

NO. 66352-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

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.

RESPONDENT STATE OF WASHINGTON'S REPLY BRIEF

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This reply brief is limited to the comparative negligence of Ms. Kress. As set forth in the State's Brief at p. 39, the trial court improperly dismissed the State's comparative negligence affirmative defense because an issue of fact exists whether Ms. Kress was driving too fast for conditions. If this court affirms the trial court's summary judgment orders dismissing the State and Tri-State, this cross appeal is moot. However, if this court reverses those orders, it should also reverse the trial court's order withdrawing comparative negligence from the jury's consideration.

Ms. Kress's position essentially is that if she was not traveling in excess of the posted speed limit, she must not have been negligent. (Appellants' Reply Brief, p. 41.) However, she cites no authority and fails to address the statute and case law which plainly state otherwise.¹ An operator of a vehicle is negligent when he or she drives too fast for conditions, even while driving at or below the posted speed limit. *Id.*; *See also, Owens v. Seattle*, 49 Wn.2d 187, 193, 299 P.2d 560 (1956). "The maximum statutory rate of speed is not always permitted by law." *Robison v. Simard*, 57 Wn.2d 850, 852, 360 P.2d 153 (1961). Specifically addressing the issue of speed on a curve in a highway with a limited

¹ RCW 46.61.400 and 46.61.445, cited in the State's response at pp. 41-42, require a driver to appropriately reduce speeds where road conditions--including curves--warrant, and that a posted speed limit does not relieve an operator from "the further exercise of due care and caution as further circumstances shall require."

shoulder and a posted speed limit of 50 m.p.h., the Supreme Court in *Johnson v. Ohman*, 10 Wn.2d 466, 117 P.2d 217 (1941), found the appellant plaintiff comparatively negligent even though he was driving under the speed limit and had even slowed for the curve. It held:

[F]ifty miles an hour is the maximum lawful speed limit, and is permissible only under the most favorable circumstances. The statute which fixes the limit . . . qualifies it by providing that a vehicle must be operated 'in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation . . .'

Johnson, 10 Wn.2d at 469-70.

Here, there is admissible evidence to support the State's position that Ms. Kress was driving too fast for conditions, and it comes from Ms. Kress's own testimony and that of her own experts. Ms. Kress testified that in the construction zone where the accident occurred, the road was tight and she used the retaining wall as a guide. (CP 1541-1542; see State's response at p. 40.) The lighting was poor. *Id.* Because of these conditions, "[i]t's always been a problem." (CP 1541.) In fact, as with the plaintiff in *Johnson, supra*, Ms. Kress testified *she slowed down* for the curve. (CP 1539, 1540.) She did this because she knew it was a construction zone and because it was "tight". *Id.*

Ms. Kress's traffic engineering expert Ed Stevens opined that "[t]he ability to see ahead was reduced, *calling for an appropriate reduction in speed.*"

(CP 1564; emphasis added.) He believes the posted speed limit of 55 m.p.h. was too high given the conditions in the construction zone and that the speed limit should have been 35 m.p.h. *Id.* However, Ms. Kress testified she was driving "50 -- or under 55" in the construction zone (CP 1538.)

The testimony of Ms. Kress and her experts presents a question of fact whether Ms. Kress was driving too fast for conditions. Ms. Kress testified she slowed down for the curve and knew, before the accident, that the area had "always been a problem". It is for a jury to decide whether "50 -- or 55" was slow enough for conditions despite the fact her expert Mr. Stevens testified the speed limit should have been 35 m.p.h.

Respectfully submitted, this 15th day of August, 2011.

MURRAY, DUNHAM & MURRAY

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CERTIFICATE OF SERVICE

I, Dorothy Brooks, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on this day, I caused a true and correct copy of Respondent's Motion for Extension of Time to File Respondent State of Washington's Brief and Declaration of Harold B. Field to be served upon the following in the manner indicated therein:

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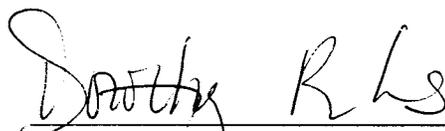
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DATED this 15th day of August, 2011, at Seattle,
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