not see the retaining wall, and began to turn (CP 1282). Dr. Strayer admitted that he was not aware of the statement in the police report that Mr. Mobley was told to “go home” immediately before the crash, and that it is possible Mr. Mobley felt he had to turn around in order to “go home”. CP 1288.

Transportation engineer Edward Stevens confirms both Dr. Gill’s and Mr. Tompkin’s conclusions that the negligence of the Defendants deprived motorists of positive guidance in this location. Mr. Stevens testified that from a road design perspective the lack of lane delineation in the subject curve put drivers at risk of traveling into oncoming lanes 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.

CP 1361.

Up until the moment of the crash when he exclaimed “oh sh\*t”, Mr. Mobley had been on his cell phone with Mr. Giroux for twelve minutes (CP 1703). Although he may have been on his cell phone, the undisputed evidence in this case shows that Mr. Mobley drove for these twelve minutes without any incident until he reached the curve in the

construction zone with the 110 foot gap in the double yellow line. In other words, the evidence is that Mr. Mobley crossed into the opposite lane of travel and crashed into Ms. Kress' vehicle at the very location in the construction zone where the Defendants had negligently failed to keep SR 202 reasonably safe for ordinary travel due to all of the hazards discussed above. This evidence supports a reasonable inference that Mr. Mobley's inattention combined with the Defendants' negligence in proximately causing the crash and that the trial judge should have denied the Defendants' summary judgment motions.

**D. The negligence of the State and Tri-State was a proximate cause of this collision because it deprived Ms. Kress of the chance to avoid the collision and/or her injuries.**

Defendants both refer to what they term as the "Appellants' enhanced injury theory." This badly mischaracterizes the Plaintiffs' argument. Contrary to the Defendants' mischaracterization, counsel for the Plaintiffs specifically emphasized to the court that "this is not an enhanced case." RP 25, RP 26-27 (Nov. 12, 2010 hearing transcript). Plaintiffs' claim is that the negligence of the State and Tri-State was a proximate cause of this collision and/or Marla Kress' injuries because their negligence deprived Ms. Kress of the chance to either avoid the collision and/or at least lessen the severity of her injuries.

Because they mischaracterize the Plaintiffs' claim, both Defendants totally ignore and fail to address evidence that their negligence in failing to repair road defects at the scene of the crash – including specifically the missing reflectors and the gap in the double yellow line –

prevented Marla Kress from quickly recognizing her predicament and taking effective action to either avoid the collision or protect herself from serious injury.

WDOT's Design Manual states that "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 (emphasis added). Marla Kress was denied this ability by the temporary retaining wall. This wall reduced the sight distance in Ms. Kress' lane from more than 550 feet to only 283 feet. This reduced sight distance prevented Marla from being able to see far enough ahead to see Mr. Mobley's approaching vehicle in time to take appropriate action by either avoiding a crash at highway speeds or being able to maneuver her vehicle to lessen the intensity of the crash and reduce the extent of her injuries.

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. By the time she was finally able to see Mr. Mobley's vehicle, it was too late – as a matter of geometry/physics – to avoid the catastrophic crash.

Ms. Kress depended on the State and its contractor to post the proper speed limit for the available sight distance through this unlit construction zone. According to WSDOT's Design Manual, 495 feet of stopping sight distance are required for a 55-mph speed limit, Ms. Kress had only 283 feet of sight distance. 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. Because of the improper speed limit, Ms. Kress had no chance to avoid the collision or prevent her own injury.

Mr. Mobley crossed into Ms. Kress' lane through a gap in the centerline on a curve. There was no line, and therefore no reference for Ms. Kress to quickly determine that Mr. Mobley was crossing into her lane. CP 1208; CP 1883. Human Factors Engineer Richard Gill, Ph.D. testified that "the absence of a double yellow at the location where Mr. Mobley crossed over hindered Ms. Kress's ability to recognize her own predicament and react in such a way as to prevent or reduce her injuries" and further that "a center line provides a salient and discrete cue as to whether or not an oncoming vehicle has crossed into one's lane of travel..." CP 1206, 1209. Dr. Gill established that "[A] centerline provides a reference point to aid in determining the rate at which an oncoming vehicle is crossing into one's lane of travel." CP 1209.

An escape route to her right would have provided a way for Marla Kress to steer safely out of the way of the oncoming Mobley vehicle, but the shoulder to her right was eliminated during construction by a Jersey barrier that was placed just 12-16 inches to the right of the worn, degraded

fog line. As a result, Marla Kress had nowhere to go, and not enough time to brake effectively.

Here, the evidence supports an inference that the negligence of the State and Tri-State was a proximate cause of this collision because it deprived Ms. Kress of the chance to avoid the collision and/or her injuries. For this reason, as well as those above, the trial judge erred in entering summary judgment in favor Defendant State and Defendant Tri-State.

**E. The Defendants' own theory is speculative**

Defendant State claims that Plaintiff Kress' theory of the case relies upon layers of speculation. It does not. Plaintiffs' theories are based upon the careful analysis and accepted methodologies of five different engineers, two of whom hold Ph.D.'s in engineering and three of whom have had long careers in the field. *See* CP 1198-1212 (Gill Dec.); CP 479-486 (Tompkins Dec.); CP 503-512 (Bragdon Dec.); CP 487-502 (Ward Dec.); CP 537-547 (Stevens Dec.).

The defense theory is that Mr. Mobley was seriously distracted by talking on his cell phone while driving, failed to maintain proper lane position, crossed into Ms. Kress' lane of travel, and collided head-on with her vehicle. *See* Respondent State's Brief at 7. Dr. Strayner stated that in his opinion "Mr. Mobley was using his cell phone at the time of the accident that he was lost and confused, that he failed to maintain his lane position and strayed into the oncoming lane of traffic and that impairment caused by the cell phone was a proximate cause of the accident." CP 1277.

Under the defense theory, it must be assumed that Mr. Mobley is so distracted that he crosses into the oncoming lane at some unknown point at 50 mph, but:

- Maintains his position in the wrong lane while negotiating lengthy curve at high speed;
- Drives through most of the curve on the wrong side of a double yellow line and reflectors (which, being on the outside of the curve, are lighted by his headlights);
- Drives through the curve with the Jersey Barrier to his immediate left;
- Fails to notice the supposed retro-reflective reflectors on the barrier (which are in range of his headlights);
- Fails to notice that the oncoming lane to his left has suddenly disappeared;
- Fails to notice that a new lane has appeared to the right of the double yellow line;
- Suddenly returns to his senses and shouts “Oh Sh\*t!”
- Then, instead of attempting to evade a crash by steering right, steers his vehicle left towards the concrete barrier at an angle of 4.3 degrees, while still travelling 50 mph;
- Yet somehow, does not hit the barrier; and despite the fact that his vehicle was supposedly moving at a speed equal to Ms. Kress and has not been knocked rearward in the collision,
- Somehow winds up parked on top of his own spare tire, which broke loose during the crash; and,

- All of this happens to occur in a small portion of the construction site where numerous dangerous road defects are evident in police photos taken immediately after the crash.

This theory of the crash is completely speculative and without any basis in logic or fact—so much so that the Defendants failed to submit a single declaration from one of their engineering experts in support of it. In addition, this theory does not negate the inference from the evidence that Mr. Mobley’s inattention combined with the Defendants’ negligence in proximately causing this collision.

**F. The cases that the Defendants relied on in support of their summary judgment motions do not apply here based on the inferences that arise from the circumstantial evidence in this case.**

Both Defendants make much of the fact that Mr. Mobley had no memory of how his injury occurred. Relying primarily on *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001), *Johanson v. King County*, 7 Wn.2d 111, 109 P.2d 307 (1941), and *Moore v. Hagge*, 158 Wn. App. 137, 241 P.3d 787 (2010), Defendants claimed that because Mr. Mobley does not remember what caused him to cross over into the oncoming lane, they were entitled to summary judgment. But these cases are inapposite here because of the admissible circumstantial evidence in this case and the clear inferences that this circumstantial evidence creates.

In *Miller v. Likins, supra*, the defendant’s vehicle hit a 14-year-old boy at a curve in the road where two streets converged. The defendant, who was 87 years old at the time of the accident, subsequently died from causes unrelated to the accident. The boy’s mother filed suit against the

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defendant driver, as well as the city for failure “to adequately or properly perform design, engineering and maintenance duties instrumental to keeping the roads, streets and sidewalks and lighting in a reasonably safe condition for ordinary travel by persons using them.”

The trial court entered summary judgment in favor of the city. The appellate court affirmed on the basis that there was no evidence that any of the defects suggested by the plaintiff actually confused or misled the defendant driver:

In this case, Miller contends that the accident occurred when Likins' vehicle crossed over the fog line and onto the shoulder of the road, striking Quirmbach. Miller claims that if the City had taken additional precautions, such as installing raised pavement markings on the fog line, lowering the speed limit, or posting additional road signs, Likins “would have been likely to be more alerted to possible presence of pedestrians, enabling him to avoid a collision.” But like the driver in *Johanson*, Likins passed away before he could give his own sworn account of how the accident happened. ***There is no direct or circumstantial evidence showing that Likins was in fact confused or misled by the condition of the roadway.*** Like the plaintiffs in *Johanson* and *Kristjanson*, the most Miller can show is that the accident *might* not have happened had the City installed additional safeguards. Miller's contentions “can only be characterized as speculation or conjecture.” Accordingly, a jury could not reasonably infer that had the City implemented the additional precautions [plaintiff's expert] suggested, Likins would not have crossed the fog line and hit Quirmbach. We conclude summary judgment was proper here because Miller failed to satisfy her burden of producing evidence showing that the City's negligence proximately caused Quirmbach's injuries.

*Miller*, 109 Wn. App. at 147 (emphasis added).

The outcome in *Miller* turned on the fact that there was no evidence, circumstantial or otherwise, tending to prove that the defendants' negligence caused the plaintiff's injuries. That is not the case here. In this case, the reasonable inferences drawn from the evidence establish a genuine issue of material fact as to whether or not the negligence of the Defendants was a proximate cause of Mr. Mobley crossing into Ms. Kress' lane of travel.

The same analysis holds true for *Johanson v. King County, supra*. In *Johanson*, the plaintiff, who was injured in a motor vehicle accident, argued that the County was negligent in failing to remove old road lines which could mislead drivers into thinking that the road was a two-lane, rather than a four-lane road. The plaintiff asserted that the driver who caused the accident "*might have been* and probably was deceived and misled by the yellow line." But since the driver who caused the accident was killed in the accident, the plaintiff could not offer any testimony to show that the driver was in fact deceived by the old lines and that the driver's misunderstanding caused the accident. The Washington Supreme Court affirmed dismissal of the claim against the County because even if the County breached its duty of care, the plaintiff failed to present any "testimony, or inference which can reasonably be drawn from [the] testimony, that the location of the [road] line was a proximate cause of the accident." In reaching this conclusion, however, the *Johanson* court suggested that a reasonable inference that the driver of an automobile was misled or deceived by the residue of a directional yellow line in a highway

that had been recently expanded would be sufficient to defeat summary judgment. *See Johanson*, 7 Wn.2d at 122. Because the *Johanson* plaintiff and his passenger both testified that they knew nothing of how or where the accident had happened, the trial court properly granted the County's summary judgment motion. *Johanson*, 7 Wn.2d at 116-117.

Again, in this case the evidence creates a reasonable inference that the Defendants negligence in failing to safely maintain this construction zone misled Mr. Mobley into believing that he could turn left in the 110 foot gap in the double yellow centerline. As described by Plaintiffs' experts, the lack of positive guidance for motorists in this construction zone created a hazardous situation that put drivers at risk of traveling into an opposing lane of traffic, as occurred here. CP 1361. Unlike the facts in *Johanson*, the facts in this case raised a reasonable inference that the Defendants' negligence was a proximate cause of Mr. Mobley's driving error.

Likewise, in *Moore v. Hagge*, *supra*, a pedestrian plaintiff sustained serious injuries when he and a vehicle operated by the defendant driver collided on South 240th Street in the City of Des Moines. The plaintiff brought claims against both the driver and against the city for its failure to provide a safe roadway. The trial court then dismissed the plaintiff's claim against the city on summary judgment and the plaintiff appealed. Because he had no memory of the collision, and no one saw him immediately before it, the plaintiff relied on his own testimony about his routine walking habits and expert testimony about roadway conditions

in the accident vicinity to show that the City's failure to provide a safe roadway caused the accident.

On appeal, the court upheld the trial court's ruling. In its opinion, the court noted that the investigating officer reported that "the pavement was dry, that the reflectorized lane markings, center buttons, and fog lines were clearly visible, and that the adjacent grass shoulder, open ditch, and gravel footpath were visible." *Moore*, 158 Wn. App. at 142. The court also noted that the city's engineering expert opined that "there was no unusual danger in S. 240th Street, in the vicinity where [the plaintiff's] accident occurred" and that this expert also found ample sight distance for pedestrians to see oncoming vehicles in either direction, providing "a reasonabl[y] safe opportunity for [the plaintiff] to wait in the adjacent grass shoulder area for any traffic to clear before making a decision to cross S. 240th Street-if he had chosen to do so." *Id.* at 143. Based on this and other evidence, the court affirmed summary judgment in favor of the city.

Contrary to the evidence in *Moore*, the evidence in this case shows that the Defendants negligently failed to properly maintain the subject construction zone in a reasonable safe manner for ordinary travel as the law required them to do. Plaintiffs' experts all opine that the gap in the centerline, the shortened sight distance, dangerously high speed limit, and a degraded fog line all made this location unsafe for motorists traveling through this area. Unlike the situation in *Moore*, the curve on SR 202 had significantly reduced sight distances, the reflectors in this area were either

damaged or missing and the fog lines were obliterated with dirt to the point where they could not be seen. Also unlike *Moore*, the evidence and testimony of these experts establishes that these hazardous conditions could mislead motorists into traveling into the oncoming lane of traffic, as the Plaintiffs allege happened here.

#### **IV. OPPOSITION TO DEFENDANTS' COUNTER APPEAL**

It is conceded by all that Marla Kress was driving straight ahead, within her lane. The Defendants' own expert agrees that she was traveling below the posted speed limit and that there was no evidence that she was exceeding the speed limit prior to the crash. CP 1934. Statements to the contrary by respondents' attorneys are mere speculation.

The Mobley vehicle, coming from the opposite direction in darkness, suddenly entered her lane and crashed into her.

The Defendants had the burden of producing admissible evidence of a tortious act by Ms. Kress that proximately caused the crash and her resulting injuries. They produced nothing.<sup>4</sup>

That, of course, is why partial summary judgment was granted dismissing their affirmative defense of contributory fault pursuant to Civil Rule 56.

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<sup>4</sup> "The Defendants' reference to Marla's driving earlier in the evening is obviously irrelevant, whether 10 minutes before or the day before. The single issue before the court was whether the Defendants could produce evidence that she committed a tortious act that was a proximate cause of the crash – at the time of the crash. They failed."

Lawfully driving within one's own lane of travel, within the speed limit, having consumed no alcohol or drugs – just traveling straight ahead – is not tortious conduct, and the Defendants' mere allegation of contributory fault, without supporting admissible evidence, was properly rejected.

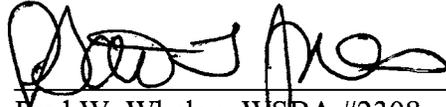
## V. CONCLUSION

The evidence clearly shows that Defendants 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. On the one hand, there is copious evidence to support the reasonable inference that numerous roadway defects, including an obsolete and misleading 100 foot gap in the centerline, missing reflectors, a degraded fog line, and shortened sight distance misled an already distracted Richard Mobley to turn left where an intersection had been closed by construction. By the same token, and without regard to why Mr. Mobley crossed into her lane, it is undisputed that those *same defects*, along with an inappropriately high speed limit and the absence of any escape shoulder, eliminated any hope Ms. Kress had to take evasive action to protect herself from catastrophic injuries.

Despite clear evidence of both negligence and proximate cause, 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 14th day of July, 2011.

A handwritten signature in black ink, appearing to read 'Paul W. Whelan', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on July 14, 2011, I served or caused to be served a true and correct copy of Reply Brief of Appellants Kress/Appellants' Response to Defendants' Cross Appeals, by U.S. Mail, postage prepaid and addressed as follows:

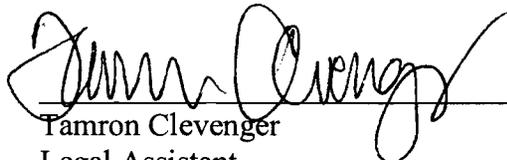
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