

No. 66352-6-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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/Cross-Appellants.

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RESPONDENT TRI-STATE CONSTRUCTION, INC.'S REPLY BRIEF
IN SUPPORT OF CROSS APPEAL

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I. INTRODUCTION IN SUPPORT OF TRI-STATE'S CROSS APPEAL

The Kresses assert, without any legal support and contrary to Marla Kress' own testimony and the opinions of her experts, that "lawfully driving within one's lane of travel, within the speed limit, having consumed no alcohol or drugs – just traveling straight ahead – is not tortious conduct." (*See* Kress' Response to the Cross Appeal at 40-41). Kress' conclusory statement fails to consider Washington statutes and controlling case law.

The Court of Appeals should reverse the trial court's ruling that Kress was not contributorily negligent because Tri-State Construction presented genuine issues of material fact regarding Kress' failure to adhere to the Rules of Road (RCW 46.61) by: (a) driving her vehicle at a speed greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards; (b) failing to drive at an appropriate reduced speed when approaching and going around a curve and when special hazards existed due to roadway conditions; and (c) failing to control to her speed to identify, anticipate, and avoid a collision. When viewing the facts in the light most favorable to Tri-State—the nonmoving party—the trial court's ruling should be reversed.

II. SIGNIFICANT EVIDENCE ESTABLISHES THAT KRESS WAS CONTRIBUTORILY NEGLIGENT

Kress' eight sentence opposition to Tri-State's cross-appeal fails to dispute the facts or law submitted by Tri-State in its opening brief. (*See* Kress' Response to the Cross Appeal at 40-41). Accordingly, the facts and legal argument asserted by Tri-State regarding Kress' negligence are uncontroverted, undisputed, and unchallenged. As such, the Court of Appeals may rule as a matter of law that Kress bears fault for this accident by her failure to exercise due care for her safety, or alternatively, reverse and remand for a jury's consideration of genuine issues of material fact.

As her "main route," Kress was familiar with the ongoing construction work on SR 202 because she traveled through the construction area at least 20 times per week for several months—i.e., over 200 times. (CP 1529-31) (*See* Kress' Response to Cross Appeal at 40-41). Throughout the months that she drove through the construction area, she never had any problems driving through the curve in the construction zone; never noticed a gap in the double-yellow centerline; and never had any problem staying in her own lane of travel. (CP 1541-44).

Kress admitted that because of the known construction activities, "you need to kind of *slow down*" and "you always have to be careful and

attentive.” (CP 1539; CP 1544). However, despite acknowledging the need to exercise caution, Kress failed to obey traffic control devices through the known construction zone in her rush to get to work. (CP 1534-38; CP 1551). Mere seconds prior to the head-on collision and in an effort to avoid waiting for a red light, Kress made a right turn onto eastbound SR 202, made an illegal U-turn within the construction zone, and quickly accelerated to *at least* 50 mph on westbound on SR 202 before impact. Id.

No evidence exists to establish the speed of Kress’ vehicle prior to impact. Kress estimates, but cannot confirm, that she was “going 50 – or under 55 mph” prior to the collision. (CP 165). Kress’ accident reconstruction expert, Mr. Tompkins, “arbitrarily” set Kress’ speed at 55 mph prior to impact and was unable to refute the very real possibility that Kress was speeding through the known construction zone. (CP 1554-61). Regardless, according to Kress’ transportation engineer, Ed Stevens, any speed over 35 mph would be considered “speeding” or “too fast for conditions” given Mr. Stevens’ opinion that “the speed limit (or advisory speed on the curve) should have been reduced from 55 mph to 35 mph.” (CP 1575). Whether Kress should have been traveling at the speed recommended by her own expert (35

mph) rather than the speed she estimates she was driving (50-55 mph) is a question for the jury.

Notably, the trial court dismissed defendants' affirmative defense of comparative fault only *after* dismissing both the State and Tri-State from the case. Specifically, after dismissing the State and Tri-State, the trial court ruled:

The only evidence before the Court on this issue is when she's driving, from the evidence of the experts, she's driving at 50. The speed limit is 55. What she would have seen is the Jersey barrier. And based on that, I don't think there's any showing that she had notice of a hazardous condition such that the statute cited in the opposing briefs [RCW 46.61.400] are—come into play. So the Court would dismiss the contributory fault defense at this time. (RP at 55 (Dec. 3, 2010)).

However, the evidence establishes the following genuine issues of material fact regarding Kress' contributory negligence:

- (1) Kress was in a rush to avoid being late for work (CP 1536);
- (2) Kress disregarded traffic control devices in a known construction area and made an illegal U-turn because she was too impatient for the light to turn green (CP 1534-37; 1551);
- (3) Kress was traveling 50 mph around a curve *at the time of impact* and could have been traveling in excess of the 55 mph speed limit prior to impact (CP 1386; 1538)¹;

¹ Appellant Kress states in her Response Brief that “[i]t is conceded by all that Marla Kress was driving straight ahead[.]” (See Kress Response to Cross Appeal at 40) This is erroneous as the impact occurred as Kress approached and traveled along a curve in the roadway.

- (4) Kress' own experts claim that the speed limit should have been reduced from 55 mph to 35 mph due to the roadway conditions (CP 1575; 1564);
- (5) Kress admitted that had she "been driving more slowly and had more time to react, [she] could have done more to slow [her] car and prevent the serious injuries [she] suffered" (CP 1590); and
- (6) Kress saw the illumination of Mobley's headlights suddenly enter her lane and only had time to slam on her brakes immediately prior to impact. (CP 5; 1389).

Based on these unconverted facts, a jury could conclude that Kress was contributorily negligent by breaching her statutory duty to drive at a speed no greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing and to reduce her speed when approaching and going around a curve, when traveling upon a narrow or winding roadway, and when special hazards existed due to traffic, weather, or highway conditions. (RCW 46.61.400(1) & (3)). Contrary to the trial court's ruling, it was Kress' duty to drive at an appropriately reduced speed based upon the conditions, with regard to actual and potential hazards.

III. LEGAL ARGUMENT IN SUPPORT OF TRI-STATE'S CROSS APPEAL THAT KRESS WAS CONTRIBUTORILY NEGLIGENT

- A. Viewing All Evidence and Inferences in the Light Most Favorable to Tri-State, the Trial Court Erred in Striking Tri-State's Affirmative Defense of Comparative Fault.**

Kress argues, without any legal authorities, that “[t]he Defendants had the burden of producing admissible evidence of a tortious act by Ms. Kress that proximately caused the crash and her resulting injuries.” (See Kress Response to Cross Appeal at 40). However, in a summary judgment motion, it is Kress’ burden, as the moving party, to demonstrate there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper. Atherton Condo. v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990) *citing* Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). “The moving party is held to a strict standard” and “any doubts as to the existence of a genuine issue of material fact is resolved against the moving party.” Atherton Condo., 115 Wn.2d at 515 *citing* Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 38, 785 P.2d 447 (1990). “In addition, we consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party.” Id.

Kress’ Response to Tri-State’s Cross Appeal not only disregards her burden, but also dispenses with the “strict standard” to which she is held. Instead, she states in relevant part, as if a *fait accompli*, that she was traveling “lawfully.” (See Kress Response to Cross Appeal at 40). However, Tri-State has presented admissible evidence - based upon Kress’ own testimony and

the opinions of Kress' own experts - that creates genuine issues of material fact that Marla Kress was traveling too fast and/or failed to appropriately reduce her speed based upon conditions and with regard to actual and potential hazards. As such, the trial court's ruling should be reversed.

In dismissing the State's and Tri-State's affirmative defenses, the trial court ruled that "I don't think there's any showing that [Kress] had notice of a hazardous condition" as she would have only seen a Jersey barrier. (RP at 55 (Dec. 3, 2010)). The trial court misinterpreted and misapplied RCW 46.61.400(1) & (3) as "notice of a hazardous condition" is not a prerequisite for driving in a reasonably safe and prudent speed. RCW 46.61.400 states, in relevant part:

(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

* * *

(3) The driver of every vehicle shall, consistent with the requirements of subsection (1) of this section, drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

RCW 46.61.400(1) & (3) (emphasis added).

Kress' experts assert that the speed limit should have been reduced from 55 mph to 35 mph based upon various roadway conditions and hazards. However, Kress admitted she was aware of the conditions created by the construction and admitted she had to slow down, be careful, and be attentive. (CP 1539; CP 1544). Kress had a statutory duty to: "drive at an appropriate reduced speed;" be aware of "actual and potential hazards;" control her speed to avoid a collision; and reduce her speed when "approaching and going around a curve" and "when special hazards exist due to roadway conditions." See RCW 46.61.400(1) & (3). As such, significant evidence exists to refute Kress' conclusory claim that she was "driving lawfully." (See Kress' Response to Cross Appeal at 41).

B. Merely Driving at or Just Below the Posted Speed Limit Does Not Exonerate a Driver from Contributory Negligence.

Kress inexplicably failed to address RCW 46.61.400 and controlling Washington case law, Hough v. Ballard and Harris v. Burnett, as detailed in Tri-State's Opening Brief in Support of its Cross Appeal at 42, 45-47. Contrary to the trial court's ruling in this case which required "notice of a hazardous condition," Hough v. Ballard held that "RCW 46.61.400 imposes a

duty to drive at a prudent speed, not only for known conditions, but also for ‘potential’ hazards.” Hough v. Ballard, 108 Wn. App. 272, 284, 31 P.3d 6 (2001). This alone illustrates the trial court’s error.

In addition, in this case, the trial court erred by basing its ruling on the belief that Kress was driving slightly below the posted maximum speed limit at the time of impact. (RP at 55 (Dec. 3, 2010)). However, in Hough, the Court of Appeals reversed the trial court’s decision and ruled that this was an issue for the jury. In addition, the Court in Hough, relying heavily on Harris v. Burnett, held:

- “*It is for the jury to decide* whether the driver of a vehicle was exceeding the speed limit or exceeding a reasonable speed under the circumstances and whether such excessive speed constituted negligence[.]”
- “Where there is conflicting evidence as to the proper speed on an approach to an intersection, *it is for the jury to decide (a) what was a reasonable speed under all of the circumstances, (b) was that speed exceeded by the approaching driver, and (c) if so, was the speed a proximate cause of the accident*” [internal citations omitted].
- “The operator of a motor vehicle is required to drive at a speed that allows him to observe the roadway ahead and be able to take appropriate action in the event that hazards appear in his path” [internal citations omitted].

Id. (citing Harris v. Burnett, 12 Wn. App. 833, 532 P.2d 1165 (1975)).

In reversing the trial court's decision, the Court in Hough held there was "substantial evidence to raise questions of material fact as to whether Hough failed to exercise due care in driving at a speed appropriate for the existing and potential conditions and hazards." Id. at 286. More significantly, the Court of Appeals rejected plaintiff's argument that he was free of comparative negligence because he was driving at a speed less than the posted speed limit. Id. at 286-87. The Court concluded that plaintiff's argument was "contrary to law" and RCW 46.61.445, which stated:

Compliance with speed requirements...shall not relieve the operator of any vehicle from the further exercise of due care and caution as further circumstances shall require.

Id. (citing RCW 46.61.445 (emphasis original)).

"The purpose of this statute is to indicate that, under certain conditions, the lawful speed may be less than the posted speed limit." Hough at 287 (citing Owens v. Seattle, 49 Wn.2d 187, 299 P.2d 560 (1956)). "Posted speed limits merely indicate the maximum speed a person may legally drive a vehicle; but these posted speed limits give way "when a special hazard exists that requires lower speed for compliance with subsection (1)." Id. (citing RCW 46.61.400(2) (referring also to RCW 46.61.445, .400(1)). "A party may be liable for negligently contributing to

causing a collision if “he was traveling at a rate of speed greater than reasonable or proper under the conditions existing at a particular point of operation[.]” Id. (citing Shultes v. Halpin, 33 Wn.2d 294, 205 P.2d 1201 (1949)).

Kress’ argument is the exact argument the Court of Appeals rejected in Hough. Kress states that “[a]t the point of impact Ms. Kress was going 49 mph—or more than five miles per hour under the posted speed limit.” (Kress’ Opening Brief at 15). Kress then argues that she was therefore driving “lawfully.” (See Kress’ Response to the Cross Appeal at 40-41). However, as unequivocally set forth in Hough, simply traveling at or just below the posted maximum speed limit does not exonerate one from contributory fault.²

Kress’ Response states that she had “reduced sight distance” as she approached the curve which did not allow her an opportunity to “maneuver her vehicle to lessen the intensity of the crash and reduce the extent of her injuries.” (Kress Response at 31). However, pursuant to RCW 46.61.400, Hough, and Harris (among other cases that Kress does not address or rebut), it is a question for the jury to determine whether Kress was driving at a speed that was greater than was reasonable and prudent given the conditions and

² Further, as explained above, Mrs. Kress testified that she does not know how fast she was going as she never looked at her speedometer, but intimated that it was under 55 mph prior to the collision. (CP 165).

with regard to the actual and potential hazards on the highway. Similarly, it is a question for the jury to determine whether Kress was driving at an appropriately reduced speed due to the alleged reduced sight distance and roadway conditions. Finally, as stated in Hough, Kress was “required to drive at a speed that allowed [her] to observe the roadway ahead and be able to take appropriate action in the event that hazards appear in [her] path.” Id. (citing Harris v. Burnett, 12 Wn. App. 833, 532 P.2d 1165 (1975)).

Tri-State has submitted an abundance of evidence to establish genuine issues of material fact that Kress was contributorily negligent. Accordingly, this Court should reverse the trial court’s order dismissing the State’s and Tri-State’s affirmative defense.

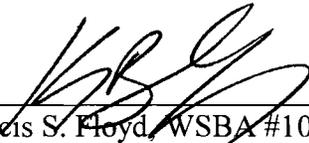
VI. CONCLUSION

Tri-State respectfully requests that if the Court of Appeals reverses the trial court’s decisions, or any part thereof, on the issues of proximate cause or enhanced injury, then this Court should likewise reverse the trial court’s ruling that Kress is fault-free. Pursuant to RAP 14.1 and RAP 14.2, Tri-State further requests that it be awarded all expenses and fees provided in RAP 14.3 if it prevails on appeal.

Dated this 15th day of August, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 15th day of August, 2011, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

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