

No. 35411-0-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
STATE
BY *JW*

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

LINDA ANN DOMINGUEZ
and
THE ESTATE OF MICHAEL DOMINGUEZ,
Appellant

v.

CITY OF TACOMA, TACOMA POWER
and LEEWARD ENTERPRISES, INC.,
Respondents

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred by finding that “no act or omission of the City of Tacoma, Tacoma Power, or Leeward Enterprises, Inc. d/b/a Traffic Control Services was a proximate cause of Michael Dominguez’s accident[.]”

Finding of Fact (Order on Summary Judgment at 1; CP 423).

2. The trial court erred by failing to consider there could be more than one proximate cause of Mr. Dominguez’s death.

3. The trial court erred by not finding that the Defendants were bound by the requirements of WAC 296-155-305 and the Federal Highway Administration’s Manual on Uniform Traffic Control Devices.

4. The trial court erred by not viewing all of the facts and inferences drawn therefrom in a light most favorable to the Plaintiff (the nonmoving party).

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

I. Did the trial court err by granting the Defendants’ motion for summary judgment, thereby dismissing Mrs. Dominguez’s complaint?

Assignments of Error 1-6.

STATEMENT OF THE CASE

A fatal motorcycle accident underlies this appeal. At issue is the trial court's dismissal of the Plaintiff's complaint on summary judgment.

Factual background

Michael and Linda Dominguez were married in 1973. CP 3; CP 233. They have two adult children. CP 3; CP 234. Mr. Dominguez had been an electrician's trades helper at Western State Hospital since 1983. CP 70; CP 234.

On April 23, 2004, Mr. Dominguez worked until 4:00 p.m. CP 75; CP 239. He drove his 1977 Harley Davidson to meet some friends. CP 75; CP 154; CP 239; CP 295. When Mrs. Dominguez got off work, she drove her own motorcycle to meet Mr. Dominguez for dinner. CP 75; CP 239.

Following their dinner, Mr. and Mrs. Dominguez went to play pool and listen to music. CP 75; CP 239. Mrs. Dominguez left for home at about 10:30 p.m. CP 75; CP 239. Mr. Dominguez left for home at approximately 12:00 a.m. CP 75; CP 239.

At approximately 12:38 a.m., Mr. Dominguez was traveling westbound on State Route 702, approximately ½ mile west of Kingsman

Road East, in rural Eastern Pierce County, Washington. CP 2; CP 123; CP 126; CP 154; CP 294.

At the same date, time and location, Defendant Tacoma Power was working in the right of way on the south side of State Route 702, due to an accident that had occurred there that same day in the afternoon. CP 2; CP 151; CP 153, 154; CP 294. In the afternoon accident, a utility “box” van vehicle, after swerving to avoid hitting two vehicles that had collided in front of it, struck and damaged a utility pole. CP 151; CP 295.

Tacoma Power arrived at that location at approximately 11:00 p.m. to repair the damaged utility pole. CP 127; CP 151; CP 175.

At the same date, time and location, Defendant Leeward Enterprises, Inc., d.b.a. Traffic Control Services, was providing traffic control services, specifically including flagging and signage along said route at the request of, under the supervision of and on behalf of Tacoma Power. CP 2.

A sign stating “FLAGGER AHEAD” was located approximately 198 feet east of the construction area. CP 128; CP 155; CP 162; CP 296. Another sign stating “LEFT LANE CLOSED AHEAD” was located approximately 531½ feet east of the construction area. CP 128; CP 155; CP 162; CP 296. Another sign stating “UTILITY WORK AHEAD” was located approximately 850 feet east of the construction area. CP 128; CP

155; CP 162; CP 296. A fourth sign stating “BE PREPARED TO STOP” was located approximately 1,183 feet east of the construction area. CP 127; CP 155; CP 162; CP 296.

The only flashing lights in the area at that time were the flashing amber lights on the Tacoma Power trucks. CP 151; CP 176.

A white Ford Escort was stopped in the roadway at the repair site due to the ongoing construction work. CP 126; CP 155. A flagger was standing approximately 30 feet in front of the Ford Escort. CP 158.

Mr. Dominguez entered the construction area and struck the right rear corner of the Ford Escort. CP 2; CP 123; CP 126; CP 151; CP 153; CP 157, 158; CP 294. Mr. Dominguez landed in the ditch next to the road. CP 153, 155; CP 157. His left leg appeared to be broken. CP 157.

Trooper Robert Wollnick, the State Patrol’s accident scene “investigating tech,” reported that “it [didn’t] appear that there was much collision with the motorcycle hitting the back of the car.” CP 160.

Nonetheless, Mr. Dominguez was seriously injured as a result of the collision. He was transported to Madigan Army Hospital. CP 79; CP 151; CP 153; CP 158; CP 294.

Yvette Renee Coleman, a witness who lived near the accident scene, had been a certified flagger since 2002. CP 176. Ms. Coleman gave a sworn statement in which she stated flaggers were in the

construction area at the time of the accident but there was no illumination other than “four flashing LED lights” to warn approaching motorists of the construction area and activity. CP 175, 176. Ms. Coleman testified “all that the flaggers had for anything was their stop paddle, their reflective gear and a red LED flashing light to warn motorists that they were in the road.” CP 176.

Ms. Coleman testified she saw Tacoma Power personnel provide battery-powered outside illumination lights to the flagger approximately 35 to 45 minutes *after* the ambulance left to transport Mr. Dominguez to Madigan. CP 175.

The [night traffic control] lighting was not put into place until after the second accident occurred, approximately 35 to 45 minutes after that second accident. Then the Tacoma, Tacoma Utilities, Tacoma Power came out and brought two portable work station lamps, one is a battery on a utility cart with one lamp positioned that it could be swiveled in a different area so that it’s not glaring. The flagger that was on duty in front of my residence, she did position the light where it illuminated the street but she didn’t stand in the illumination area. She wandered back and forth within those 300 feet of work space.

CP 177.

Ms. Coleman also reported that the flagger signage was improperly positioned in the construction area. CP 176. Finally, Ms. Coleman testified that the flagger did not utilize a “flagger box,” commonly used to designate a safe work area for a flagger. CP 178.

Investigating State Trooper Ostrander made no mention of Mr. Dominguez being intoxicated at the time of the accident. CP 151-52. Dr. Mullenix, the reporting physician from Madigan, stated to the Medical Examiner that Mr. Dominguez was intoxicated at the time of the accident. CP 123-24. But blood work done on Mr. Dominguez at Madigan Army hospital 1½ hours after the accident indicated he had a blood alcohol level of 0.059%. CP 50. In addition, the State Patrol's own press release expressly stated drugs or alcohol were not factors in the accident. CP 196.

Because Mr. Dominguez had sustained extensive brain injuries, he was taken off life support. He died on April 28, 2004. CP 123, 124; CP 153, 156; CP 295, 297.

Summary judgment

On summary judgment, the Defendants argued that "Mr. Dominguez's accident was solely caused by Mr. Dominguez's inattention." CP 55. They argued further that Mr. Dominguez's inattention was the result of intoxication. CP 55-56. The Defendants argued that the intoxication defense barred Mrs. Dominguez's claims. CP 55-56.

The Defendants relied on the affidavits of Ann Gordon (CP 28-50), a forensic toxicologist, and John Hunter (CP 125-212), a retired Washington State Patrol trooper to support this contention. In response,

Mrs. Dominguez relied on the affidavit of David Predmore, former Supervising Forensic Toxicologist for the Washington State Toxicology Laboratory. CP 328-46.

At oral argument on the summary judgment motion, when Mrs. Dominguez's counsel began to address the intoxication issue, the trial court orally ruled, "Well, you win on intoxication, so you can skip that."¹
1 VRP 16.

As to the remaining issues on summary judgment, the Defendants relied on the affidavit of John Hunter to support their argument that no aspect of traffic management contributed to Mr. Dominguez's accident, but that his own inattention and unsafe motorcycle were the cause. CP 125-140.

Edward M. Stevens, a professional civil engineer specializing in the field of highway safety, provided an affidavit in support of Mrs. Dominguez's opposition to the Defendants' motion for summary judgment. CP 213-25. Based upon his own review of the evidence (including an inspection of the accident site) as well as his professional training and experience, Mr. Stevens opined:

¹ When a trial court does not make explicit written findings as to a given issue, this court may look to the trial court's oral decision for interpretation. *State v. Kronich*, 131 Wn. App. 537, 543, 128 P.3d 119 (2006) (citing *State v. Motherwell*, 114 Wn.2d 353, 358 n. 2, 788 P.2d 1066 (1990)).

Advance warning signing sequence and spacing were substandard and the flagging worker station was not illuminated at the time of the incident: The use of the “Left Lane Closed Ahead” sign instead of the “Lane Closed Ahead” was misleading in that it indicates the right lane as open to high speed traffic. Proper sequencing of a standard sign layout is most important in promoting uniformity and recognition in obtaining proper driver behavior. All work vehicles with flashing lights were in the left lane vicinity. At the time of the incident the flagger was stationed in front of the stopped vehicle which is in violation of industry standards which require the flagger to be visible to oncoming traffic at all times and specifically states “Do not stand in front of stopped or parked vehicles on the road.” This standard is set forth in the “Traffic Control, Flagger Certification Handbook[.]” . . .

In summary, it is my professional opinion that the Traffic Control that was put in place did not conform with WAC 196-155-305 nor authoritative industry standards and that SR-702 was not reasonably safe for westbound traffic as well as flaggers and construction workers as it existed at the time of the Dominguez fatal accident.

CP 217.

Antoni Froehling, a licensed attorney, has been co-owner of a motorcycle fabrication and repair business since 1996, and has worked extensively with Harley Davidson motorcycles since 1967. CP 317-18. Mr. Froehling also provided an affidavit in support of Mrs. Dominguez’s opposition to the Defendants’ motion for summary judgment based on his independent examination of Mr. Dominguez’s motorcycle and his extensive knowledge and experience with Harley Davidson motorcycles. CP 317-327. Mr. Froehling concluded as follows:

In my opinion, despite outward appearances that this was an old, marginally legal motorcycle, I believe this appearance was misleading and that the motorcycle was safe and functional for its intended purpose. In reaching that conclusion, I am assuming that at the time it was involved in the accident it was in the same condition as when I observed it, less the damage which resulted from the accident. I saw nothing to suggest that the condition of the motorcycle contributed to this accident.

CP 325-26.

After hearing oral argument on July 28, 2006, the trial court granted the Defendants' motion for summary judgment, dismissing Mrs. Dominguez's complaint. CP 423-25. The trial court ruled:

I am going to grant the summary judgment motion. I believe that the precedent that has been provided is applicable in this case and that the plaintiff has not met its burden to show proximate cause. I'm very sad for the plaintiff's family. It's a tragic situation.

1 VRP 23. In the written order, the trial court found:

No act or omission of the City of Tacoma, Tacoma Power, or Leeward Enterprises, Inc. d/b/a Traffic Control Services was a proximate cause of Michael Dominguez's accident[.]

CP 423.

Mrs. Dominguez moved for reconsideration. CP 426-45; 2 VRP.

At oral argument, the trial court stated it had not previously ruled that the sole proximate cause of the injury rested with Mr. Dominguez. 2 VRP 4.

Counsel for Mrs. Dominguez argued that Trooper Wollnick's investigation contradicted the Defendants' interpretation of the events that

led to Mr. Dominguez's injury and subsequent death. 2 VRP 5. But the court stated

I can't interpret [Trooper Wollnick's] data without an expert.

* * * *

. . . I don't think any fact finder can, so I think your motion was deficient by not having an accident reconstructionist interpret this raw data that was given by a trooper, and that is the reason for the summary judgment.

2 VRP 5-6.

I think it would have been extremely helpful and I think it was [Mrs. Dominguez's] burden, once summary judgment was brought, to provide expert testimony with respect to how this accident occurred and whether or not evasive action happened. But without meeting that burden, I don't know how I can rule. And you know I'm very sympathetic to Plaintiff's situation.

2 VRP 7. The trial court concluded:

I cannot change my ruling on this. I find that necessary testimony linking, for purposes of summary judgment, the admitted negligence to the cause of the accident is missing.

2 VRP 10. Mrs. Dominguez appeals.

ARGUMENT

I. THE TRIAL COURT ERRED BY DISMISSING THIS COMPLAINT ON SUMMARY JUDGMENT

Standard of Review

This Court reviews orders on summary judgment de novo, performing the same inquiry as did the trial court. *Seiber v. Poulsbo*

Marine Center, Inc., -- Wn. App. --, 150 P.3d 633, 635 (2007) (citing *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004)). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hisle*, 151 Wn.2d at 861.

In a summary judgment proceeding, the evidence and reasonable inferences drawn therefrom are viewed in a light most favorable to the nonmoving party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987).

But if the nonmoving party offers only a mere “scintilla” of evidence, evidence that is “merely colorable,” or evidence that “is not significantly probative,” the nonmoving party will not defeat the summary judgment motion. *Herron*, 108 Wn.2d at 170. Furthermore, conclusory² statements offered by the nonmoving party are insufficient; the nonmoving party must demonstrate the basis for his or her assertions. CR 56(e); *Herron*, 108 Wn.2d at 170.

In other words, in opposing a motion for summary judgment, the nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits

² A conclusory statement is defined as “expressing a factual inference without stating the underlying facts on which the inference is based.” BLACK’S LAW DICTIONARY 284 (7th ed. 1999).

considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and show that a genuine issue as to a material fact exists. *Seven Gables*, 106 Wn.2d at 13. Ultimate facts or conclusions of fact are insufficient; nor will conclusory statements of fact suffice. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-360, 753 P.2d 517 (1988).

Negligence

In order to prevail in an action for negligence, a plaintiff must show that:

- (a) the defendant(s) owed a duty of care to the plaintiff;
- (b) the defendant(s) breached that duty;
- (c) injury to the plaintiff resulted; and
- (d) the breach of duty was a proximate cause of the injury.

Seiber v. Poulsbo Marine Center, Inc., -- Wn. App. --, 150 P.3d 633, 636 (2007) (citing *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 599, 20 P.3d 1003 (2001)). Whether a defendant owes a duty of care is a question of law. *Hoffstatter*, 105 Wn. App. at 601.

Proximate cause

“Proximate cause consists of two elements: cause-in-fact and legal causation.” *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 307, 151 P.3d

201 (2006) (citing *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)).

Cause-in-fact refers to the actual, “but for,” cause of the injury, i.e., “but for” the defendant's actions the plaintiff would not have been injured. *Lynn*, 136 Wn. App. at 307. Establishing cause-in-fact involves a determination of what actually occurred and is generally left to the jury. *Hartley*, 103 Wn.2d at 778.

Legal causation is a question of law. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311-12, 151 P.3d 201 (2006) (citing *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001)). It is a inquiry subsequent to the inquiry on cause-in-fact, asking as a matter of law whether liability should attach. *Ang v. Martin*, 154 Wn.2d 477, 490, 114 P.3d 637 (2005) (citing *Hartley*, 103 Wn.2d at 779). Legal causation can be so intertwined with duty that the former can be answered by deciding the latter. *Taggart v. State*, 118 Wash.2d 195, 226, 822 P.2d 243 (1992).

a. **Proximate cause is a question of fact, to be determined by the jury.**

As stated above, proximate cause is generally a question of fact. *White v. Township of Winthrop*, 128 Wn. App. 588, 595, 116 P.3d 1034 (2005) (citing *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400

(1999)). See also *Hosea v. City of Seattle*, 64 Wn.2d 678, 683, 393 P.2d 967 (1964) (in order to determine proximate cause the “jury ... must weigh and weight factors, values, facts and circumstances presented in a given case”); *Everest v. Riecken*, 26 Wn.2d 542, 548, 174 P.2d 762 (1946) (the issue of proximate cause is “generally a question of fact for the jury to find from all the pertinent facts and circumstances”) (quotation omitted). But proximate cause may be a question of law “if the facts are undisputed, the inferences are plain and inescapable, and reasonable minds could not differ.” *Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections*, 122 Wn. App. 227, 239, 95 P.3d 764 (2004).

When reviewing an order on summary judgment, this court reviews the record to determine whether the plaintiff offered sufficient admissible evidence, which if proved, would support sufficient allegations of material fact to warrant sending the case to a jury. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 307-08, 151 P.3d 201 (2006) (emphasis added).

In this case, Mrs. Dominguez offered sufficient evidence that the Defendants did not comply with regulations set forth in the Washington Administrative Code pertaining to traffic management at roadway repair sites. The Declaration of Edward Stevens was based upon his thorough review of the file and evaluation of the evidence (including an inspection

of the accident site), not upon a mere scintilla of evidence. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); CP 213-225.

Edward Stevens reviewed the very same evidence the Defendants' expert, John Hunter, reviewed. CP 125-212. The evidence and reasonable inferences drawn therefrom (by the experts) should have been viewed in a light most favorable to the nonmoving party, Mrs. Dominguez. *Herron*, 108 Wn.2d at 170. The trial court was given competing expert opinions derived from and based upon the same evidence. Thus, under CR 56(c), there were genuine issues of material fact. The inferences drawn from the evidence by Edward Stevens should have been viewed by the trial court in a light most favorable to Mrs. Dominguez. Had the trial court done so, the Defendants' summary judgment motion necessarily would have failed, because reasonable minds *could* differ as to which expert to believe. A jury should have been allowed to "weigh and weight" these competing opinions. *Everest*, 26 Wn.2d at 548. It was error to grant summary judgment.

b. Under Washington tort law, an injury may have more than one proximate cause.

There may be more than one proximate cause of an injury, because the acts of different actors may combine to cause an injury. *Brashear v.*

Puget Sound Power & Light Co., 100 Wn.2d 204, 207, 667 P.2d 78 (1983); *Travis v. Bohannon*, 128 Wn. App. 231, 242, 115 P.3d 342 (2005) (citing *State v. Jacobsen*, 74 Wn.2d 36, 37, 442 P.2d 629 (1968)); *Estate of Keck by and Through Cabe v. Blair*, 71 Wn. App. 105, 111, 856 P.2d 740 (1993).

RCW 4.22.070 provides:

In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW.

1. *Questions of contributory negligence should rarely be taken from the jury.*

“Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage complained of.” 6 Washington Practice: Pattern Jury Instructions, Civil 11.01 (2002); *Berglund v. Spokane County*, 4 Wn.2d 309, 321, 103 P.2d 355 (1940).

Our Supreme Court has held that

When multiple proximate causes have been determined for a single injury, the trier of fact still must determine and apportion the responsibility based upon the varying degrees of culpability and causation among the actors. As commentators have explained: ‘It does not follow that simply because the harm is indivisible that there is no basis for apportionment. It is the responsibility for causing the harm which should be the focus of the inquiry.’ Initially

through the adoption of comparative negligence between plaintiffs and defendants that have concurrently caused the harm, and subsequently through the enactment of RCW 4.22.070 to govern the accountability among multiple tortfeasors contributing to a single injury, Washington has adopted comparative fault as the touchstone for apportionment of responsibility in damages.

Tegman v. Accident & Medical Investigations, Inc., 150 Wn.2d 102, 116-17, 75 P.3d 497 (2003) (citing Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. Puget Sound L.Rev. 1, 41 (1992) (footnotes and emphasis omitted)).

The Defendants' expert, John Hunter, concluded that Mr. Dominguez's inattentiveness was the sole cause of his fatal injuries. CP 125-212. Mrs. Dominguez's expert, Edward Stevens, concluded that the Defendants' failure to abide by road repair traffic control regulations led to Mr. Dominguez's fatal injuries. CP 213-25. As stated above, both experts reviewed and relied upon the same evidence.

Questions of contributory negligence are questions of fact and should be withdrawn from the jury "*only in rare cases.*" *Boyle v. Emerson*, 17 Wn. App. 101, 109, 561 P.2d 1110 (1977) (citing *Rhoades v. DeRosier*, 14 Wn. App. 946, 948-49, 546 P.2d 930 (1976)).

If substantial evidence has been presented that could support a reasonable conclusion that the plaintiff was contributorily negligent, *the*

issue must be presented to the jury. *Boyle*, 17 Wn. App. at 109; *Harris v. Burnett*, 12 Wn. App. 833, 532 P.2d 1165 (1975); *McKillip v. Union Pac. R.R. Co.*, 11 Wn. App. 829, 525 P.2d 842 (1974).

Therefore, assuming for purposes of this argument only, that Mr. Dominguez was contributorily negligent, it was error for the trial court to take this issue from the jury.

c. **The Defendants' failure to abide by roadway repair regulations was a proximate cause of Mr. Dominguez's death.**

1. ***The Defendants failed to abide by the requirements of WAC 296-155-305 and the Federal Highway Administration's Manual on Uniform Traffic Control Devices.***

The Washington Department of Transportation adopted the Federal Highway Administration's Manual on Uniform Traffic Control Devices (hereafter "MUTCD").³ Section 1A.01 of the MUTCD provides:

Purpose of Traffic Control Devices

The purpose of traffic control devices, as well as the principles for their use, is to promote highway safety and efficiency by providing for the orderly movement of all road users on streets and highways throughout the Nation. Traffic control devices notify road users of regulations and provide warning and guidance needed for the reasonably

³ WAC 468-95-010 provides:

The 2003 Edition of the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), published by the Federal Highway Administration and approved by the Federal Highway Administrator as the national standard for all highways open to public travel, was duly adopted by the Washington state secretary of transportation.

the flagger.” CP 175). Ms. Coleman gave her declaration soon after the accident occurred, with no knowledge that a lawsuit would be brought against the Defendants. Her statements were not conclusory – her testimony was based on her own personal observation as well as her qualification as a duly certified flagger.

The Washington State Patrol Report of Investigation states that the flaggers had flashing traffic wands and stop/go paddles. CP 151-52. But the investigating officers arrived *after* the accident, and the record contains nothing else to conclusively show that the flaggers indeed had lighted wands and paddles before the accident.

This conflicting evidence raises a legitimate issue of material fact precluding summary judgment dismissal of Ms. Dominguez’s complaint. These facts should have been viewed on summary judgment in a light most favorable to Ms. Dominguez, but were not. Therefore, summary judgment was improper.

- **Improper placement of signage.**

The use and placement of the repair signage is not in dispute.

A sign stating “FLAGGER AHEAD” was located approximately 198 feet east of the construction area. CP 128; CP 155; CP 162; CP 296.

The next sign, stating “LEFT LANE CLOSED AHEAD,” was located approximately 531½ feet east of the construction area. CP 128; CP 155; CP 162; CP 296.

The next sign, stating “UTILITY WORK AHEAD,” was located approximately 850 feet east of the construction area. CP 128; CP 155; CP 162; CP 296.

The last sign, stating “BE PREPARED TO STOP,” was located approximately 1,183 feet east of the construction area. CP 127; CP 155; CP 162; CP 296.

WAC 296-155-305(8)(c) prescribes the distances between advance warning signs used in flagging operations. On rural highways with posted speed limits of 55 mph, the required distance between each advance warning sign is no less than 500 feet. *See* WAC 296-155-305(8)(c) at Table 1. *See also* MUTCD at Section 6C-4 (Table 6C-1).

The following is a comparison between the required placement and distance between signs with the actual placement and distances.

<u>REQUIRED SIGNAGE</u>	<u>ACTUAL SIGNAGE</u>
In required order Required distances between signs	Order actually used Actual distances between signs
ROAD WORK AHEAD 500 feet to next sign	BE PREPARED TO STOP 333 feet to next sign
ONE LANE ROAD AHEAD 500 feet to next sign	UTILITY WORK AHEAD 319 feet to next sign
BE PREPARED TO STOP 500 feet to next sign	LEFT LANE CLOSED AHEAD 333 feet to next sign
FLAGGER (graphic) 500 feet	FLAGGER AHEAD 237 feet
(ACTUAL FLAGGER)	(ACTUAL FLAGGER)

Edward Stevens stated that, based upon his considerable professional experience and training, the work repair area “was not reasonably safe” for traffic and the repair workers at the time of Mr. Dominguez’s accident. CP 217.

- **Improper location of flagger station.**

Section 6E.05 of the MUTC provides the following:

Except in emergency situations, flagger stations shall be preceded by an advance warning sign or signs. Except in emergency situations, flagger stations shall be illuminated at night.

The flagger should stand either on the shoulder adjacent to the road user being controlled or in the closed lane prior to stopping road users. A flagger should only stand in the lane being used by moving road users after road users have stopped. The flagger should be clearly visible to the first approaching road user at all times. The flagger also should be visible to other road users.

WAC 296-155-305(8)(c) requires that the flagger station “must be seen from the [“flagger ahead”] sign.”

In addition, the flagger station must be located 335 feet in front of the work space. WAC 296-155-305(9)(a). Further, MUTCD Section 6F.29 states the flagger sign should be “in advance of any point where a flagger is stationed.”

In this case, the flagger was stationed approximately 30 feet in front of the stopped Ford Escort. CP 158. The Defendants produced no evidence that the flagger was visible to oncoming traffic. There is no evidence that there were any reflective cones or other lighting around the flagger station. In fact, the flagger station consisted solely of the flagger herself. There were no lights other than the lighted stop paddle used by the flagger. Yvette Coleman observed that “there was not a flagger box set up for night time flagging.” CP 178.

The Defendants offered nothing to contradict Ms. Coleman’s personal observations. Ms. Coleman’s observations were also based on her personal knowledge of roadway repair safety regulations. Ms. Coleman was qualified to make these observations because she was a certified flagger. Her statements were not conclusory. All facts she testified to and any reasonable inferences drawn therefrom should have

been viewed in a light most favorable to Mrs. Dominguez, but were not.
CR 56(c). Summary judgment was improperly granted.

2. Violations of WAC 296-155-305 and the MUTCD are evidence of negligence.

RCW 5.40.050 provides:

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but ***may be considered by the trier of fact as evidence of negligence***; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to electrical fire safety, the use of smoke alarms, sterilization of needles and instruments used in tattooing or electrology as required under RCW 70.54.350, or driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

Violation of a legal requirement is evidence of negligence if (1) the harm that occurs is the type of harm the legal requirement is designed to prevent and (2) the person claiming it is in the class of persons the legal requirement is designed to protect. *Tyner v. State Dept. of Social and Health Services*, 141 Wn.2d 68, 96, 1 P.3d 1148 (2000) (citing *Herberg v. Swartz*, 89 Wn.2d 916, 923, 578 P.2d 17 (1978)); *Pettit v. Dwoskin*, 116 Wn. App. 466, 472, 68 P.3d 1088, *review denied*, 151 Wn.2d 1011 (2003).

The regulation of traffic control devices is intended to “promote highway safety” and “provide warning and guidance needed for the reasonably safe, uniform, and efficient operation of all elements of the

traffic stream.” MUTCD § 1A.01. The harm in this case is precisely the type of harm traffic control devices are intended to prevent. Mr. Dominguez, as a user of a public roadway, was in the class of persons these regulations were intended to protect. As such, the failure of the Defendants to abide by the provisions of the WAC and/or MUTCD is evidence of their negligence. *Tyner*, 141 Wn.2d at 96.

3. *Other negligent acts of the Defendants, while not in violation of WAC 296-155-305 or the MUTCD, were a proximate cause of Mr. Dominguez’s fatal injuries.*

• Improper location of flagger station.

Edward Stevens stated that “The use of the “Left Lane Closed Ahead” sign instead of the “Lane Closed Ahead’ was misleading in that it indicates the right lane was open to high speed traffic. Proper sequencing of a standard sign layout is most important in promoting uniformity and recognition in obtaining proper driver behavior.” CP 217. Mr. Dominguez could very likely have perceived exactly what Stevens suggests – he could have believed the right lane was open and that there was no need to slow down. In this respect, reasonable minds *can* differ; therefore, summary judgment was improper.

d. The trier of fact should be allowed to determine whether Mr. Dominguez contributed to his own fatal injuries.

- **Purported inattentiveness.**

John Hunter concluded that “Mr. Dominguez’s collision was caused by his inattention” to the traffic control signage and work area. CP 130. A trier of fact should have been allowed to weigh this testimony against that of Edward Stevens. Because reasonable minds *could* differ as to the issue of Mr. Dominguez’s purported inattentiveness, summary judgment was improper here.

- **Roadworthiness of the motorcycle.**

John Hunter testified that Mr. Dominguez’s motorcycle was not roadworthy, suggesting that some aspect of its purported poor condition could have contributed to the accident. CP 129-30. In particular, Hunter suggested the brakes may have not functioned properly, in addition to concluding that there was no evidence Mr. Dominguez attempted to stop or swerve to avoid colliding with the Ford Escort. CP 129, 130.

However, Antoni Froehling, who has nearly 40 years of extensive experience with Harley Davidson motorcycles, concluded that, even though Mr. Dominguez’s motorcycle might not have been completely “street legal,” it was indeed roadworthy. CP 317-27. His conclusion was

based upon his own thorough examination of Mr. Dominguez's motorcycle and his significant experience and knowledge. CP319.

The opinions of Mr. Froehling and Mr. Hunter were not based on a mere scintilla of only colorable evidence. *Herron*, 108 Wn.2d at 170. Therefore, reasonable minds *could* differ as to this genuine issue of material fact, and summary judgment was improperly granted.

- **Intoxication.**

As stated above, the trial court ruled that Mrs. Dominguez successfully defeated the Defendants' motion for summary judgment as to the intoxication issue. 1 VRP 16. Therefore, no appeal is taken from that portion of the trial court's ruling.

- e. **Any purported failure by Mr. Dominguez to exercise due care for his own safety did not excuse the Defendants from their duty to protect the motoring public.**

This Division of the Court of Appeals has held that *even if an injured driver failed to exercise due care for his own safety, it has no bearing on the issue of whether the defendant breached its duty to maintain a safe road.* *Breivo v. City of Aberdeen*, 12 Wn. App. 520, 550 P.2d 1164 (1976) (emphasis added).

In *Breivo*, the driver of a car was on his way to a party in "the early morning hours." He had three passengers. He was driving between 50

and 80 miles per hour in a 35 mile per hour zone. The driver lost control of the car, jumped a curb and collided with a solid barrier placed by the City of Aberdeen to protect a breakaway light standard. Two of the three passengers died. *Breivo*, 15 Wn. App. at 521.

The plaintiffs brought suit against the city, claiming the city was negligent in placing an immovable barrier only 13 inches from the “traveled portion of the roadway.” *Breivo*, 15 Wn. App. at 521. The city appealed the \$214,000 in damages awarded to the plaintiffs. *Breivo*, 15 Wn. App. at 521.

The Court held, “Whether the breach, if any, was the proximate cause of the plaintiff’s injuries, or whether the [alleged] negligence of the driver superseded the City’s negligence, is an entirely separate question which was properly submitted to the jury by the trial court.” *Breivo*, at 524 (citation omitted).

Assuming for purposes of this argument only, that Mr. Dominguez’s inattentiveness was a cause of his fatal injuries, it has no bearing on the issue of whether the defendants breached their own duty to maintain a safe roadway and repair area. *Breivo*, 15 Wn. App. at 521. This is not a case where Mr. Dominguez’s injuries necessarily had to be caused by either his own attentiveness or by the defendants’ negligence. Both could be a proximate cause of his fatal injuries, and reasonable

minds *can* differ as to this issue. Therefore, summary judgment was improper.

f. **The trial court did not view all of the facts and inferences drawn therefrom in a light most favorable to Mrs. Dominguez.**

Nothing in the record indicates the trial court viewed all of the facts and inferences drawn therefrom in a light most favorable to Mrs. Dominguez.

The parties' experts were sufficiently qualified to render their opinions. Both parties' experts evaluated the same evidence. Ms. Coleman was both an eyewitness and a certified flagger. Therefore, reasonable minds could *not* reach but one conclusion. CR 56(c). Yet, the trial court granted summary judgment in favor of the Defendants. This was error.

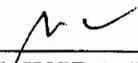
CONCLUSION

This is a case where the evidence clearly indicates there could be more than one proximate cause of Mr. Dominguez's fatal accident. The Defendants argue Mr. Dominguez was inattentive and that his motorcycle was not roadworthy. Mrs. Dominguez argues that the Defendants failed to properly maintain the roadway repair area. None of the experts or witnesses gave conclusory statements or opinions. All facts and inferences drawn therefrom that formed the basis for these statements and

opinions should have been viewed by the trial court in the light most favorable to Mrs. Dominguez. Based on the evidence and the affidavits of these highly qualified individuals, reasonable minds can differ as to the cause or causes of Mr. Dominguez's fatal injuries. The trial court's dismissal of Mrs. Dominguez's complaint on summary judgment was improper and should be set aside.

DATED the 16th day of April, 2007.

RESPECTFULLY SUBMITTED,



Robert Helland, WSBA # 9559
Attorney for Appellant.

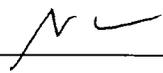
Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington
I affirm the following to be true:

On this date I transmitted the original document to the Washington
State Court of Appeals, Division II by personal service, and delivered a
copy of this document via United States Postal Service to the following:

Daniel F. Mullin
Alan M. Singer
Mullin Law Group PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104

Signed at Tacoma, Washington on this 16th day of April, 2007.



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DIVISION II
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