

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,

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 BRIEF

William W. Spencer, WSBA #9592
Harold B. Field, WSBA #11020
Dirk Bernhardt #33071
Of Attorneys for Respondent State of Washington
MURRAY, DUNHAM & MURRAY
200 West Thomas, Ste. 350
PO Box 9844
Seattle WA 98109-0844
Phone: (206) 622-2655
Fax: (206) 684-6924

FILED
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
2011 MAY 27 PM 3:07

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

I. STATEMENT OF THE CASE.....1

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR...10

III. ARGUMENT.....11

 A. THE APPELLANTS’ FOCUS ON NEGLIGENCE
 ISSUES MISSED THE POINT.....11

 B. PROXIMATE CAUSE REQUIRES PROOF OF
 CAUSE IN FACT.....12

 C. THE APPELLANTS’ FAILURE TO ESTABLISH
 THAT MR. MOBLEY WAS IN FACT MISLED BY
 THE CONDITION OF THE ROADWAY IS FATAL
 TO THEIR CLAIM.....14

 D. THE CASES RELIED UPON BY THE
 APPELLANTS TO REBUT THE STATE’S
 SPECULATION AND CONJECTURE ARGUMENT
 ARE EASILY DISTINGUISHABLE.....23

 E. THE TRIAL COURT PROPERLY REJECTED THE
 APPELLANTS’ ENHANCED INJURY THEORY...30

 1. Appellants’ Theory Is Not Supported By Case Law
 31

 2. Appellants’ Theory Undermines Public Policy....37

F.	MS. KRESS' SPEED, UNDER THE CIRCUMSTANCES, CREATES AN ISSUE OF FACT REGARDING COMPARATIVE NEGLIGENCE.....	39
IV.	CONCLUSION.....	44

TABLE OF AUTHORITIES

FEDERAL CASES

Boodoo v. Cary, 21 F.3d 1157 (D.C. Cir. 1994).....34, 35

Brownell v. Fred M. Manning, 102 F.Supp. 138 (1950).....35, 36

Hennessey v. Burlington Transp. Co., 103 F.Supp. 660 (1950).....36

Pacific Greyhound Lines v. Rume, 178 F.2d 652 (9th Cir. 1949).....36

Sketo v. Olympic Ferries, 436 F.2d 1107 (9th Cir. 1970).....23, 25, 27

WASHINGTON CASES

Baughn v. Honda Motor Co., Ltd., 107 Wn.2d 127, 727 P.2d 655 (1986)
.....12

Channel v. Mills, 77 Wn. App. 268, 890 P.2d 535 (1995).....31, 32, 37

Coates v. Tacoma School Dist. No. 10, 55 Wn.2d 392, 347 P.2d 1093
(1960).....12

Doherty v. Municipality of Metropolitan Seattle, 83 Wn. App. 464, 921
P.2d 1098 (1996).....32, 33, 34

Gardner v. Seymour, 22 Wn.2d 802, 809, 180 P.2d 546, 569 (1947).13, 26

Garcia v. State of Washington Dept. of Transportation, et al. (Div.1, 2011
No. 63689-8-1, certified for publication).....20, 21

Hartley v. State of Washington, 103 Wn.2d 768, 698 P.2d 77 (1985).21, 38

Hough v. Ballard, 108 Wn. App. 262, 31 P.3d 6 (2001).....42, 43

Johanson v. King County, 7 Wn.2d 111, 122, 109 P.2d 307 (1941)
.....12, 13, 14, 15, 16, 17, 19

<i>Klossner v. San Juan County</i> , 21 Wn. App 689, 586 P.2d 899 (1978).....	23, 24, 25, 27
<i>Kristjanson v. City of Seattle</i> , 25 Wn. App 324, 326, 606 P.2d 283 (1980).....	16, 17
<i>Laguna v. State of Washington</i> , 146 Wn. App. 260, 264, 192 P.3d 374 (2008).....	33, 34
<i>Mathis v. Ammons</i> , 84 Wn. App. 411, 928 P.2d 431 (1996).....	12
<i>McCoy v. American Suzuki Motor Corp.</i> , 136 Wn.2d 350, 961 P.2d 952 (1998).....	12
<i>Miller v. Likins</i> , 109 Wn. App 140, 34 P.3d 835 (2001)...	15, 16, 17, 19, 23
<i>Moore v. Hagge</i> , 158 Wn. App 137, 241 P.3d 787 (2010).....	18, 19, 20
<i>Nakamura v. Jeffery</i> , 6 Wn. App 274, 492, P.2d 244 (1972).....	21, 22
<i>Owens v. Seattle</i> , 49 Wn.2d 187, 299 P.2d 560 (1956).....	42
<i>State v. Two Bulls</i> , 547 N.W.2d 764 (1996).....	36, 37

OTHER AUTHORITY

RCW 46.61.400.....	41, 43
RCW 46.61.445.....	42

I. STATEMENT OF THE CASE

This personal injury case arises from a head-on collision between two Dodge Durangos. On January 23, 2007, Ms. Kress was driving westbound on SR 202 in her 2003 Dodge Durango. At the same time, Richard Mobley was driving his 2001 Dodge Durango eastbound on SR 202. Mr. Mobley was talking on his cell phone. At some point, Mr. Mobley crossed into the westbound lane of SR 202 and collided head-on with Ms. Kress' vehicle. (CP 973, 1277). There is no evidence to establish why Mr. Mobley crossed into the westbound lane, and no evidence to establish how long Mr. Mobley was traveling in the wrong lane of travel.

The accident occurred on January 23, 2007, at about 11:00 p.m. (CP 973). SR 202 was a two-lane highway. A construction project was underway, with the intention being to add two additional lanes immediately north of the existing two lane east-west roadway. The existing roadway was bounded on the north by jersey barriers with an 8 – 10 foot retaining wall behind the barriers. (CP 1014-45)¹. The jersey barriers and the wall had retroreflective markers on them. (CP 1014-1272).

In the area of the accident, there was a 110 foot gap in the centerline of the roadway. At 50 mph, a driver would traverse this gap in a

¹ See also, Appendix 1, a color photograph in the record at CP 1043.

little over one second (CP 1280). There is no evidence that Mr. Mobley ever saw this gap in the centerline. Ms. Kress drove that stretch of SR 202 about 20 times a week. (CP 965-66). She does not recall ever noticing the gap in the centerline. (CP 966). Other than the gap in the centerline, there was no indication to drivers, in the area of the accident, that an intersection was approaching or that an opportunity to turn left was approaching. There were no signs to indicate an intersection (CP 1273).

Mr. Mobley was an experienced, 51 year old driver at the time of the accident. (CP 88). While Mr. Mobley has no memory of the accident, he did testify extensively regarding his driving habits. Mr. Mobley described himself as a very cautious driver, with an “impeccable” driving record. (CP 962). Mr. Mobley had a habit of being very cautious when making left turns on two-way streets. (CP 962). He would signal 200 feet in advance to turn left. (CP 614). Mr. Mobley’s habit was to look before turning left onto a road or driveway to make sure he had a clear path of travel. (CP 961-62).

After eating and drinking at the Rock Bottom Brewery in Bellevue, Washington, Mr. Mobley and David Giroux decided to drive, separately, to the Lucky Seven Bar in Kirkland. (CP 1778-79). Mr. Mobley was talking on his cell phone with Mr. Giroux just before the impact. The last thing

Mr. Mobley said was “Oh shit.” (CP 1777). At the time Mr. Mobley said “Oh shit,” they were deciding what to do, whether to proceed to the Lucky Seven Bar or just go home. (CP 1778).

The Appellants’ theory of the case is that Mr. Mobley was turning left, even though he had not yet decided whether to go to the Lucky Seven Bar in Kirkland, or to go home.

Regarding Mr. Mobley’s use of a cell phone, while driving at night on a roadway unfamiliar to him, it is agreed that the cell phone was a serious distraction. As stated by the Appellants’ human factors expert, Richard Gill, Ph.D.:

... [c]ell phones are a serious distraction, and inhibit an individual’s ability to focus on and perceive events.

Dr. Gill admitted that Mr. Mobley had “... reduced attention due to his ongoing cell phone conversation at the time of the collision.” (CP 522).

David Strayer, Ph.D. is a psychologist at the University of Utah. Dr. Strayer opined that using a cell phone while driving quadruples the risk of a crash. (CP 1283). There is no difference in risk between a hand held and a hands free cell phone. (CP 1287). Drivers using cell phones tend to fail to maintain proper lane positions. (CP 1283). Dr. Strayer stated his opinion regarding the cause of the accident:

My opinion is that 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)

This accident was investigated by Detective Russell Haake of the Washington State Patrol. Detective Haake agrees with Dr. Strayer that this accident occurred because Mr. Mobley was lost and distracted while on his cell phone, crossed into the westbound lane, and collided with Ms. Kress. (CP 973).

There is a paucity of testimonial or physical evidence regarding how and why this accident occurred. Mr. Mobley has no memory of the accident. (CP 958). There are no independent witnesses. There is no physical evidence of Mr. Mobley's path of travel before impact. (CP 1737). Ms. Kress' testimony regarding the accident is of limited value because she did not know anything was amiss until seeing Mr. Mobley's headlights just a split-second before the crash. (CP 969).

The Appellants' theory of the case depends on the opinions of their litigation experts. These experts opine that Mr. Mobley intended to turn left, saw the 110 foot gap in the centerline, believed there was a side road coming onto the highway from his left, either did not look before he turned or did not see the reflectorized jersey barriers and 8 – 10 foot high wall to his left, proceeded to

turn left, then “may have” made a right steering input, before colliding head-on with the approaching Kress vehicle. (CP 993, 977).

The speculative nature of the opinions of the Appellants’ experts is demonstrated, in part, by their own testimony. The Appellants’ accident reconstructionist, Larry Tompkins, testified at his deposition on the subject of Mr. Mobley’s path of travel before impact:

Q. Okay ... So you are assuming in this scenario right here -- this is the second line, the green line -- that the Mobley vehicle is initiating a turn to the left before it can see the Kress vehicle, correct? Is that correct?

A. It's traveling to the left **for whatever reason.**

Q. And what is the basis for that? What factual basis do you have for that?

A. The angle at which they collided.

Q. And how can you tell from the angle at which they collided that the Mobley vehicle started to turn left and crossed the centerline before it could see the Kress vehicle?

A. That's a -- that's a turning radius that I -- that I put in **that was just consistent with the orientation at impact.**

Q. And you **assumed** that the Mobley vehicle proceeded on that constant radius until impact, correct, with no change in its direction?

A. That's correct.

(CP 1279, 1232). *Emphasis supplied.*

In a declaration, Mr. Tompkins undermined his assumption of a “constant radius until impact” by opining that Mr. Mobley “may have made a right steering input that reduced his heading angle across Ms. Kress’ travel lane in an attempt to return to his own lane.” (CP 977).

Mr. Tompkins admitted that he does not know why Mr. Mobley crossed into the westbound lane:

Q. And you don’t know why he went into the westbound lane to start with, correct? You can’t say why he did that, can you?

A. All I can say is that there’s an approximate area where he crossed into the westbound lane, and it happens to be in the gap in the – in the centerlines.

(CP 1294).

Mr. Tompkins created an animation of the accident. He had to input speeds in order to complete the animation. Mr. Tompkins admitted that his choice of speeds for Mr. Mobley was “arbitrary”:

Q. I understand that you are reluctant to give speeds for my question, but you did assume a speed in your arc, correct?

A. So do you want me to assume whatever –

Q. Yes.

A. Well, that’s fine. I don’t have a problem with that.

Q. Let's assume 27 -- Well, it was 27-1/2, correct?

A. Well, I have him -- I have him slowing down from -- **and it's arbitrary**, okay?

(CP 1736). *Emphasis supplied.*

Another of the Appellants' litigation experts, engineer James Bragdon, admitted that he does not know if Mr. Mobley saw the continuous jersey barriers and wall on the north side of the highway. (CP 1274). As to the key issue of why Mr. Mobley crossed the centerline, Mr. Bragdon admitted that he did not know why Mr. Mobley crossed the center of the roadway into Ms. Kress' lane.

Q. You're speculating about that, correct?

A. Well, sure. I haven't seen any indication exactly of what -- why he was over in the other lane. There are several reasons for it, but --.

Q. Well, let me ask you this: Were you ever told that he was on his cell phone at the time of the accident?

A. That discussion has probably come up. I don't recall.

(CP 1274).

The parties have competing theories as to how and why this accident occurred. 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, and collided head-on with her vehicle.

The Appellants' theory is that Mr. Mobley saw the 110 foot gap in the centerline, believed it represented an intersection, saw the gap at a sufficient distance to substantially slow his speed, did not look before turning, or if he looked, failed to see a reflectorized jersey barriers and a reflectorized 8 to 10 foot high wall, failed to see Ms. Kress' approaching highlights, attempted to turn left into the retaining wall, and then "may have" made a right steering input. The Appellants' theory of the case relies upon layers of speculation, including the following:

1. Mr. Mobley intended to turn left.

Mr. Mobley has no recollection of the accident and there is no evidence of his intentions.

2. Mr. Mobley saw the gap in the centerline.

Mr. Mobley was driving at night, at about 50 mph. At that speed, it would take him a little over a second to traverse the 110 foot gap. There is no evidence Mr. Mobley saw the gap in the centerline.

3. Mr. Mobley saw the centerline gap at a sufficient distance to enable him to substantially reduce his speed and turn left through the gap.

The Appellants' theory is that Mr. Mobley saw the centerline gap at a sufficient distance to enable him to conclude the gap represented an intersection, to decide that he wanted to turn left through the gap, to slow down,

and then turn left through the gap. There is no evidence to support these assumptions. In fact, these assumptions are unwarranted in view of the fact that Ms. Kress had traveled this stretch of road about 20 times a week and cannot recall ever seeing the gap. (CP 965-66).

4. Mr. Mobley was deceived into believing there was a side street.

Mr. Mobley has no recollection of the accident. What he believed or did not believe about the existence of a side street is sheer speculation.

5. Mr. Mobley turned left despite the existence of reflectorized jersey barriers, and a reflectorized wall, despite Ms. Kress' approaching headlights, and despite his long-standing habit of being conservative in making left turns.

These assumptions are speculative, contrary to Mr. Mobley's driving habits, and contrary to common sense. Mr. Mobley's driving habit was to look before turning onto a side street. There is no evidence that Mr. Mobley varied from his habit at the time of the accident. The Appellants would have the court believe that either Mr. Mobley did not look where he was turning, or if he looked, somehow failed to see the reflectorized jersey barriers and wall.

The Appellants' experts claim Mr. Mobley was attempting to turn left, through the gap in the centerline, despite the existence of the reflectorized jersey

barriers and wall. The left turn theory is inconsistent with Mr. Mobley's driving habits and with Ms. Kress' observations. Mr. Mobley is a very cautious driver with an impeccable driving record. (CP 962). His habit was to signal 200 feet before turning left, and to look before turning onto a roadway. (CP 614, 962). Ms. Kress did not see any turn signal on Mr. Mobley's vehicle. (CP 1273). She did not see Mr. Mobley's headlights change directions, as would be expected with a left turn maneuver. (CP 967).

The Appellants' theory of the case is not based upon the testimony of the participants, nor upon eyewitness testimony, nor upon physical evidence. It is based upon speculation concerning Mr. Mobley's mental processes, intentions, and conduct.

On November 12, 2010, the Honorable Jean Rietschel granted the State's Summary Judgment concluding that: "[t]here is no direct or circumstantial evidence showing that Mr. Mobley was in fact misled or confused by the conditions of the roadway." (RP November 12, 2010, 51-52).

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1) Was the trial court correct in granting the State's Motion for Summary Judgment because there is a lack of competent evidence that any alleged act or omission of the State was a proximate cause of the accident?

2) Was the trial court justified in rejecting the Appellants' increased severity of injuries claim?

3) Did the trial court err in dismissing the comparative negligence affirmative defense?

III. ARGUMENT

A. THE APPELLANTS' FOCUS ON NEGLIGENCE ISSUES MISSES THE POINT.

The Appellants' Opening Brief contains a lengthy discussion of issues of negligence. The Appellants' statement of the issue is framed in terms of negligence, rather than proximate cause.² The brief emphasizes the opinions of their experts that a centerline should have been present in the area of the crash, and refers to various standards and guidelines in support of that argument.

The Appellants' negligence arguments miss the point. The State's Summary Judgment Motion was based on principles of proximate cause, not negligence. (CP 1017.) The Court granted summary judgment on the basis of proximate cause, not negligence. (RP November 12, 2010, 53:1-9.)

² The issue is framed in terms of "... whether or not the Defendants breached their duty to the traveling public to maintain the subject section of SR 202 in a reasonably safe condition for ordinary travel?" Opening Brief of the Appellants, pp. 6-7. *See also*, Appendix 2.

The Appellants' lengthy discussion of negligence is not useful in analyzing the real issue, which is proximate cause.

B. PROXIMATE CAUSE REQUIRES PROOF OF CAUSE IN FACT.

In a negligence case, a plaintiff is required to prove four elements.

1. The defendant had a duty;
2. The defendant breached that duty;
3. The breach was a proximate cause of the plaintiff's injury;
and
4. The plaintiff suffered legally compensable damages.

See Mathis v. Ammons, 84 Wn. App. 411, 928 P.2d 431 (1996). Proximate cause is composed of two distinct elements: (1) cause in fact, and (2) legal cause. *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 727 P.2d 655 (1986). A party must provide adequate proof of both elements of proximate cause to defeat a summary judgment motion. *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 961 P.2d 952 (1998); *Coates v. Tacoma School Dist. No. 10*, 55 Wn.2d 392, 347 P.2d 1093 (1960). Although proximate cause may be established by circumstantial evidence, as well as direct evidence, it cannot be established with reliance upon speculation or conjecture. *Johanson v. King County*, 7 Wn.2d 111, 122, 109 P.2d 307 (1941).

The cause of an accident is speculative when, from consideration of all the facts, it is as likely to have occurred from one cause as another. *Johanson, supra*, at 643. If there is nothing more tangible to proceed upon than two or more conjectural theories, one that supports liability and one that does not, “a jury will not be permitted to conjecture how the accident occurred.” *Gardner v. Seymour*, 22 Wn.2d 802, 809, 180 P.2d 546, 569 (1947).

In the present case, there is no evidence that Mr. Mobley was **in fact** misled by any condition of the roadway. There is no proof Mr. Mobley even saw the gap in the centerline. The Appellants’ accident reconstructionist, Larry Tompkins, admits that he does not know why Mr. Mobley went into the westbound lane. (CP 1294) Mr. Tompkins admits that he does not know Mr. Mobley’s path of travel, stating that Mr. Mobley “may have” made a right steering input before the collision. (CP 977) Mr. Tompkins stated that Mr. Mobley was “traveling to the left **for whatever reason.**”³ (CP 729) Mr. Tompkins assumed a turning radius for Mr. Mobley, but the most he can say about that hypothetical turning radius is that it is “consistent with the orientation at impact.” (The head-on position of the vehicles at impact) (CP 1729). To conclude that Mr. Mobley saw

³ Emphasis added.

the gap in the centerline, was deceived by it, and as a result attempted to turn left into reflectorized jersey barriers a reflectorized wall, is speculative. There is no direct or circumstantial evidence showing that Mr. Mobley was in fact confused or misled by the condition of the roadway.

C. **THE APPELLANTS' FAILURE TO ESTABLISH THAT MR. MOBLEY WAS IN FACT MISLED BY THE CONDITION OF THE ROADWAY IS FATAL TO THEIR CLAIM.**

The case of *Johanson v. King County, supra*, also involved a claim of negligence related to a centerline on a roadway. In *Johanson*, King County widened a road from two lanes to four lanes but did not move the yellow centerline. The result was that the yellow stripe was no longer in the center of the roadway. Instead, there were three lanes on one side of the yellow stripe and only one lane on the other side. The at-fault driver crossed over the center of the roadway into the plaintiff's lane and collided head-on with the plaintiff's vehicle. The only direct testimony came from a passenger in one of the vehicles; all other witnesses were dead, unconscious or knew nothing about how the accident happened. The passenger had no idea where the other vehicle came from. The plaintiff argued that the evidence regarding the proper location of the yellow stripe created an inference that the driver was misled. In rejecting this argument, the court reasoned:

The appellants cannot recover herein because of what they claim might have happened, or because the driver of the Rian car might have been misled by the location of the yellow line, or because there was no evidence upon which the jury could have found that Rian was not deceived. The burden is upon the appellants to establish, by direct or circumstantial evidence, that the location of the yellow line did in fact deceive and mislead the driver of the Rian car, to his injury.

Johanson at 122.

In our case, as in *Johanson*, there is no evidence that Mr. Mobley was in fact misled or deceived by the condition of the roadway into making a left turn toward a reflectorized jersey barriers and a reflectorized wall.

In *Miller v. Likins*, 109 Wn. App 140, 34 P.3d 835 (2001) an elderly driver struck a 14 year old pedestrian resulting in injuries. There was a conflict as to where the impact occurred, but for purposes of the City's summary judgment motion the court assumed the plaintiff's version of the accident, which was that the accident occurred outside the fog line, off the traveled portion of the road. The elderly driver died, from unrelated causes, so was unable to testify as to why he left the traveled portion of the road and struck the plaintiff on the shoulder.

The plaintiff's claims against the City were that the City should have installed raised pavement markings on the fog line, lowered the speed limit, or posted additional road signs. The determinative issue was whether sufficient direct or circumstantial evidence existed to lead a reasonable person to conclude, without conjecture or speculation, that the driver was in fact confused or misled by the condition of a roadway leading to the accident. In rejecting the plaintiff's claim, the court reasoned:

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.'⁴ Accordingly, a jury could not reasonably infer that had the City implemented the additional precautions Cottingham suggested, Likins would not have crossed the fog line and hit Quirmbach.

Miller at 147.

In the present case, according to the Appellants' human factors expert, "cell phones are a serious distraction, and inhibit an individual's ability to focus on and perceive events." (CP 1604) The Appellants claim that Mr. Mobley crossed into the westbound lane of traffic not because of

⁴ *Kristjanson v. City of Seattle*, 25 Wn. App 324, 326, 606 P.2d 283 (1980); emphasis in original.

his cell phone usage but because the condition of the roadway. However, as in *Miller*, there is no direct or circumstantial evidence showing that Mr. Mobley was in fact confused or misled by the condition of the roadway. This theory can only be characterized as speculation or conjecture.⁵

In *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 326, 606 P.2d 283 (1980), the plaintiff complained that the City failed to provide adequate sight distance and signing on the road. These are claims also made in the present case. The Court of Appeals affirmed the trial court's dismissal of the City on summary judgment on the basis of proximate cause. The court stated:

At most, Kristjansen's contentions are that given additional sight distance, **he might** have reacted in a way which could have avoided the collision and that [the other driver] **might** have heeded warning signs to drive carefully. His contentions can only be characterized as speculation or conjecture.

Johanson at 326. (Emphasis supplied).

⁵ Attempting to distinguish *Miller*, Appellants claim at page 40 that Defendants made no effort to strike the testimony of Plaintiff's various experts. That is incorrect; the entire basis of the proximate cause argument was that Mr. Tompkins' testimony was speculative and was not admissible evidence. While Respondents did not make that argument in a separately filed motion, Appellants have identified no authority that a separately filed motion would be required. The record is clear that the issue was briefed, argued, and ruled upon. Further, if Appellants indeed claim error in this regard, they failed to preserve the issue for appeal. Appellants did not make this argument in the court below and RAP 2.5 would preclude its consideration here.

The case of *Moore v. Hagge*, 158 Wn. App 137, 241 P.3d 787 (2010), decided by the Court of Appeals, Division I, last year, is instructive. The plaintiff was a pedestrian who was struck by defendant Hagge's car while she was driving west on South 240th St. in the city of Des Moines. The plaintiff had no memory of the accident. The defendant driver, and the witness, did not see the plaintiff prior to impact.

The plaintiff, through his engineering expert, claimed that the accident location was "inherently dangerous" due to narrow traffic lanes, high traffic volume, narrow shoulders, and lack of pedestrian access. The expert concluded that these inherent dangers were "more likely than not a substantial factor" in causing the plaintiff's injuries, and that if the City had taken action to improve the safety of the area the accident probably would have been avoided.

The court affirmed the summary judgment in favor the City and reaffirmed the principle that the cause of an accident is speculative where it is as likely that it happened from one cause as another. The court stated:

The cause of the accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another. Stated differently,

[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant

would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

In the present case, the accident likely occurred because Mr. Mobley was distracted while talking on his cell phone. Alternatively, Mr. Mobley could have been distracted or simply inattentive for any number of reasons. At a minimum, it cannot reasonably be concluded, in the absence of speculation or conjecture, that the accident probably occurred because of the condition of the roadway rather than the distraction and/or inattentiveness caused by Mr. Mobley's cell phone usage or by other unknown factors.

The court in *Moore*, like the courts in *Miller* and *Johanson*, concluded that there was no evidence that the driver was in fact confused or misled about the condition of the roadway, and the most that could be said is that the accident **might** have been avoided had the municipality installed additional safeguards. The court reasoned:

There is no evidence that the additional safeguards would have made Moore more aware of the conditions of the roadway at the time of the accident. As was true for the driver in *Miller*, there is no evidence that Moore was confused or misled about the roadway conditions. Thus, there is no direct or circumstantial evidence showing that the City's alleged negligence caused his injuries. As in *Miller*, the most that Moore can show is that the

accident might not have happened if the City had installed additional safeguards.

Moore at 151-52.

A consistent holding was reached in yet another recent case, *Garcia v. State of Washington Dept. of Transportation, et al.* (Div.1, 2011 No. 63689-8-1, certified for publication).⁶ In *Garcia*, an inattentive driver failed to see a pedestrian ahead of her in an intersection crosswalk, and struck and killed him. Previously WSDOT had installed an electronic LED “roving eyes” traffic control device at the same intersection, for the purpose of focusing the attention of inattentive drivers on pedestrians who may be in or near the crosswalk. However, the roving eyes device did not work on the day of the accident.

The plaintiffs sued the State for negligence, claiming that the inoperative state of the roving eyes system was a proximate cause of the accident. In support of that claim their traffic engineering expert opined that if the system had been activated, it would have been more effective than a de-activated system to alert the driver to the presence of a

⁶ A copy of the *Garcia* opinion is attached as Appendix 3. An Order Granting Motion to Publish was entered in *Garcia* on April 13, 2011; see Appendix 4. The appellants have filed a motion to vacate that order, which motion is pending at this time.

pedestrian. The State moved for summary judgment and prevailed. On appeal, Division One held, *inter alia*:

Here, even assuming WSDOT breached its duty, as in *Hartley*, the Estate cannot show that any failure on the part of WSDOT to ensure the roving eyes device was properly functioning was a proximate cause of the accident . . . The Estate's claim that WSDOT should have activated the roving eyes device sooner or installed different technology, and the argument that the roving eyes device would have prevented the collision, is based on speculation and as a matter of law is too attenuated to impose liability in this case.

In *Garcia*, the Court noted there were facts that reduced the plausibility of the appellants' theory and underscored its speculative nature, such as the fact the driver did not notice other cars that were stopped at the intersection. Similarly, Appellants' theory in our case is doubtful from the outset because people generally do not attempt to make a turn into a large concrete retaining wall.

In *Nakamura v. Jeffery*, 6 Wn. App 274, 492, P.2d 244 (1972) two drivers collided in an uncontrolled intersection in Seattle. The plaintiff claimed that the City was negligent for failing to post a warning sign regarding a garage, bulkhead, and hedge which obstructed the view of approaching drivers. The trial court granted the City's motion for summary judgment, and the Court of Appeals affirmed, relying upon the

absence of evidence that the disfavored driver was actually deceived or misled by the existence of the garage, bulkhead, or hedge. The court concluded:

In this case it would be mere guessing, in view of all of the facts, to say that Grady Jeffery was in any way deceived or misled by the existence of the garage, bulkhead and hedge.

Nakamura at 277.

In our case, it would be speculation to conclude that Mr. Mobley was in fact deceived by the centerline gap, the degraded north fog line, or other conditions of the roadway. This is particularly true where Mr. Mobley's conduct is *at least* as plausibly explained by distraction arising from his cell phone use. To conclude that the center line gap and/or other conditions of the roadway caused the accident, one must speculate as to Mr. Mobley's state of mind. Did Mr. Mobley intend to turn left, even though he and Mr. Giroux had not yet decided whether to proceed to the Lucky Seven Bar in Kirkland or to return home? Did Mr. Mobley see the center line gap? If so, did he believe the gap represented an intersection, despite lack of any other "evidence" of the existence of an intersection? Did Mr. Mobley see the center line gap from a sufficient distance to conclude it represented an intersection, make a decision to turn left, slow to turn left, and proceed through the gap? Did Mr. Mobley fail to see the

reflectorized jersey barriers and wall, despite his testimony regarding his habit of looking before he turns left?⁷ To answer each of these questions requires speculation regarding what Mr. Mobley saw, what he believed, and what he intended. The most that can reasonably be said is that Mr. Mobley **may** have been deceived by a condition of the roadway, and this possibility is insufficient to establish cause in fact.

D. THE CASES RELIED UPON BY THE APPELLANTS TO REBUT THE STATE'S SPECULATION AND CONJECTURE ARGUMENT ARE EASILY DISTINGUISHABLE.

In Section E of their brief, the Appellants attempt to distinguish “*Miller v. Likins* and its progeny.”⁸ In doing so, the Appellants rely primarily on *Klossner v. San Juan County*, 21 Wn. App 689, 586 P.2d 899 (1978) and *Sketo v. Olympic Ferries, Inc.*, 436 Fed.2d 1107 (9th Cir. 1970).⁹ These cases are readily distinguishable.

Klossner involved a truck driver who died as a result of injuries suffered when his truck left the road. His widow brought an action against

⁷ Review of the photograph in the Appellants’ Summary Judgment briefing of the jersey barriers and retaining wall is useful in understanding the unlikelihood that Mr. Mobley would have failed to see the reflectorized barriers and retaining wall and turned left toward them. (CP 1043). *See also* Appendix 1.

⁸ Opening Brief, p. 39.

⁹ Opening Brief pp, 41-2.

the County alleging defects in the roadway caused the accident. Specifically, the alleged defects included cracks at the edge of the road, lack of a shoulder, brush near the edge of the road, an improperly maintained drainage ditch, a lack of guardrails, and a lack of warning signs.

The County brought a motion for summary judgment and in doing so utilized an unusual tactic; it relied exclusively **on the plaintiff's** answers to interrogatories. These interrogatory answers set forth the aforementioned defects and “describe[d] in detail the action of the truck during the accident and the **effect of the road's defects on the path of the truck.**”¹⁰

The County argued that even if the plaintiff's interrogatory answers permitted an inference that the County's negligence was a proximate cause of the accident, the interrogatory answers were inadmissible because they were not based on personal knowledge. The court rejected this argument because the County submitted, and relied exclusively upon, plaintiff's answers to interrogatories to support its motion, and should not be allowed to challenge the adequacy of the evidence it submitted and relied upon. The County's decision to rely on the plaintiff's interrogatory answers was a fatal mistake. The court reasoned:

¹⁰ *Klossner* at pp. 691-2.

The county elected to rely solely on Klossner's answers to interrogatories to support its motion. By so doing the county admits, for purposes of their motion, the answers, and all reasonable inferences that can be drawn therefrom. *Bates v. Grace United Methodist Church*, 12 Wn. App 111, 115, 529 P.2d 466 (1974).

Plaintiff's interrogatory answers in *Klossner* included a detailed description of "...the effect of the road's defects on the path of the truck." In our case there is no evidence of the effects of the road's alleged defects on the path of travel of Mr. Mobley's vehicle. In *Klossner* "[F]rom the interrogatories one can draw the reasonable inference that the accident was caused by the negligent maintenance of the road and its shoulder and by the failure of the County to adequately warn drivers of the danger."¹¹ In the present case, there are no such interrogatory answers, or other evidence, which allows reasonable inference that the alleged road defects did, in fact, mislead Mr. Mobley and cause him to cross the center of the roadway.

In the case of *Sketo v. Olympic Ferries, supra*, the plaintiff fell on the automobile deck of a Washington State Ferry. The ferry car deck was surrounded by an elevated platform or landing. The platform and car deck had numerous white lines painted on them causing a deceptive appearance of a single level which the District Court characterized "a trap." There

¹¹ *Klossner* at p. 692.

were no warnings indicating that the platform was elevated from the car deck.

The 15-year-old plaintiff was a severe hemophiliac with a lengthy history of traumatically induced internal bleeding. He returned with his mother from the upper deck to the lower level in preparation for departure. The young man, Stanley, age 15, was momentarily out of his mother's view when she heard him fall. Stanley ended up face down on the car deck with his feet near the platform edge. The only evidence from Stanley regarding how the accident happened was his statement that he "never noticed the step."

The defendant moved for summary judgment, arguing that there were two equally likely accident scenarios for the cause of the accident: 1) the negligence of the ferry company; and 2) failure on the part of Stanley to observe his surroundings. The defendant cited to authority indicating that where two equally likely scenarios exist to explain an accident, under one of which the defendant would be liable, and the other it would not be liable, then proximate cause cannot be proven without resorting to speculation. *See Gardner v Seymour, supra*, 27 Wn.2d. 802, 180 P.2d. 564 (1947).

The court stated it was “not unimpressed by the logic of this argument.” The court further stated that unwitnessed accidents traditionally pose problems of proof for plaintiffs, regarding proximate cause. However, the court rejected the ferry company’s argument because of the existence of facts which made it more likely that the accident was caused by the defendant’s negligence rather than inattention on the part of Stanley. The court reasoned:

There was evidence that the decedent was aware of the seriousness of his condition and of the need to exercise extreme caution to avoid traumas which could result in serious instances of bleeding. Further, the testimony of his mother concerning his activities immediately before the fall does not indicate that he was running or distracted nor gives support to the appellant’s argument that it is equally probable that he was inattentive or careless. (CP 1109).

In *Sketo*, there was no evidence to support the defendant’s theory of the case. In our case, the opposite is true. In fact, the trial court entered summary judgment declaring Mr. Mobley to be at fault as a matter of law. (CP 2329). The facts of *Sketo* and *Klossner* are easily distinguishable from the facts of the case at bar, and those cases provide scant support for the Appellants’ position.

The Appellants also attempt to distinguish case authority cited by the defense by arguing that the facts of our case are different because "... the evidence traces Ms. Kress' actions as well as Mr. Mobley's actions right up until the moment of impact."¹² While the actions of Ms. Kress can be traced right up until the moment of impact, the claim that Mr. Mobley's actions can be traced "right up until the moment of impact" does not withstand scrutiny.

Mr. Mobley has no memory of the accident and Ms. Kress did not see the Mobley vehicle until a split second before impact. (CP 958, 969). There are no independent witnesses. There is no physical evidence of Mr. Mobley's path of travel before impact. (CP 1737). The Appellants' accident reconstructionist, Larry Tompkins, merely **assumed** a path of travel. (CP 1279, 1232). He admitted there was "no physical evidence" illustrating when Mr. Mobley crossed from the eastbound lane to the westbound lane. (CP 1802). He admitted that what Mr. Mobley's intentions were in getting into the westbound lane would be speculative. (CP 1806).

Notwithstanding this lack of evidence, Mr. Tompkins' analysis arbitrarily places the initiation of Mr. Mobley's hypothetical left turn about

¹² Opening Brief, p. 42.

30 feet from the beginning of the gap in the center line (CP 1794), and, again arbitrarily, assumed he was driving about 40 and slowed to 30 mph prior to initiating his turn (CP 1795). When asked why Mr. Mobley would be driving 30 m.p.h., Mr. Tompkins could not provide any basis for his assumptions, and testified, “. . . all of this is so speculative, I mean, what’s the point, honestly?” (CP 1797). Using these arbitrary figures, Mr. Tompkins’ analysis produced a version not of what did in fact occur, but rather one possible scenario based on the largest turning radius possible as an indicator of Mr. Mobley’s possible path of travel. (CP 1799-1801).

Mr. Tompkins’ uncertainty regarding Mr. Mobley’s path of travel is further illustrated by his opinion that Mr. Mobley “**may have**” made a right steering input that reduced his heading angle across Ms. Kress’ travel lane in an attempt to return to his own lane.” (CP 977, emphasis supplied). This right steering input theory is essential in reconciling Appellants’ left turn theory with the inescapable fact that the vehicles collided head-on. However, like the left turn theory, the right steering input theory is devoid of factual support. Mr. Tompkins’ inability to commit to the theory, offering no more than the mere possibility that it

could have happened, underscores the fact that the theory is patently speculative.

In sum, the Appellants' attempt to distinguish case authority relied upon by the defense, by arguing that "the evidence traces ... Mr. Mobley's actions right up until the moment of impact," is factually unsupported.

E. THE TRIAL COURT PROPERLY REJECTED THE APPELLANTS' ENHANCED INJURY THEORY.

The Appellants' fallback position is that even if the State's conduct did not cause the collision, the State's failure to reduce the speed limit enhanced the injuries sustained. The Appellants admit that a reduction in the speed limit to 40 m.p.h. would not have prevented the collision. (CP 1383; RP November 12, 2010, at 29:13-30:4). Instead, the Appellants argue that the failure to reduce the speed limit caused Ms. Kress' injuries to be more severe than they would have been at a lower speed. This enhanced injury theory should be rejected because it is inconsistent with established Washington precedent regarding speed as a proximate cause and because creating a cause of action for failure to reduce speed limits would subject the State to virtually unlimited liability in highway accident cases.

1. Appellants' Theory Is Not Supported by Case Law.

It is well established in Washington that for excessive speed to constitute a proximate cause, it must be a cause of the collision itself. The case of *Channel v. Mills*, 77 Wn. App. 268, 890 P.2d 535 (1995) contains a detailed discussion of Washington case law regarding excessive speed as a proximate cause. In *Channel*, the accident occurred in an intersection controlled by traffic lights. The issue was which driver had the green light. The plaintiff argued that she had the green light. Alternatively, the plaintiff argued that even if the defendant had the green light, his excessive speed was a contributing factor. The trial court excluded evidence of the defendant's excessive speed.

The Court described the cause in fact requirement in this context:

A cause in fact in a case but for which the **accident** would not have happened. *Christen*, 113 Wn.2d at 507, 780 P.2d 1307; *Boughn*, 107 Wn.2d at 142, 727 P.2d 655. (Emphasis supplied).

...

A number of cases have said that speed in excess of that permitted by statute or ordinance is not a proximate cause of a **collision** if the favored driver's automobile is where it is entitled to be, and the favored driver would have been unable to avoid the **collision** even if driving at a lawful speed. *E.g.*, *Robe v. Valley Garbage Service, supra*; *Bonesack v.*

*Kirkham, supra; White v. Greyhound Corp., supra; Theonnes v. Hazen, supra.*¹³

The Appellants cite only one Washington case in support of their enhanced injury theory, *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 921 P.2d 1098 (1996). The Appellants' reliance on *Doherty* is misplaced because the decision in *Doherty* was based upon expert testimony that but for the negligence of the Metro driver, the accident either would have been avoided or the nature of the accident would have been dramatically different. In our case, it is conceded by the Appellants that the head-on, or nearly head-on, impact would have occurred even if the State had reduced the speed limit. (CP 1383; RP November 12, 2010, at 29:13-30:4).

In *Doherty, supra*, the driver of an articulated City bus failed to clear the intersection when making a left turn. The plaintiff, suffering from hypoglycemic shock, lost control of her car, collided with several other cars, and finally hit the side of the bus. The plaintiff claimed that the Metro driver failed to yield the right of way. Metro argued that the crash would have occurred even if the Metro driver had stopped before failing to

¹³ *Channel* at 272-3, 276. (Emphasis supplied).

yield the right of way, and, as a result, proximate cause could not be established.

The plaintiffs' accident reconstructionist opined that if the bus driver had stopped the bus before failing to yield the right of way, the collision would have either been avoided completely or a very different collision would have occurred; a minor, shallow sideswiping event. The *Doherty* court held that this opinion evidence, that but for the bus driver's negligence, the collision would have been avoided, or the nature of the collision would have been dramatically different, presented factual issues precluding summary judgment.

In our case, there is no evidence that a reduction in the speed limit would have enabled Ms. Kress to avoid the collision or would have changed the nature of the impact. The head-on collision, or near head-on, still would have resulted if the speed limit had been lowered.

The question of whether a cause of action for enhanced injuries exists in Washington was not before the *Doherty* court. There was no discussion in *Doherty* of whether such a cause of action exists. The focus of the *Doherty* opinion was on the defendant's claim that it was not a proximate cause of the accident. There was no legal challenge by the defendant, as there is in this case, as to the viability or existence of a claim

for enhanced injuries. In the 15 years since the issuance of the *Doherty* opinion, no Washington court has cited it to endorse a cause of action for enhanced injury.

Furthermore, *Doherty* did not address the duty of a state or municipality to maintain public roads in a reasonably safe condition.¹⁴ *Doherty* only addressed the duty of a disfavored driver who fails to yield the right of way to a favored driver. The Appellants are not only asking this court to create a new cause of action for enhanced injuries, but also to apply that cause of action to a governmental entity in the context of setting speed limits. This request to create a new cause of action should be rejected as contrary to existing Washington case authority, and public policy.

The Appellants argue that “[o]ther courts across the nation also recognize liability where a crash would have been less severe but for the defendant’s negligence, regardless of the specific duty owed.” (Appellants’ brief at p. 49, footnote 10.) Review of these cases reveals that they do not support the proposition for which they are cited. The first case cited by the Appellants is *Boodoo v. Cary*, 21 F.3d 1157 (D.C. cir. 1994). In *Boodoo*, a northbound metro bus was struck by a turning car.

¹⁴ *Laguna v. State of Washington*, 146 Wn. App. 260, 264, 192 P.3d 374 (2008).

The plaintiff's accident reconstructionist opined that the bus was traveling at 20 m.p.h. over the speed limit and that the accident would not have occurred but for the excessive speed. The court's analysis focused on whether the **collision** would have occurred but for the excessive speed, not whether the excessive speed led to more severe injuries. The court in *Boodoo* concluded:

At trial, the appellant offered evidence that the Metrobus driver perceived the Camaro 185 feet from the point at which he locked the brakes. The jury was entitled to accept his expert testimony, and at that distance it is evidenced a bus could have avoided the **collision** if it were traveling the speed limit. Therefore, the jury was free to conclude that speeding was a proximate cause of this **accident**. (Emphasis supplied).

Likewise, in *Brownell v. Fred M. Manning*, 102 F.Supp. 185 (1950), a case involving a collision between a bus and a tractor trailer on snow and ice, the court's proximate analysis focused on the cause of the collision, not the cause of enhanced injuries:

... court feels obligated to conclude that the negligence of both drivers furnished a proximate cause of the **collision** of the two vehicles and the consequent damages, injuries and loss of life. (Emphasis supplied).¹⁵

¹⁵ *Brownell*, p. 140. (Emphasis supplied).

In *Hennessey v. Burlington Transp. Co.*, 103 F.Supp. 660 (1950), a companion case to *Brownell*, the court focused on the proximate cause of the accident, not the cause of the enhanced injuries:

... all of which furnishes further support to the holding by the court that the combined negligence of both drivers was the proximate cause of the **collision** and fire, and consequent loss of life and property.¹⁶

In *Pacific Greyhound Lines v. Rume*, 178 F.2d 652 (9th Cir. 1949), a 60 year old case applying New Mexico law, the court did comment that excessive speed increased the violence of the impact and contributed to the injuries. However, the essence of the court's decision was rejection of the defendant's assertion that he was without fault because the other driver's car came into his lane of travel "suddenly." The court observed that there was a question of fact on that issue, and that there was evidence, "... that the Ford car left its side of the road on a 'long arc', 'a gradual arc' observable by the bus driver, rather than the sudden turn claimed by the appellant."¹⁷ The opinion's brief discussion of speed was only pertinent to the court's observation that the defendant's excessive

¹⁶ *Hennessey* at p. 664. (Emphasis supplied).

¹⁷ *Pacific Greyhound*, *supra* at p. 653-54.

speed, which was *per se* negligence under New Mexico law, contributed to the severity of the injuries.

Finally, the remaining case cited by the Appellants in support of their enhanced injury theory is a criminal case, *State v. Two Bulls*, 547 N.W.2d 764 (1996). This criminal case, which involved a prosecution for negligent homicide, is of limited value because an element of the crime was proximate cause of death or serious bodily injury. Hence, the seriousness of the injuries was directly at issue, as an element of the crime. Such is not the case in Washington for civil actions involving excessive speed, as outlined by the court in *Channel v. Mills, supra*.

2. Appellants' Theory Undermines Public Policy.

Public policy considerations dictate against expanding tort liability of governmental entities regarding the setting of speed limits, where the speed limit is not a proximate cause of the accident, but only a cause of enhanced injuries. All public highways in Washington have speed limits. All speed limits are debatable. Should the State, and municipalities, be subject to liability for setting speed limits where speed is not a proximate cause of the collision?

Consider speed limits on our freeways. Previously, the maximum speed limit on all freeways in Washington was 55 m.p.h. Now, on rural

freeways, the typical speed limit is 70 m.p.h. In freeway accidents, should the State be subject to tort liability for its decision to raise speed limits from 55 m.p.h. to 70 m.p.h.? Would the government be subject to almost unlimited liability for its speed limits decisions?

Hartley v. State of Washington, 103 Wn.2d 768, 698 P.2d 77 (1985) addressed public policy considerations in the context of alleged failure to revoke an offender's driver's license under the Habitual Traffic Offenders Act. The plaintiff argued the State was liable for negligently failing to revoke the offender's driver's license, which allegedly led him to drive and cause an accident. Rejecting the claim, the Supreme Court reasoned:

Public policy considerations also dictate against liability in this case. The government would be open to unlimited liability were we to hold potentially liable every decision by a prosecutor or the DOL to delay proceedings.

In the present case, it would be bad public policy to create potential liability for every governmental decision regarding the setting of speed limits throughout the state, where the speed limit is not a proximate cause of the accident, and is only alleged to have increased the severity of the injuries. The flood of litigation which would follow, motivated by the government's deep pockets and the law regarding joint and several

liability, would unfairly burden taxpayers with expanded governmental liability.

F. MS. KRESS' SPEED, UNDER THE CIRCUMSTANCES, CREATES AN ISSUE OF FACT REGARDING COMPARATIVE NEGLIGENCE.

In the State's Answer, it alleged Ms. Kress' contributory fault as an affirmative defense. The Appellants moved to strike this affirmative defense. (CP 1042). The issue was whether a jury question exists as to whether Ms. Kress' speed was excessive under the circumstances. The trial court granted the Appellants' Motion Striking the Affirmative Defense of Contributory fault. (CP 2329).

After the Appellants appealed the trial court's summary judgment orders dismissing the Appellants' claims against the State and Tri-State, these Respondents filed a cross-appeal challenging the trial court's order striking the comparative fault affirmative defense. This cross-appeal is moot if this court affirms the trial court's summary judgment orders dismissing the State and Tri-State. However, if this court reverses the trial court's order granting summary judgment, then the court should also reverse the trial court's order withdrawing comparative negligence from the jury's consideration.

The speed limit for Ms. Kress on the evening of the accident was 55 mph. (CP 1537). In her deposition, Ms. Kress testified she was travelling “50 – or under 55.” (CP 1538). Ms. Kress also admitted that she was concerned about being late for work, and shortly before the location of the accident, she took action to avoid having to wait for a red light. (CP 1536)

As Ms. Kress approached a red light at the intersection of Sahalee and SR-202, she decided not to wait for the red light to change. Instead, she turned right and then made a u-turn. (CP 1536). Ms. Kress admitted that if she had waited for the red light to change, she might have been late for work. (CP 1536-67).

Ms. Kress further admitted that she knew at the time of the accident that she was going to drive through a construction zone on SR-202 on her way to work. Ms. Kress believed this construction zone was a problem due to poor lighting, roads being so “tight,” and the absence of a shoulder. (CP 1541, 1544). Ms. Kress admitted that if she had been traveling at a lower speed she could have done more to slow her car and protect herself from serious injury. (CP 1590).

The Appellants’ traffic engineering expert, Ed Stevens, opined that due to the conditions in this construction zone on SR-202 an advisory

speed limit should have been placed advising motorists to reduce their speed from 55 mph to 35 m.p.h. (CP 1564).

The issue is whether a reasonable person could conclude that Ms. Kress was traveling too fast for existing conditions where:

1. She was in a hurry because she was concerned about being late for work;
2. She understood the need to slow down in this construction zone due to lighting conditions, the road being “tight” and the absence of a shoulder; and
3. Despite Ms. Kress’ knowledge that this construction zone was a “problem” and she needed to slow down, she only slowed to between 50 and 55 m.p.h. in a 55 m.p.h. zone.

It is not always allowable to drive at the speed limit. Under certain conditions, the safe speed may be lower than the posted maximum speed.

RCW 46.61.400 provides:

(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.

Additionally, pursuant to RCW 46.61.445:

Compliance with speed requirements of this chapter under the circumstances hereinabove set forth shall not relieve the operator of any vehicle from the further exercise of due care and caution as further circumstances shall require.

The purpose of RCW 46.61.445 is “to indicate that, under certain conditions, the lawful speed may be less than the posted speed limit.”

Owens v. Seattle, 49 Wn.2d 187, 299 P.2d 560 (1956).

Hough v. Ballard, 108 Wn. App. 262, 31 P.3d 6 (2001), involved a nighttime vehicle collision. The plaintiff had been driving about 10 m.p.h. under the speed limit. The trial court granted partial summary judgment to plaintiff, finding he was zero percent negligent and defendant was 100 percent negligent, because plaintiff was the favored driver. *Hough*, 108 Wn. App. at 275. The Court of Appeals reversed, holding that even

though the plaintiff was driving at a speed below the posted speed limit, his speed was a question for the jury because the plaintiff had a duty to drive at a prudent speed not only for known conditions but also for potential hazards. *Id.* at 285-86. “Whether Hough’s excessive speed was a proximate cause of the accident is a question of fact for the jury and is not to be resolved by the trial court as a matter of law.” *Id.* at 284.

In *Hough, supra*, the court held that a driver is required to drive at a speed less than the speed limit where special hazards exist:

Posted speed limits merely indicate a 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 the compliance with sub-section (1).

Hough, 108 Wn. App. 287.¹⁸

Ms. Kress claims that if her speed had been lower she could have done more to slow her vehicle and protect herself from serious injuries. (CP 1590). If this court reverses one or more of the trial court’s orders granting summary judgment to Respondents State and Tri-State, particularly regarding the enhanced injury claim, then the court should also reverse the trial court’s order striking the affirmative defense of

¹⁸ Referring to sub-section 1 of RCW 46.61.400.

comparative negligence, because reasonable persons could conclude Ms. Kress' speed was excessive under the circumstances known to her.

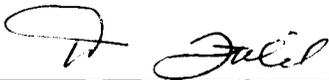
IV. CONCLUSION

The trial court properly determined that the Appellants failed to carry their burden of proof on the element of proximate cause. It also properly determined there is no basis in Washington law for recognition of the Appellants' "enhanced injury" theory in the context of this case. The State therefore requests that entry of summary judgment for the State be affirmed.

Should the trial court's decision, or any part thereof, be reversed, the State requests that summary judgment on the issue of Ms. Kress's own negligence be reversed and submitted to the jury for a determination whether she was driving at a reasonable speed under the circumstances.

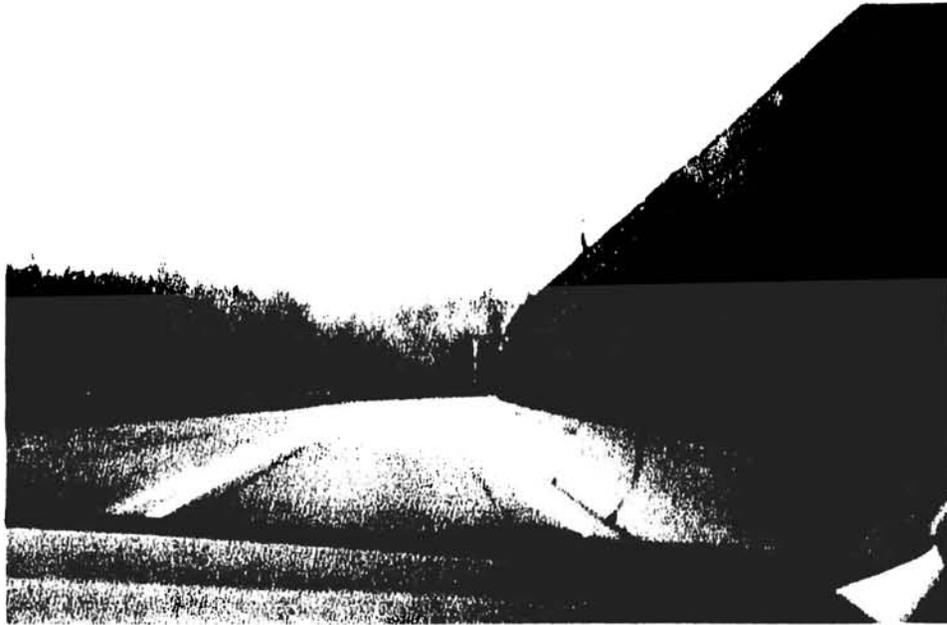
Respectfully submitted, this 27th day of May, 2011.

MURRAY, DUNHAM & MURRAY

By: 

William W. Spencer, WSBA #9592
Harold B. Field, WSBA #11020
Dirk Bernhardt, WSBA #33071
of Attorneys for Respondent State of
Washington

APPENDIX 1



APPENDIX 2

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

II. ASSIGNMENTS OF ERROR

The trial court erred in entering the following orders:

1. Order Granting Defendant State of Washington's Motion for Summary Judgment and Defendant Tri-State's Joinder entered by Judge Rietschel on November 12, 2010;
2. Order Dismissing Plaintiffs' Increased Severity of Injuries Claims Against Defendant Tri-State Construction entered by Judge Rietschel on December 3, 2010; and
3. Order Granting Defendant State of Washington's Motion for Summary Judgment Re: Increased Severity of Injuries entered by Judge Rietschel on December 3, 2010.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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

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

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

IV. STATEMENT OF CASE

A. Introduction.

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

APPENDIX 3

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

Tara A. GARCIA, individually and as personal representative of the Estate of Frank J. Garcia,)	No. 63689-8-1
)	
)	
Appellant,)	UNPUBLISHED OPINION
v.)	
)	
THE STATE OF WASHINGTON)	
DEPARTMENT OF)	
TRANSPORTATION, THE State of)	
Washington, and THE CITY OF)	
SHORELINE,)	
)	
<u>Respondents.</u>)	FILED: February 22, 2011

Schindler, J. — Frank Garcia was killed when the car driven by Diana Cushing struck him while he was crossing the street at the intersection of North 170th Street and Aurora Avenue North. Cushing admitted that she “wasn’t really looking” and was talking to her son who was sitting in the passenger seat, and she did not see Garcia until “about two second[s] before” hitting him in the crosswalk with her car. Tara Garcia, individually and as the personal representative of the Estate of Frank Garcia (Estate), appeals summary judgment dismissal of negligence claims against the Washington State Department of Transportation (WSDOT) and the City of Shoreline

(City). Because as a matter of law neither the failure of WSDOT to properly install and activate a “roving eyes” device over the crosswalk, nor the City’s decision to not install traditional traffic signals was a proximate cause of Garcia’s death, we affirm.

FACTS

Diana Cushing struck and killed Frank Garcia while he was in the crosswalk at the intersection of North 170th Street and Aurora Avenue North. Before the accident on October 26, 2002, WSDOT and the City made a number of improvements to enhance pedestrian safety at that intersection.

Aurora Avenue North is a state highway and a major arterial through the city of Shoreline. At the intersection of North 170th Street and Aurora Avenue North, the southbound and northbound lanes are separated by a median. The posted speed limit is 40 miles per hour (m.p.h.).

In the mid-1990s, the City hired traffic engineer consultant William Haro to conduct a pedestrian safety study. In Haro’s 1998 report, he recommended a number of safety improvements. Based on the report, the City obtained federal “Hazard Elimination Safety” grants to improve pedestrian safety. At around the same time, WSDOT was working with the Washington State Traffic Safety Commission to develop a plan to improve pedestrian safety along Aurora Avenue North. One recommendation was to select a limited number of projects to implement the identified recommendations. WSDOT obtained federal safety funds to do so.

In the spring of 1999, the City and WSDOT agreed to combine the federal grants for pedestrian safety improvements on Aurora Avenue North. The intersection at North

170th Street and Aurora Avenue North was one of the two intersections selected by the City and WSDOT. WSDOT assumed responsibility for construction and installation of the pedestrian safety improvements.

The project at the intersection of North 170th Street and Aurora Avenue North consisted of nine pedestrian safety improvements. The nine improvements are:

- (1) Marked cross walk [sic] at North 170th Street;
- (2) Raised planted medians with a pedestrian refuge path cut through the median at an angle so pedestrians can view oncoming traffic;
- (3) Advance yield bars 40 feet in advance of the designated pedestrian crosswalk;
- (4) 2' X 3-1/2' Advance Yield for Pedestrian warning signs on both sides of the yield bar to the approaching drivers['] right and left;
- (5) Enhanced overhead lighting of the intersection and crosswalk;
- (6) Relocated transit stops;
- (7) New sidewalks, curbs and gutters;
- (8) Overhead electronic LED [light emitting diode] animated roving-eyes warning signs for motorists and pedestrian-height signs for pedestrians; and
- (9) 4' X 4' Pedestrian warning signs 300 feet in advance of each crosswalk, both directions, with an amber beacon.

By June 2002, the nine pedestrian safety improvements were installed at the intersection of North 170th Street and Aurora Avenue North.

Based on a study showing that use of the roving eyes device increased the number of motorists who yielded to pedestrians, WSDOT and the City decided to include the experimental technology as part of the project. Because the experimental roving eyes device did not comply with the "Manual on Uniform Traffic Control Devices" (MUTCD) of the Federal Highway Administration (FHWA), WSDOT sought approval to use the device. The FHWA approved installation of the roving eyes device

The roving eyes device is an overhead LED display that is designed to flash when a pedestrian enters the crosswalk. The display uses a passive detection system designed to "sense" the presence of a pedestrian and begin flashing.

The roving eyes device was installed in June 2002. But the roving eyes device did not work properly. WSDOT engineers worked with the private vendor to solve the problem and fix the device. On September 25, WSDOT and the vendor determined that the wiring was faulty. New parts were ordered but did not arrive until October 30. Consequently, the roving eyes device was not working at the time of the accident.

On October 26, 2002, Frank Garcia was shopping at the Pawn Exchange. The Pawn Exchange is located at the intersection of North 170th Street and Aurora Avenue North. Just before 5 p.m., Garcia left the Pawn Exchange to cross the street to use the restroom at Parker's Casino. It was still daylight outside and the weather was clear. Garcia used the marked crosswalk to get to Parker's Casino.

Garcia used the crosswalk to return to the Pawn Exchange. A Volkswagen van driven by James Green stopped in the outside southbound lane to let Garcia cross. Garcia nodded at Green as he started to cross in front of Green's van. Green said that while he was waiting for Garcia to cross, two other cars stopped behind his van.

Green said that a car drove past him in the next lane traveling close to the speed limit of 40 m.p.h. and did not slow down. Green watched as the car drove into the crosswalk and hit Garcia. The right front of the car hit Garcia in the left leg. Garcia's head hit the windshield of the car. After the impact, Garcia was thrown approximately 49 feet into the intersection.

Diana Cushing was the driver of the car that hit Garcia. Right after the accident, Cushing gave a statement to Detective James Leach of the Major Accident Response and Reconstruction Unit of the King County Sheriff's Office. Cushing admitted that she was talking to her 13-year-old son Andrew Bergstrom who was sitting in the passenger seat and that she was not paying attention or looking ahead. Cushing said that she did not notice the three cars stopped in the next lane at the crosswalk and she did not see Garcia. Cushing said that after her son yelled at her to stop, she slammed on the brakes but was unable to avoid hitting Garcia in the crosswalk.

Cushing: I was driving southbound on Aurora and I was talking to my son, who was sitting in the passenger side seat and I wasn't really looking and apparently somebody . . . from the outside lane had screeched and I didn't really notice it and then this man walked . . . walked out into the street on . . . from the west hand side of the road and into the

Leach: So he would have been going from your right to your left?

Cushing: Yes. Yeah.

Leach: Okay.

. . . .

Cushing: And he . . . I didn't see him and he just . . .

Leach: When was the first time you saw him?

Cushing: I . . . about two second [sic] before I hit him.

. . . .

Leach: Now the vehicle . . . you said there was a vehicle on the outside lane?

Cushing: I . . . I didn't even notice the vehicle on the outside lane. I didn't . . .

Leach: Okay.

Cushing: I didn't really . . . I didn't see him

Cushing's son Andrew told Detective Leach that he saw Garcia walking quickly as he was crossing in front of Green's van and yelled at his mother to stop. Andrew said that when Garcia saw Cushing's car driving towards him, he looked startled and jumped back.

Detective Leach determined that Cushing was driving approximately 36 m.p.h. at the start of the first skid mark and estimated she was driving at approximately 27 to 30 m.p.h. when her car hit Garcia. Surveillance cameras also showed that Green slowed down as he approached the intersection but that Cushing did not slow down.¹ The traffic collision report prepared by Detective Leach states that the accident was caused by Cushing's improper passing, her failure to yield to a pedestrian, and her inattention. Garcia died the next morning from his injuries. The State charged Cushing with negligent driving in the second degree.

Tara Garcia, individually and as the personal representative of the Estate of Frank Garcia, filed a wrongful death action against Cushing, WSDOT, the manufacturer of the roving eyes device, the manufacturer of the microwave sensors used in the roving eyes device, and the contractors who installed the roving eyes device. Cushing stipulated to entry of a final judgment against her for \$883,884.31.

WSDOT filed a summary judgment motion arguing that the intersection was

¹ The accident was recorded by several surveillance cameras located on the exterior of Parker's Casino. The tape recordings from the cameras are consistent with the eye witness accounts and there is no factual dispute regarding the accident.

reasonably safe for ordinary travel, the sole proximate cause of Garcia's death was Cushing's inattentiveness, and the decision to install the improvements was a discretionary governmental decision. In support, WSDOT submitted the declarations of accident reconstruction expert Richard Chapman and the WSDOT traffic engineer for the northwest region, Mark Leth, as well as the declarations of highway engineering experts Charles Zegeer of the University of North Carolina Highway Safety Research Center and Michael Cynecki, a traffic engineer for the city of Phoenix.

Chapman confirmed that at the time of impact, Cushing's speed was at least 36 m.p.h. and that when Garcia was struck, he was in the crosswalk. Chapman also determined that the brake lights of Green's van and the two cars behind him had been on for a minimum of three seconds while Garcia was crossing. In Chapman's opinion, the accident was caused by Cushing's failure to pay attention as she entered the intersection, her inattention to the reflective warning signs for the approaching crosswalk, and her failure to notice the vehicles stopped in the next lane.

The traffic experts testified that the intersection met applicable safety standards and the crosswalk was reasonably safe for ordinary travel. WSDOT traffic engineer Leth testified that WSDOT was not required to install a traffic control signal at the intersection because the intersection did not meet the criteria in the MUTCD, and the improvements made to the intersection were a matter of engineering discretion.²

Leth also stated that while the roving eyes device increased the likelihood that motorists would yield to pedestrians, compliance with the roving eyes device was not

² The MUTCD outlines current applicable traffic engineering standards and compliance is a condition of federal grant funding.

consistent. According to Leth, after the push button activation system was installed in November 2002, only one third of pedestrians activated the roving eyes device. Leth said that it would be speculative to conclude that Garcia would have used the device had the push button system been installed.

Cynecki and Zegeer also stated that it would be speculative to conclude that Cushing would have reacted differently if the roving eyes device had been properly working. According to Zegeer, the fact that Green's van was stopped at the crosswalk and that the two cars were stopped behind the van was the most important "visual clue" that a pedestrian was crossing.

[T]he most important visual clue to Ms. Cushing that a pedestrian was crossing Aurora as she approached the intersection was the fact that the lead vehicle to her right had come to a stop at this intersection and two following vehicles were slowing to a stop as she approached the intersection clearly marked as a pedestrian crossing.

Cynecki also concluded that Cushing's failure to notice the cars stopped in the next lane was "a clear indication that she was not paying attention."

In opposition, the Estate submitted the declaration of traffic engineer Timothy Miller. Relying on Miller, the Estate argued that because studies showed that the roving eyes device was successful in redirecting the attention of inattentive drivers, it was reasonable to infer that if the device had been working it would have alerted Cushing that a pedestrian was in the crosswalk and increased the likelihood that she would have yielded. Miller stated, in pertinent part:

[I]f the "roving eyes" system had been activated at the time of the collision or if some other traditional over the roadway amber light had been installed and operating, either would have been more effective than the de-activated "roving eyes" system to alert Diana Cushing or her front seat

passenger that a pedestrian was crossing at the time, thereby causing her to stop and avoid the collision.

Without reference to engineering guidelines, Miller concluded that WSDOT should have “activated the ‘roving eyes’ system sooner,” left the roving eyes system operating during the time they were troubleshooting the system, used push button controls or some “other more reliable detection technology rather than pole mounted microwave sensors,” used a more traditional over the roadway amber light display, or installed pedestrian instructional signs similar to those later requested by WSDOT.

The Estate also argued that driver inattention at the intersection was reasonably foreseeable, and that WSDOT and the City created a hazardous condition by turning off the device when it was not functioning properly.

The trial court granted WSDOT’s motion for summary judgment. The court ruled that the use of the roving eyes device was a discretionary decision and failure to activate the device was not a proximate legal cause of the accident. The trial court ruled, in pertinent part:

Counsel, I think the way this breaks down is this: The decision to try using that roving eye sign was a discretionary decision that was made by the governmental entities involved, the City of Shoreline, the WSDOT utilizing Federal money.

The truth of the matter is, almost all of the improvements that were to be made at that particular site were made except for the fact that the roving eye sign, up until after this accident occurred, was not working properly.

It seems to me that the Department of Transportation exercised its discretion in how to deal with that problem. The problem being the signage, the cautionary signage, the roving eye, was not working right.

So you have two choices. You either shut it down, because it is not working right or you, in the alternative, leave it running knowing full well it is not working right.

The bottom line is they opted for the more sensible position, and

they shut it down.

I don't see any reason why it would have to be bagged, because I don't believe it does fit in under the rubric of a traffic signal. Even if it did, there is no point in arguing that issue because the sign itself was completely black when it was shut down.

Could an argument be made that it could be fixed faster? I suppose so. But I think that still comes within the discretionary call of DOT, and the resources they have available.

It may be true that after the accident occurred they moved with greater alacrity as a result of that, but that doesn't mean they were negligent in not moving as quickly earlier on with the resources they had.

With regard to whether or not the absence of that sign was a cause in fact, I suppose you could say that reasonable minds could differ. If the defendant was looking forward and the sign fulfilled its purpose, which is to alert people to the intersection, and it works better than normal signage, just maybe it might have made a difference. I suppose we could say that's a material issue of fact.

But when you get right down to it, counsel, I don't think there is any legal causation here. I do think the decisions that were made by the State were discretionary.

When you look at legal causation you have to consider logic, common sense, justice, policy and precedent. And when I put all those things into a mix, what I end up with is granting the State's motion for summary judgment for dismissal.

So, counsel, I would appreciate it if you could craft the order up, making sure that all the attachments and so forth are cataloged and indicate that the Court is making the determination strictly on the notion that the determination to shut off the roving eye was discretionary, as far as I was concerned, and that I don't find legal causation.

After dismissal of the claims against WSDOT, the Estate filed an amended complaint naming the City of Shoreline as a defendant. The Estate alleged the City should have requested installation of a traditional traffic control signal at the intersection. The City filed a motion for summary judgment. In opposition, the Estate submitted the declaration of Miller.

Miller conceded that the installation of a traffic control signal is a matter of "engineering discretion to be exercised when specific criteria or warrants are met."

Miller also conceded that “satisfaction of one or more warrants does not in itself require the installation of a traffic signal and that the decision still comes down to ‘engineering discretion’ even if the criteria are satisfied.”

Nonetheless, Miller stated that in his opinion, the “proper exercise of engineering discretion called for the installation of the more traditional traffic control signals utilizing pedestrian push button controls.” According to Miller, if the City had requested a traffic control signal, the request would have been granted, the signal would have been installed before the accident, and the collision would not have occurred.

Miller also concluded that while the crosswalk was “not reasonably safe for pedestrians prior to the improvements being made,” because the marked crosswalk did not have an operational traffic control, the improvements potentially gave a “false sense of security to pedestrians in a multiple threat environment.”

The trial court granted the City’s motion for summary judgment. The court ruled, in pertinent part:

First, is there any proof of negligence by omission by the City that is tied inextricably in the Court’s view with the second issue, which is whether there’s any evidence that the state Department of Transportation would have approved such a request in a timely manner. The evidence before this court is that, in the opinion of Mr. Miller, who by all accounts is certainly qualified as an expert in this area, in his opinion, the City failed to exercise proper engineering discretion by not demanding or requesting of the state Department of Transportation the installation of traditional traffic control signals at this intersection.

He then goes on to opine that, quote: A traditional traffic control signal would have been operational before the collision because it would not have encountered the same operational problems the experimental roving eyes technology did.

That is not a sufficient factual basis for the conclusion, or there is

no sufficient factual basis for the conclusion Mr. Miller reaches. He does nothing to address how it is that the process of approval works within the department, when the department's [sic] or the department would have had to receive the request from the City, and basically how long that process takes and what the factors are that go into the analysis of whether, in fact, such a request would have been approved.

It is clear from the evidence before the Court that the state Department of Transportation had made a decision in its discretion to install this experimental, very expensive traffic control device at this intersection rather than install a traditional traffic control signal. There is, in the Court's view, no evidence and no genuine issue of material fact to establish that the department would have, in fact, approved such a request under [RCW] 47.24.020 Sub 13 in a timely manner had the City made such a request for the installation of a traditional traffic control device at that intersection.

ANALYSIS

The Estate appeals summary judgment dismissal of the claims against WSDOT and the City. The Estate asserts that as a matter of law, the failure of WSDOT to activate the roving eyes device or install other technology was a proximate cause of the accident, and the City's failure to request installation of traditional traffic control signals was a proximate cause of the accident.

We review summary judgment de novo. Hartley v. State of Wash., 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. CR 56(c).

A defendant can move for summary judgment by showing that there is an absence of evidence to support the plaintiff's case. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the defendant shows an absence of evidence to establish the plaintiff's case, the burden then shifts to the plaintiff to set forth specific

facts showing a genuine issue of material fact for trial. Young, 112 Wn.2d at 225.

While we construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, if the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” summary judgment is proper. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002); Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

The nonmoving party may not rely on speculation or “mere allegations, denials, opinions, or conclusory statements” to establish a genuine issue of material fact. Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (citing Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988)).

The Estate claims WSDOT breached its duty to maintain the intersection at North 170th Street and Aurora Avenue North in a condition that is reasonably safe for ordinary travel. The Estate argues that because studies showed the roving eyes device was successful in redirecting inattentive drivers, it would have prevented the accident.

In support, the Estate relies on Miller’s opinion that “WSDOT should have activated the ‘roving eyes’ display sooner,” that “WSDOT should have used [push button] controls or other more reliable technology than pole mounted sensors,” and “WSDOT could have placed a simple warning sign . . . when the ‘roving eyes’ were not

activated.” The Estate also argues that despite Cushing’s statement that she was not looking and did not notice the cars stopped in the next lane, she would have noticed the roving eyes device because “it is unreasonable to argue that she could be going forward at approximately 40 [m.p.h.] without looking where she was going.”

As to the City, the Estate contends that the City breached its duty to maintain its roads in reasonably safe condition for ordinary travel by failing to exercise its discretion to request and install a traditional traffic control signal utilizing pedestrian push button controls.

To establish negligence, the Estate must prove (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, and (3) injury proximately caused by the breach. Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992).

There is no dispute that a municipality has a duty to exercise ordinary care to “build and maintain its roadways in a condition that is reasonably safe for ordinary travel.” Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). To defeat summary judgment, a showing of proximate cause must be based on more than mere conjecture or speculation. Miller v. Likins, 109 Wn. App. 140, 145, 34 P.3d 835 (2001). It is well established that in order to hold a municipality liable for failure to provide a safe roadway, the plaintiff must establish “more than that the government’s breach of duty might have caused the injury.” Miller, 109 Wn. App. at 145.

There are two elements of proximate cause: cause in fact and legal causation. Hartley, 103 Wn.2d at 777. Cause in fact concerns the actual consequences of an act. On the other hand, legal causation is grounded in the determination of how far the

consequences of a defendant's act should extend and focuses on whether the connection between the defendant's act and the result is too remote or inconsequential to impose liability. Hartley, 103 Wn.2d at 778-79.

Hartley illustrates the circumstances where as a matter of law, the State's liability for a car accident was "too remote and insubstantial to impose liability." Hartley, 103 Wn.2d at 784. In Hartley, Janet Hartley was killed when the car driven by Eugene Johnson crossed the center line and hit her car. Hartley, 103 Wn.2d at 770. Johnson was intoxicated at the time of the accident. Johnson had previously been arrested numerous times for drunk driving. Hartley, 103 Wn.2d at 770. The Estate filed a wrongful death action against the State for negligence in failing to revoke Johnson's license under the Washington Habitual Traffic Offenders Act. Hartley, 103 Wn.2d at 772. The court held that as a matter of law, the failure to revoke the intoxicated driver's license was too remote and insubstantial to impose liability. Hartley, 103 Wn.2d at 784.

Here, even assuming WSDOT breached its duty, as in Hartley, the Estate cannot show that any failure on the part of WSDOT to ensure the roving eyes device was properly functioning was a proximate cause of the accident. Cushing did not notice any of the warning signs and visual clues as she approached the intersection, including the painted stop bar 40 feet before the crosswalk, the two-by-three-and-a-half-foot "Yield for Pedestrians" warning signs with arrows pointing at the stop bar, and the four-by-four-foot yellow pedestrian warning signs. There is also no dispute that Cushing was not looking ahead and was talking to her son who was sitting in the

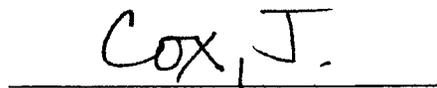
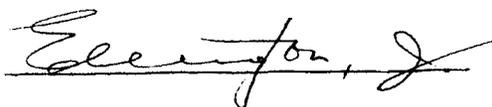
passenger seat. By her own admission, Cushing did not notice the three cars stopped in the outside lane to her right. The Estate's claim that WSDOT should have activated the roving eyes device sooner or installed different technology, and the argument that the roving eyes device would have prevented the collision, is based on speculation and as a matter of law is too attenuated to impose liability in this case.

Likewise, the negligence claim against the City fails. The Estate argues that the City was negligent because "the proper exercise of engineering discretion called for the installation of the more traditional traffic control signals." The record does not support the Estate's argument. The record shows that because the intersection did not meet the criteria for traffic control signals, the City had to request a permit to install traffic control signals at the intersection. There is nothing in the record showing that if the City had exercised its discretion to apply for a permit to install traditional traffic control signals, the permit would have been granted, or that if granted, the City could have obtained funding and installed the traffic control signals before the accident.

We affirm summary judgment dismissal of the claims against WSDOT and the City.



WE CONCUR:



No. 63689-8-1/17

APPENDIX 4

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

TARA A. GARCIA, individually and as)
personal representative of the Estate)
of FRANK J. GARCIA,)

Appellant,)

v.)

THE STATE OF WASHINGTON)
DEPARTMENT OF)
TRANSPORTATION, THE STATE OF)
WASHINGTON, and THE CITY OF)
SHORELINE,)

Respondents.)

No. 63689-8-1

ORDER GRANTING MOTION
TO PUBLISH

The respondent City of Shoreline and third party Washington Association of Prosecuting Attorneys filed a motion to publish the opinion filed on February 22, 2011 in the above case. A majority of the panel has determined that the motion should be granted;

Now, therefore, it is hereby

ORDERED that respondent's motion to publish the opinion is granted.

DATED this 13th day of April, 2011.

FOR THE COURT:


Judge

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2011 APR 13 AM 9:39

CERTIFICATE OF SERVICE

I, Oscar Ramos Jr., 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 State of Washington's Brief to be served upon the following in the manner indicated therein:

Court

Clerk of the Court – via hand delivery
Court of Appeals, Division I
600 University Street
Seattle WA

The Appellants' Counsel

Keith Kessler – via e-mail
Stritmatter Kessler Whelan Coluccio
413 Eighth Street
Hoquiam WA 98550
keith@stritmatter
kerrym@stritmatter.com

Paul Whelan – via Hand Delivered
Stritmatter Kessler Whelan Coluccio
200 Second Avenue West
Seattle WA 98119
paulw@stritmatter.com

Peter O'Neil – via e-mail
3300 E Union St
Seattle WA 98122-3372
peter@peteroneil.net

Alisa Brodkowitz – via e-mail
Brodkowitz Law
81 Vine Street, Ste. 202
Seattle WA 98121
alisa@brodkowitzlaw.com
jessica@@brodkowitzlaw.com

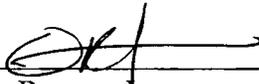
***Attorney for Respondent
Tri-State Construction***

Francis Floyd – via e-mail
Kerry Gress – via e-mail
Doug Weigel – via e-mail
Floyd, Pflueger & Ringer, PS
200 W. Thomas Street, Ste. 500
Seattle WA 98119
ffloyd@floyd-ringer.com
kgress@floyd-ringer.com
dweigel@floyd-ringer.com
tcarey@floyd-ringer.com
ebeck@floyd-ringer.com
dweller@floyd-ringer.com

Attorney for Respondent Richard Mobley

Pauline Smetka – via e-mail
Hellsell Fetterman
1001 4th Ave Ste 4200
Seattle WA 98154-1154
psmetka@hellsell.com
mglazier@hellsell.com

DATED this 27th day of May, 2011, at Seattle, Washington.



Oscar Ramos, Jr.